Dr. Farkas Krisztina

Möglichkeiten der beschleunigung und vereinfachung des verfahrens im deutschen strafprozessrecht

Weltweit kann die Erscheinung heutzutage festgestellt werden, dass die Strafverfahren überlange Dauer haben. Eine Verfahrensdauer von mehreren Jahren ist nicht nur in komplizierten Strafsachen, sondern auch in Prozessen, deren Gegenstand die alltäglichen Fälle der kleineren oder mittleren Kriminalität sind, nicht ungewöhnlich.[1] Die wichtigsten Gründe hierfür sind die Verbreitung der Kriminalität, die Zunahme der Zahl von Verbrechen, die Änderung der Kompliziertheit der Strafsachen. Infolgedessen werden die Strafverfolgungsorgane überlastet, was zu einer überlangen Dauer von Strafverfahren führen. Die verschiedenen Möglichkeiten im Strafprozess der einzelnen Staaten bieten jeweils eine andere Lösung für diese negativen Erscheinungen. In nehme in diesem Beitrag vor, einen Überblick über die Lösungen in deutschem Verfahren geben, über ihre Anwendungsbereiche, über ihre Eigenarten, über ihre Schwachpunkte und über die Erfahrung in der Praxis. Mein Ziel war, mit den Erkenntnissen der Untersuchung der Effektivität unseres Strafprozessrechts beizutragen.

I. Beschleunigungsgebot

Zuerst möchte ich ein Grundprinzip des deutschen Strafprozesses, den Grundsatz der Beschleunigung vorstellen. Dieser Grundsatz formuliert das Interesse, das Verfahren so schnell wie möglich durchzuführen. Das hat aber keine ausschließliche Priorität, weil durch die Beschleunigung und die Vereinfachung die materiellrechtliche Wahrheit nicht in den Hintergrund gedrängt werden kann.

Dieser Grundsatz folgt aus dem Rechtsstaatsprinzip des Grundgesetzes (§ 20 III GG). Das Beschleunigungsgebot erscheint bei allen Beteiligten des Verfahrens. Für die Justizbehörden bedeutet das eine Entlastung, darüber hinaus auch eine gründliche Bearbeitung der konkreten Fälle. Für den Beschuldigten kommt eine Verzögerung einer psychischen, physischen und sozialen Belastung gleich, die auch seine Umgebung betrifft. Dadurch kann auch das Recht des Beschuldigten zur Rechtsstaatsprinzip verletzt werden. Adressaten sind alle Strafverfolgungsorgane, die an jeglichen Stadien des Verfahrens beteiligt sind. Der Beschuldigte dagegen ist kein Adressat sondern Begünstigter dieses Gebots. Daraus geht hervor, dass dieses Anforderung ein doppeltes Ziel verfolgt: dem Interesse des Beschuldigten gegenüber steht das Pflicht der Behörden das Prozess rechtzeitig durchzuführen. Dieser Grundsatz ist im deutschen Strafprozessordnung nicht ausdrücklich geregelt, doch sichern zahlreiche Vorschriften, dass diese Anforderung erfüllt wird.

II. Die besonderen arten des verfahrens

In der deutschen Strafprozessordnung – ähnlich der anderen europäischen bzw. nicht europäischen Ländern – werden neben dem ordentlichen Strafverfahren Sonderformen geregelt. Die deutsche StPO enthält ein ganzes Buch für die besonderen Arten des Verfahrens. Es befasst sich mit 5 Verfahren, aus denen 2 zur Beschleunigung und Verkürzung dienen. Deshalb möchte ich im Weiteren über diese zwei berichten:

– Verfahren bei Strafbefehlen (§§ 407–412)
– Beschleunigtes Verfahren (§§ 417–420)

Vor der Darstellung dieser Verfahren möchte ich den Ablauf des Strafverfahrens nach allgemeinen Vorschriften darstellen um die Abweichungen vom Normalverfahren deutlicher zu machen Das Verfahren gliedert sich in drei Stadien:

– das Ermittlungs- oder Vorverfahren,
– das Zwischenverfahren,
– die Hauptverhandlung oder Hauptverfahren.

In Bezug auf das Thema haben die zweite und dritte Phase bzw. ihr Wegfall oder Vereinfachung eine Bedeutung. Das Ermittlungsverfahren immer nach den allgemeinen Vorschriften durchgeführt. Das Zwischenverfahren läuft vor dem zuständigen Gericht, das mit dem Einreichen der Anklageschrift beginnt. Dieses Stadium hat eine „negative Kontrollfunktion":[2] einerseits wird untersucht, ob die Sache für die Eröffnung der Verhandlung geeignet ist. Andererseits soll ein zusätzlicher Schutz für den Beschuldigten gewährt werden. Die Hauptverhandlung besteht aus zwei Teilen. Zuerst ist die Vorbereitung der Verhandlung aus administratorischen Zwecken nötig, wie zum Beispiel Ausgabe der Ladungen, Sicherstellung von Beweismitteln etc. Danach folgt die Verhandlung selbst, die als „Kern und Höhepunkt" des gesamten Verfahrens gilt.[3]

1 Trurnit, Dr. Christoph/Schrot, Marvin: Das Beschleunigung und die Konsequenzen einer überlangen Verfahrensdauer im Strafprozess. StraFo 9/2005, 358 ff, S. 358.
2 Dr. Ambos, Kai: Verfahrensverkürzung zwischen Prozessökonomie und „ fair trial" Eine Untersuchung zum Strafbefehlsverfahren und zum beschleunigten Verfahren, Jura 6/1998, 281 ff., S. 284
3 Roxin: Strafverfahrensrecht 25. Auflage 1998, S. 53

1. Verfahren bei Strafbefehlen (§§ 407–412 StPO)

Im deutschen Verfahrensrecht hat diese Verfahrensart eine lange Tradition, da es bereits in der Reichsstrafprozessordnung von 1877 eingeführt wurde und auch seitdem ununterbrochen existiert.[4] Dieses Verfahren ist ein schriftliches, sog. summarisches Verfahren, durch das eine schnelle und unkomplizierte Erledigung von Fällen kleinerer und mittlerer Kriminalität ermöglicht ist. Es kann bei solchen Fällen angewandt werden, die ohne rechtliche und tatsächliche Probleme erledigen kann.[5] Hier entfällt das Zwischenverfahren, und die Hauptverhandlung. Die Hauptverhandlung, die den Kern der Beweisaufnahme bedeutet, wird durch das Ermittlungsergebnis der Staatsanwaltschaft ersetzt.[6] Das Gericht entscheidet sich über die strafrechtliche Verantwortung ohne Anhörung des Beschuldigten, ausschließlich nach den Dokumenten der Ermittlungen. Diese Vorschriften bieten verfahrensökonomische Vorteile im Interesse der Entlastung der Justizbehörden – Arbeitskraft, Zeit und Kosten werden gespart.[7] Dieses Verfahren bietet auch dem Beschuldigten Vorteile, weil er von den Belastungen und den diskriminierten Folgen einer öffentlichen Verhandlung entlastet wird. Die Prinzipien Mündlichkeit, Öffentlichkeit und Unmittelbarkeit gelten hier nicht. Sie werden für Vereinfachung und Beschleunigung geopfert, aber unter gesetzlichen Garantien. Diese Erscheinung ist eine in dem Strafprozessrecht der meisten Staaten auftretende Tendenz, so in Italien, Spanien, Polen und Ungarn, wo die Regelung eine ähnliche Entwicklung zeigt.

Die Zulässigkeitsvoraussetzungen dieses Verfahrens sind die folgenden (§§ 407 StPO):

- die Zuständigkeit des Strafrichters oder Schöffengerichts,
- es muss sich um ein Verfahren wegen eines Vergehens handeln,
- ein schriftlicher Antrag der Staatsanwaltschaft auf Erlass eines Strafbefehls,
- der Antrag muss auf taxativ aufgezählte Rechtsfolgen gerichtet werden,
- nach dem Ergebnis der Ermittlungen ist eine Hauptverhandlung nicht erforderlich.

Untersuchen wir die Verfahrenseigenheiten ein bisschen detaillierter:

- Die Gerichtszuständigkeit: dieses Verfahren kann bei Fällen eingesetzt werden, wo das Amtsgericht in erster Instanz zuständig ist: das kann ein Einzelrichter oder Schöffengericht sein. Seit dem Rechtspflegeentlastungsgesetz hat das Schöffengericht keine Relevanz mehr. Nach dem § 25 dieses Gesetzes werden alle Vergehen, bei denen eine Freiheitsstrafe von über 2 Jahren nicht zu erwarten ist, von einem Einzelrichter behandelt. Da bei so einem Strafbefehlverfahren eine Freiheitsstrafe verhängt werden kann, die nicht über ein Jahr geht darf ausschließlich ein Einzelrichter vorgehen.
- Der Erlass des Strafbefehlsantrags gehört der Ermessensbindung der Staatsanwaltschaft, sie räumt dem Strafbefehlsverfahren den Vorrang vor dem regulären Verfahren ein.[8] Dieser Antrag gilt als eine Anklageschrift, also eine besondere Form der Erhebung der öffentlichen Klage. Wie bei der Anklageerhebung muss ein hinreichender Verdacht vorliegen.[9]
- Es muss sich um ein verfahren wegen des Vergehens handeln, im Sinne § 12 S 2 StGB. Es geht um Vergehen, wenn die rechtswidrigen Taten, die nicht über ein Jahr Freiheitsentzug oder Geldstrafe bedroht sind.
- Nach dem Ergebnissen der Ermittlungen hält der Staatsanwalt eine Verhandlung für nicht nötig. Dieser Fall liegt vor, wenn für der Staatsanwalt die Verhandlung verboten erscheint, weil aufgrund der Aufklärung der wesentlichen Umstände und Gründe, die für die Festlegung der Rechtsfolgen benötigt werden, weder aus dem Gesichtspunkt der speziellen noch der generellen Prävention vorliegen.[10]
- Der Antrag kann nur auf im Gesetz taxativ genannten Rechtsfolgen gerichtet werden: Geldstrafe, Verwarnung mit Strafvorbehalt, Fahrverbot, Verfall, Einziehung, Vernichtung, Unbrauchbarmachung, Bekanntgabe der Verurteilung und Geldbuße gegen eine juristische Person oder Personenvereinigung, Entziehung der Fahrerlaubnis nicht mehr als zwei Jahre, Absehen von Strafe.

1. Beschleunigtes Verfahren (§§ 417–420 StPO)

Eine weitere besondere Verfahrensart ist das beschleunigte Verfahren, das auch ermöglicht aus der Prozessökonomie in den einfachen Fällen eine rasche Aburteilung. Wie das Strafbefehlsverfahren dient auch dieses Verfahren nach der Absicht des Gesetzgebers vor allem der Entlastung der Rechtspflege.[11] Hier entfällt das Zwischenverfahren, es findet zwar eine mündliche Hauptverhandlung statt, in der aber die Beweisaufnahme vereinfacht ist. Da in diesem Verfahren eine Hauptverhandlung stattfindet – im Gegenteil zum Starbefehlsverfahren ist die Unmittelbarkeit, Mündlichkeit und die Öffentlichkeit gewährleistet.[12]

4 Pfeiffer, Gerd: Systematische Kommentar zur Strafprozessrecht und zum Gerichtsverfassungsgesetz Verlag München 2003, vor § 407 S. 5.
5 Kühne, Dr. Hans-Heiner: Strafprozessrecht. Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts, C.F.Müller Verlag Heidelberg 2003, S. 562.
6 Kühne, Dr. Hans-Heiner: Der Wert von Verfahrensgarantien in der prozessualen Praxis. Ein europäisch rechtsvergleichender Beitrag zur partiellen Anwendung von Strafverfahrensrecht, Festschrift für Nikolaos K. Androulakis, Ant.N.Sakkoulas Verlag 2003, 935 ff., S. 939.
7 Ranft, Prof. Dr. Otfried: Grundzüge des Strafbefehlsverfahrens, JuS 7/2000, 633 ff., S. 633.
8 Ranft, Prof. Dr. Otfried: Grundzüge des Strafbefehlsverfahrens, S. 634.
9 Beulke, Dr.Werner: Strafprozessrecht., C.F.Müller Verlag Heidelberg, 2005, S. 289.
10 Lutz Meyer – Großner: Srrafprozessordnung Verlag C.H.Beck München 2005, S. 1335.
11 Ranft, Otfried: Das beschleunigte Verfahren (§§ 417–420 StPO), JURA 6/2003, 382 ff., S. 382.
12 Ranft, Otfried: Das beschleunigte Verfahren (§§ 417–420 StPO), S. 382.

Die Zulässigkeitsvoraussetzungen sind die folgenden (Art. 417):
- die Zuständigkeit des Strafrichters oder Schöffengerichts
- ein schriftlicher oder mündlicher Antrag der Staatsanwaltschaft auf Entscheidung des Verfahrens
- die Sache muss zur sofortigen Verhandlung durch den einfachen Sachverhalt oder klare Beweislage geeignet sein
- die Sanktionen sind bestimmt, bei der Freiheitsstrafe oder der Maßregel der Besserung und Sicherung wird auch das Höchtsmaß bestimmt.

Der Regelung gehört die sog. Hauptverhandlungshaft (§ 127 b Abs. 1). Diese Vorschrift dient dem Zweck, das beschleunigte Verfahren leichter anwendbar zu machen.[13] Durch diese Regelung will der Gesetzgeber die Anwesenheit des Beschuldigten garantieren.[14]

Untersuchen wir die Verfahrenseigenheiten ein bisschen detaillierter:
- Erste Voraussetzung ist, die erstinstanzliche Zuständigkeit des Amtsgerichts. Dazu möchte ich bemerken – als schon beim Strafbefehlsverfahren erwähnt habe –, dass diese Formulierung seit der Änderung von § 25 GVG durch das Rechtspflegeentlastungsgesetz keine Bedeutung mehr hat.
- Der Sachverhalt ist dann einfach, wenn dieser für alle Verfahrensbeteiligten leicht überschaubar. Die Beweislage ist vor allem klar, wenn der Beschuldigte gesteht oder genügende und sichere Beweismittel zur Verfügung stehen.[15]
- Wenn die Voraussetzungen vorhanden sind, muss die Staatsanwaltschaft den Antrag stellen, sie hat keine Möglichkeit zum Ermessen. Ich möchte bemerken, dass dieses Verfahren unter allen besonderen Verfahren das Einzige ist, bei dem diese Pflicht der Staatsanwaltschaft vorliegt
- Das Gericht überprüft den Antrag und für ihm werden zwei Entscheidungsmöglichkeiten bestehen:
  - die Ablehnung der Entscheidung im beschleunigten Verfahren, in diesem

Fall wird die Sache nach allgemeinen Vorschriften erledigt,
  - entspricht dem Antrag, wenn die Voraussetzungen vorliegen, so wird die Sache im beschleunigten Verfahren erledigt.
  - Die beschränkten Rechtsfolgen zeigen die Absicht des Gesetzgebers, dass dieses Verfahren nur bei Kleindeliquenz angewandt werden wollen. Im Verfahren darf keine Freiheitsstrafe von mehr als 1 Jahr verhängt werden. Außerdem darf Geldstrafe, und Entziehung der Fahrerlaubnis.

Es gibt Erleichterungen, die das Verfahren beschleunigen:
- der Antrag kann auch mündlich erhoben werden, es bedarf keiner Anklageschrift,
- es gibt keinen Eröffnungsbeschluss, so entfällt das Zwischenverfahren,
- die Kurzfristigkeit: die Hauptverhandlung wird sofort oder in kurzer Frist nach dem Antrag durchgeführt,
- die Ladung des Beschuldigten ist entbehrlich (außer des geregelten Ausnahmefalls),
- die Ladungsfrist wird auf 24 Stunden verkürzt,
- nur bestimmte Rechtsfolgen dürfen verhängt werden, die ich früher schon dargestellt habe,
- die Beweisaufnahme wird vereinfacht, weil die Verlesungsmöglichkeiten in der Hauptverhandlung erweitert sind. Eine Garantie bedeutet, dass diese Ersetzung nur mit Zustimmung des Angeklagten, des Verteidiger und der Staatsanwaltschaft zulässig, wenn sie in der Hauptverhandlung da sind. Problematisch aber, wenn der Angeklagte keinen Verteidiger hat, kann allein nicht richtig entscheiden. [16]
- Die notwendige Verteidigung beschränkt sich auf den Fall, wenn die Straferwartung Freiheitsstrafe von mindestens sechs Monaten beträgt. Ein Verstoß dagegen gibt einen Revisionsgrund.

Während im Strafbefehlsverfahren die überwiegende Zahl aller Strafverfahren erledigt wird – trotz der neuen Änderung des Verfahrens –, wird dieses Verfahren in der Praxis weniger angenommen.[17] Es wäre wünschenswert, dass dieses Verhältnis sich zugunsten des beschleunigten Verfahrens verändern.

III. Andere möglichkeiten der beschleunigung

Diese Arten der Beschleunigung entstehen durch einen Konsens der Beteiligten des Verfahrens. Sie erscheinen in zwei verschiedenen Formen:
- Absehen von Klage (§§ 153–153 a StPO)
- Absprache

1. Das Absehen von Klage ist eine Art der Diversion. Diese Vorschriften bieten für Beschuldigte den Konsens zwischen dem Staatsanwalt und dem Verteidiger die Möglichkeit, das Strafverfahren bei Bagatellsachen zu vermeiden, aber der Beschuldigte nimmt an der Vereinbarung nicht teil. Das Absehen hat zwei Formen: die sog. einfache Diversion nach § 153, und die intervenierte Diversion nach Artikel 153 a.[18] Die einfache Diversion kann bei einem Vergehen angewandt werden, wenn die Schuld des Täters gering ist und kein öffentliches Interesse an der Verfolgung besteht. In diesem Fall wird es von der Verfolgung abgesehen. Es bedarf auch die Zustimmung des Richters, die in der Praxis jedoch formell ist. Er braucht sie bei einem Vergehen nicht, wenn die Verhängung des Mindestmaßes der Strafe nicht begründet wird und die verursachten Folgen der Straftat gering sind. Bei intervenierter Diversion sieht der Staatsanwalt von der

13 Ranft, Otfried: Das beschleunigte Verfahren (§§ 417–420 StPO), S. 382.
14 Kühne, Dr. Hans-Heiner: Strafprozessrecht. S. 329.
15 Lutz Meyer-Großner: Strafprozessordnung, S. 1363.
16 Ranft, Otfried : Das beschleunigte Verfahren (§§ 417–420 StPO), S. 383.
17 Kühne, Dr. Hans-Heiner: Strafprozessrecht, S. 330.
18 Fakó, Edit: Die Diversion im deutschen Strafverfahren, Ügyészek Lapja, 2002/5 57–77, S.59.

Erhebung der Klage vorläufig ab, aber der Beschuldigte muss die vom Staatsanwalt vorgeschriebenen Auflagen und Weisungen leisten. Unter ihnen kommt am häufigsten vor, dass der Beschuldigte einen Beitrag für eine gemeinnützige Einrichtung zahlt. Die weiteren Voraussetzungen sind, dass die Auflagen und Weisungen geeignet sein müssen das öffentliche Interesse an Strafverfolgung zu beseitigen und die Schuld darf nicht entgegenstehen. Mann kann annehmen, dass dieser Konsens nicht nur bei Bagatellsachen vorliegt.

2. Die Absprache ist im deutschen Strafprozess beliebt, obwohl sie in dem Strafprozessrecht ausdrücklich nicht geregelt ist. Diese Form ist mit dem Geständnis des Beschuldigten verbunden. Die Absprache kann sowohl vor der Anklageerhebung als auch in der Hauptverhandlung stattfinden. Bei erstem Fall sind die Beteiligten der Absprache der Staatsanwalt und der Verteidiger, und wenn der Beschuldigte das Begehen der Straftat gesteht, schränkt der Staatsanwalt die Klage für wenigeren Straftaten ein, oder er beantragt eine mildere Strafe. Die Absprache findet während der Hauptverhandlung ganz anders statt. Der Richter spielt in diesem Fall große Rolle, meistens regt er die Vereinbarung an. Er verspricht, dass er im Urteil einige Klagepunkte beseitigt, oder er wird das Geständnis bei der Verhängung der Strafe in Betracht ziehen.[19] Diese Verfahrensart wird trotz des Mangels an gesetzlichen Regelung zum ersten Mal in dem Urteil vom Bundesgerichtshof von 1983. anerkannt.

IV. Zusammenfassung

Die oben vorgestellten Rechtsinstitute dienen der Beschleunigung und Vereinfachung. Die zwei gesonderten Verfahren zeigen sowohl in ihrer äußeren Wirkung als auch in der Rechtssprechung wesentliche Unterschiede auf. Das Strafbefehlverfahren, weil es ein schriftliches Verfahren ist, bietet keine generelle Prävention. Beim beschleunigten Verfahren im Gegenteil, weil da eine Verhandlung durchgeführt wird, kommen die Prinzipien Mündlichkeit, Öffentlichkeit und Unmittelbarkeit zur Geltung. Das Ziel ist jedoch, dass nach der Begehung möglichst schnell eine Entscheidung des Richters folgt. Die zwei Verfahren sind auch in der Hinsicht unterschiedlich, dass sie in der Praxis in verschiedenem Masse angewandt werden. Solange das Strafbefehlsverfahren in großer Zahl der Strafverfahren eine Möglichkeit bietet, erfüllt das beschleunigte Verfahren sein Ziel und wird weniger eingesetzt.

Das Bedürfnis danach, dass die Strafsachen innerhalb angemessener Frist behandelt werden, spielt eine immer größere Rolle. Das zeigt auch die Tatsache, dass es in der obergerichtlichen Rechtsprechung – die Landsgerichte, der Bundesgerichtshof, das Bundesverfassungsgericht – in Deutschland immer mehr zur Geltung kommt.

Die gesellschaftlichen und wirtschaftlichen Veränderungen bringen immer neuere Phänomene und Bedürfnisse auf die Oberfläche, denen sowohl die Gesetzgeber und Rechtsanwender nachkommen müssen. Dementsprechend braucht man eine breitere Verwendung dieser Verfahrensformen. Es ist zu bedenken, ob es möglich ist, diese dargestellten, traditionellen Verfahrensformen beizubehalten, die Erfahrungen zu benutzen und so wie es in anderen Ländern zu beobachten ist, neue Verfahren einzuführen.

19 Herrmann, Prof. Dr. Joachim: Die Reformen des Strafprozessrechtsm in Ost- und West-Európa, Magyar Jog 1993/5, 299–306, S. 305.

Nóra Jakab

New employment policies of disabled people

This writing tries to give a general view about the changes of attitudes towards the disabled and towards their ability to work in the XX[th] century and in the early years of this century. Moreover, the author deals with some new approaches and challenges, which have come up recently, and the society, the scientists, the governments, the social workers and the individuals have to face them.

Introduction

About 50 years passed from the start of the independent living movement till the creation of the "Draft Convention on the rights of persons with disabilities and draft optional protocol".[1] The movement stems from the United States, but it effected the European movement on a large scale. The movement started with the claim for the recognition of the fundamental rights of disabled in every walk of life. The movement of the disabled developed together with the creation of social concerns in the European Economical Community. Though the Community was a financial and economical community, it created in 1960 the European Social Charter in order to come over the social deficiencies within the alliance.[2] The Charter was said to be "the conscience of Europe". The 15[th] Article names the right of disabled to vocational training, rehabilitation and reintegration into the society; in addition Article 9, 10, 12, 13, 16, 19 also deal with the disabled regarding their right to work, to social security system, to social and health assistance, to the protection of families and migrant workers etc. The problem with this Charter and with the opinions, recommendations of the European Council was that they were not compulsory. They formed part of the soft law legislation, which according to *Grimaldi vs. Fonds des Maladies Professionelles (222/88 ECR 4407* must have been taken into consideration by the decision making process in the member states.[3] Soft law legislation can help the interpretation of the decisions and, if necessary, it handles the deficiencies in the legal system. The reason why it was not possible to deliver orders and directives regarding the working hours, the part time work, the flexible retirement and the atypical employment was that there weren't any legal title in the Treaty of Rome to which the legislators could refer regarding social issues. That changed totally in Maastricht and in Amsterdam.

The legislators recognised in time, that the aim of the reintegration of disabled does not work without employment. Therefore in the 1970's there were more and more provisions regarding the employment, work opportunities and work conditions of the target group. It was obvious, that employment must be supported in the member states in order to improve the situation of disabled.

Almost each member states had an action plan regarding the active and passive measures of the employment. According to a comparative study[4] in the 15 member states of the EU, each member state developed an action plan and they preferred active employment measures to the passive employment measures. The aim of the active employment measures is to integrate the disabled to the open labour market. But the open labour market is unsure; the competitiveness is against the disabled to accommodate. Therefore they rather stay at home and live on benefits. This is the so called "benefits trap" against which the fight is difficult. It became clear that the integration to the open market can not be realised without paying the benefit, they must be kept till the disabled is strong enough to cope on the labour market.

As the employment of disabled was supported in most member states; other approaches have to be taken into account. One of them is the *individualism*, which says, that the work must be suitable to the needs of disabled. In order to integrate the disabled person, appropriate method must be applied to assess the ability of the potential worker. This method should be appropriate according to the latest methods of examination.[5] The other approach is the *new paradigm of decision making*.[6] This paradigm is an enabling model, it is based on values and principles which recognize that personal autonomy can be expressed interdependently. Every person has a will and is capable of making choices, personal support, in its many forms. The state has an obligation to provide resources, to ensure, that those who are isolated, are reconnected with others in their communities. The interest of third parties must not lead to an infringement of personal rights, and no individual should be assessed to determine his or her competency. This paradigm calls for the changes in the legislation too. The supported decision making helps the legal status of disabled who are mostly under guardianship.

1 Ad hoc committee on a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities on its eighth session, fourth revised draft of 30 October 2006

2 [1] SAMUEL, l.: Fundamental Social Rights, Case Law of the European Social Charter, Council of Europe Publishing 1997

3 GYULAVARI, T. – KÖNCZEI, Gy.: European Social Law, Budapest, Osiris, 2000, p. 37

4 Benchmarking Employment Policies for People with Disabilities, A study prepared by ECOTEC Research and Consulting Ltd. European Commission, Directorate General for Employment and Social Affairs, August 2000

5 In Hungary one of the greatest problems with regard to the employment of the target group is the lack of the appropriate methods to assess the ability of disabled to work. It is part of the rehabilitation which has been under revision recently.

6 Report of the C.A.C.L. Task Force on alternatives to guardianship, August 1992

However, the new model says that they should not be isolated, and if it possible, work can help to make contact with the community.[7]

Thanked to the movement of disabled in the last fifty years there is a real shift in disability issues.

– Instead of the rehabilitation of disabled persons *the society should be rehabilitated*.
– Instead of charity *rights should be assured*.
– Instead of the adjustment to the norm *the acceptance of differences* shall be taken into account.
– Moreover instead of exclusion *inclusion, participation and citizenship* must be guaranteed.[8]

During the years the role of some employment measures also changed. So did the role of the sheltered employment. For many years it was considered to be a tool of the institutionalisation. It could not integrate the disabled (mainly mentally disabled) to the open labour market. Nowadays the ILO thinks that it is a ramp between the real work and the sheltered work. It is the mediator towards social firms, supported employment – open employment and self employment.[9]

These new approaches encouraged the creation and development of new employment policies including new working opportunities.

New employment policies

The experience of the latest years demonstrated the following:

– people with disabilities can learn a wide variety of skills, and
– they can perform many different jobs.
– Adaptations are usually not required but if needed, it does not amount high costs.[10]
– Supports may be required.
– People with disabilities, unemployed and outside the active labour market are significant untapped potential.
– The integration is in the society's interest.
– People with disabilities can contribute.
– The relevant skills must be used, suited to the public and private interest and the abilities of the disabled.
– Jobs must be found suitable to interest, ability and work capacity.
– Appropriate supports, technical aids and adaptations must be used, only if needed.
– It is in the business interest of employers to employ disabled.[11]

The comparative study also illustrated that the active measures applied by the member states did not form a *consequent employment policy*. That is why one of the recommendations is to build up an employment policy, which counts on the co-operation of different active measures. There are many member states which applies the quota regulation. Though, the quota description in itself does not work well. Other measures must be built upon it, like the appropriate information flow between the disabled and the institutions, the motivation of employers, the vocational training, the vocational rehabilitation etc.[12]

Besides the consequent employment policy of the member states there is an other notion delivered by the ILO, which is based upon the people who are around the disabled and the institutions, which have a role to integrate the disabled into the labour market. These subjects should form *an alliance*. In this alliance the social workers, counsellors and families have a crucial role, because according to the principle of individualism, they are aware of the disabled persons' needs. There would be a placement service, which would coordinate the co-operation between the parties. This service would contact the employers and the job seekers with disability all the time. The non governmental organisation has also a significant role in the alliance. Beside these subjects the network consists of other members too:

– employers' organisation,
– disabled peoples' organisation,
– media,
– skills training centres,
– education ministry,
– other ministries (Transport, Employment, Social Matters),
– universities, research institutes,
– mainstream placement services.[13]

There has been also an approach with regard to the connection between the disability and the *sustainable development*. Where does this connection come from? The sustainable development has a social pillar. The sustainable development refers to the society, and therefore we can talk about sustainable society. The dimension of the sustainability is not endless, each society shall produce, consume and live with the others

7 In Hungary there is a problem with the persons without legal capacity. They can not be subject of a law contract, though they may be able to work, this is a gap in the Hungarian Civil Code. Nowadays, at the time of the codification the revision of the relation between the legal capacity and work has not been examined yet.

8 MURRAY, B.: Decent work for all Labour Market Integration of People with Disabilities, Open University on Employment Policy and Disabilty Studies, Bárczi Gusztav Faculty of Special Education, Eotvos Lorand University, Budapest, 30 November 2006, http://moodle.disabilityknowledge.org/mod/resource/view.php?id=405, 28 March 2007

9 MURRAY, B.: Decent work for all Labour Market Integration of People with Disabilities, http://moodle.disabilityknowledge.org/mod/resource/view.php?id=405, 28 March 2007

10 Adaptation can include the adaptation of work and workplace. In Great-Britain the adaptation of work means the amendment of the work contract according to the ability of the worker. In Germany it does not include the adaptation of the contract. It regards only to the improvements of the workplace. See also JAKAB, N.: Employment of disabled in Great-Britain and Germany, its institutional background, with special regard to the legal regulations, In: Hungarian Admisnistration, 11 (2005) p. 699–703

11 MURRAY, B.: Decent work for all Labour Market Integration of People with Disabilities, http://moodle.disabilityknowledge.org/mod/resource/view.php?id=405, 28 March 2007. The business interest is relevant because of a new approach towards disabled. It is the spending cost of the disabled, which is considerable high in the USA, UK and Canada. Though, we can think it over whether it is worthy to consider the target group as consumer. Wouldn't it be better to speak about the foundation of values?

12 JAKAB, N.: The constitutional rights of disabled in the practice in Hungary after the transformation of regime, In: Publicationes Universitatis Miskolciensis Sectio Juridica et Politica, Tomus XXIV., Miskolc University Press, 2006, 233–237. o

13 MURRAY, B.: Decent work for all Labour Market Integration of People with Disabilities, http://moodle.disabilityknowledge.org/mod/resource/view.php?id=405, 28 March 2007

and with the environment in a way, which results in the social welfare and meets the needs of the future generations. The aim of the development is to live better. The goal of the sustainable development is to assure the social welfare of its members, and to realise this aim, the economy is a tool, and the environment is a condition.[14] If the economy is a tool, what kind of economy is needed? It is a sort of social economy, in which the appropriate assistance is required regarding not only the disabled, but all the disadvantaged groups, and this is the state's task.[15]

In the recent years there have been new employment models which should be considered by other states as well. One of them is the supported employment which comes from Nottingham County Council. This model is feasible and therefore other member states, like Hungary could learn a lot from this employment form. The supported employment has preconditions:

– social model of disability (instead of the medical approach – it is a change in attitudes thanked to the disabled movement and the awareness raising),
– discriminative legislation,
– jobs available,
– workplace available and the realisation of the employment,
– public institutions, which are the best employers,
– respect of the principles,
– self-determination,
– the needs of the disabled are in the centre,
– social and economical integration,
– choice, the independence of the disabled
– everyone can work,
– "Learn about work in work".[16]

The supported employment is based upon three steps: *place – train – maintain*. The disabled people are helped by personnel, who consider all the time the needs, the ability of the disabled job seekers, and they try to improve the skills. First of all the disabled person's ability to work must be assessed. After that a workplace should be found. After having found it, the job analysis starts with regard to the ability and skills of the disabled. By examining the workplace and the skills a support plan is delivered by the personnel, in which the disabled are continuously prepared for the work. After six weeks from the start of the work the employee and the employer discuss, how the abilities, the employment and the working conditions could be approved. Therefore in this model the above mentioned individualism and co-operation play a main role. This co-operation between the parties are organised by the authorities and these institutions make the employer be interested in the improvement of the disabled person's skills.

It was described earlier that the opinion about the sheltered employment has been changed, mainly because of the new approach of the ILO. Nowadays Germany has built up an exemplary *network of sheltered employment*. It is not basically sheltered. In the 1950s and 1960s two types of *workshops* were created: one of them delivers rather catering service, the other one is productive and employment oriented. In these employment oriented workshops the status of the disabled is interesting, because it is "like an employer "status. It means that labour law regulation shall apply to them. The disabled have a right to conclude a work contract, of which rules are laid down in a collective agreement. Disputes deriving from the working relationship are settled by the Labour Court. The disabled worker receives salary for his/her work and after this salary he/she is a member of the social security system and receives benefit in case of an accident, illness or unemployment.[17]

Conclusion

In order to realise the employment of disabled there are different consideration in the ILO, in the United Nations Organisation and in the EU. Though, the new strategies of the disabled persons' employment contain key questions that should be answered. These issues are the following:

– What needs to be done, by whom?
– Will all disabled benefit from the mainstreaming trends?
– Will sufficient resources be available to provide appropriate supports to those needing these?
– What will be the new role of disabled persons' organisations, special agencies, and service providers?
– Will all government ministries cater to disabled persons in their areas of responsibility?
– Will employers become more active in promoting opportunities?
– Will trade union be supportive?

This writing does not make an attempt to answer these questions. There are very good working models of the employment and different new approaches, which helped and still support the integration. This study tried to present them. However, these are still issues which the states, the disabled and there supporters shall face in the future. They are challenges, which this century will answer.

14 GYULAI, I.: The interpretation of the sustainability and the conditions of its realisation, Evilágonline, www.evilagonline.hu 28 March 2007
15 NÁRAY-SZABÓ, G.: How long can we sustain the development? Journal of Hungarian Chemists, 3 (2007) 62. p. 75–76
16 ERIC WODKE: Supported Employment in Nottinghamshire, Open University on Employment Policy and Disabilty Studies, Bárczi Gusztav Faculty of Special Education, Eotvos Lorand University, Budapest , 25 May 2006, http://moodle.disabilityknowledge.org /mod/resource/view.php?id=301, 28 March 2007; http://moodle.disabilityknowledge.org/mod/resource/view.php?id=360, 28 March 2007
17 ERIC WODKE: Supported Employment in Nottinghamshire, http://moodle.disabilityknowledge.org/mod/resource/view.php?id=301, 28 March 2007; http://moodle.disabilityknowledge.org/mod/resource/view.php?id=360, 28 March 2007

dr. Karoliny Eszter

Attitudes to Integration

At the time when the 27-members-strong European Union celebrates the 50th anniversary of the signing of the Treaties of Rome, it faces a set of challenges that stem from within as well as without. Added to the dissatisfaction they feel with their national governments being unable to ensure 'growth and jobs', European citizens increasingly question the legitimacy of the European Union itself.

Recognising that a considerable part of this discontent is based on the twin facts that the citizens do not know enough about the EU and they have no way to influence its development, the European Commission, in the wake of the 2005 Constitutional Treaty referenda, issued a White Paper on a European Communication Policy. This policy, when in operation, is intended to 'close the communication gap' between the Union institutions and the citizens.

From the point of view of a different discipline, this policy can be seen as a giant public relations exercise. In PR terminology, the identification of 'publics', the various groups with whom an organisation communicates, is considered extremely important,[1] as only by knowing their distinguishing characteristics and the main experiences forming their attitudes can the optimal means of communication be selected. In the case of the European Union, various target groups have been identified in both the White Paper and earlier communication attempts (young people, women, pensioners, people living in rural areas, etc.); there is, however, another, more (and less) evident classification: that of the 27 different states.

This classification is both realistic and impossible. For it, stand the facts that many countries have their own language; most, their own distinctive history and the political-cultural awareness and identity that come with it. Each state, for example, has its own story of joining the European Union, and its traditions of cooperation or enmity with other Member States; also, its traditional eagerness or reluctance to participate in a given part of the EU policies or to ensure that the integration will develop in a given way. The fact that many 'European' policies are implemented on the national (state) level is also a natural factor of consideration.

As there is no one commonly agreed upon goal, no arranged final destination for EUrope, and as integration already affects many economic, political and cultural areas, it is relatively hard to find citizens who either like or dislike all aspects of European integration. The classic opinion poll questions of support of integration and support of one's own state's participation in it offer a rather one-dimensional view of opinions in connection with the EU.[2] Even if a citizen is satisfied with the results of integration so far, it does not necessarily mean that he/she would like to see it develop into a United States of Europe; likewise, someone who identifies as a eurosceptic can support cooperation on a 'free trade area' level. It is even more fruitless to designate such labels to whole states, as declaring that any Member State is homogenous from the point of view of how its citizens or inhabitants relate to integration would be a vastly untrue statement. The most eurosceptic states have citizens who are strong supporters of the EU, and, in turn, sceptics and Europhobes abound in sympathetic countries.

Nevertheless, fitting the message to the intended recipient requires knowledge of the latter; and while many features affect any person on how he or she perceives the integration process, the influence of the native (or adoptive) country, its national discourse and public opinion cannot be denied. This makes learning about each nation's attitude extremely important for a successful European Communication Policy.

For the purposes of this paper, I have decided to examine the relations of two Member States with the European project: the United Kingdom and Austria. These countries have both similarities and differences. Geographically, the UK is isolated from the continent by the Channel, Austria is in Central Europe; in geopolitics, though, Austria was for decades a buffer zone between opposing blocs or on the periphery of the EU. They differ significantly in size and population; economically, though, both can be considered wealthy amongst Member States. Historically, both had had empires at one time, but while one dissolved rather drastically in war(s), the other, although much changed in nature, still remains in the form of the Commonwealth; the UK has several centuries' worth of tradition of undisputed existence, the Republic of Austria is a 20th century invention. The United Kingdom is a country pursuing an active military policy, Austria is permanently neutral. In terms of integration, both were founding members of the European Free Trade Association, but while the UK applied for membership in 1961 and joined the then-EEC in 1972, Austria had to wait for the Cold War to be over, and is a relative newcomer. The consequences of these and other factors on how UK or Austrian citizens view the EU are examined in detail.

United Kingdom

History of relations with the integration project, or how Britain missed the boat and keeps trying to steer it

After the end of the second World War from which it emerged victorious in the 20th century, Britain found itself a situation very different from

1 see, for example Baines, Paul – Egan, John – Jefkins, Frank: Public Relations. Elsevier, Oxford, 2004
2 Medrano, Juan Díez: Framing Europe. Princeton University Press, Princeton and Oxford, 2003

most Western European countries: although recognising the importance of preventing another war and the re-development of the economies with integration, it had a choice in joining the project. This was mainly due to the fact that most of its economic connections were still with the Empire/Commonwealth instead of the continental states and it had a 'special relationship' with the USA;[3] thus being more interested in preserving and developing global free trade than joining a regional organisation. The main idea – expounded upon by, for example, Winston Churchill – was to support European integration, participate in the intergovernmental organisations, but remain away from any supranational ones. Militarily, as well as economically, the UK relied more on the USA (or NATO) and the Commonwealth defences then the 'unreliable' European states and the Western European Union.[4]

With the additional incentive from internal politics (the Labour Party, having won the first post-war elections, were distrustful of the conservative governments in Western Europe),[5] the refusal to participate in the Schuman plan and the European Coal and Steel Community was inevitable. Britain viewed the Pleven plan for a European Defence Community as an attempt to undermine the just-evolving NATO, and took immense satisfaction from the fact that the plan failed.[6] With Britain's economic and military powers unmatched by any states except the two emerging superpowers, participation in the European Economic Community and EURATOM was seen as unnecessary: Britain sent no important politician to the Messina conference in 1955 and recalled its representative before talks were concluded with the firm belief that economic integration would fail.[7] The Treaties of Rome were drafted and signed and came into effect without the British interests being represented in them. In a counter-step, the UK helped found the European Free Trade Association (EFTA) in 1959, hoping that it would, in time, supersede the EEC. The EFTA proved to be a disappointment in more than one ways: it meant more advantages for other members than for the UK, and was met with disapproval from the USA.[8]

The expected failure of the EEC not having happened by the time the United Kingdom lost most of its colonies, its economic primacy among European states, and some of its illusions of being a global power on its own, British policy turned toward it to reinforce and maintain its economic status. As this happened partly at the insistence of the USA, and with continued heavy reliance on the Atlantic links in all military matters, the Six, and the newly nationalist France can be forgiven for seeing the UK application for membership in the EEC as a chance for the USA to 'influence' European integration. De Gaulle's vetoes in 1963 and 1968 stopped the first two attempts to join, but there was in both cases considerable British opposition to the idea as well. It took a declaredly pro-European Prime Minister, Edward Heath and the retirement of De Gaulle for the United Kingdom to join the European Communities in 1973.

The realities of global economy and especially the oil crisis meant that in 1974, a Labour Government won the elections with – among others – the promises for renegotiating conditions of membership: the new terms included, in addition to some budgetary changes, several special treatment clauses for Commonwealth trade, and a European Regional Development Fund.[9] In 1975, the first referendum in Britain was held, in which 67.23%[10] of the voters decided on remaining in the 'Common Market' under the renegotiated entry terms. The referendum was held after an intensive, and in the case of the pro-Marketeers, well-funded public campaign, and has been considered by some as a deception of the British populace about the real nature of the EEC.

In the following decades, British dissatisfaction with the European project continued. While the GDP of the UK was relatively low, it continued to be a net contributor to the Community budget. In the mid-80s, the (in)famous 'rebate' – a compensation for the United Kingdom's inability to profit from the Common Agricultural Policy was negotiated, but this proved unsatisfactory in solving the fundamental problems. Conservative Prime Minister Margaret Thatcher was vehemently opposed to developments in the Community she saw as 'federalist', including, for example, the European Monetary System. The single market project, however, had her government's support. Britain signed the Maastricht Treaty with reservations, and even a more pro-European Blair government has been unable to fundamentally change the British attitude to EUrope – even in terms of the political elite, much less in public opinion.

Perceptions of Europe

If one distinguishing element of the British perception of Europe had to be named, it would have to be the often-prominent feeling that 'Europe'

3 Piper, Richard J.: The Major Nation-States in the European Union. Pearson, New York, 2005
4 Ludlow, Piers: Us or them? The meaning of Europe in British political discourse. In: The Meaning of Europe Malborg, Mikael af and Stråth, Bo (eds) Berg, Oxford, New York, 2002
5 Piper, Richard J.: The Major Nation-States in the European Union. Pearson, New York, 2005
6 Rapcsák János: A vonakodó partner. Nagy-Britannia és az európai integráció. In: A huszonötök Európái. Kiss J. László (szerk) Osiris, Budapest, 2005.
7 Spiering, Menno: British Euroscepticism. In: Euroscepticism: Party Politics, National Identity and European Integration. Harmsen, Robert and Spiering, Menno (eds) Rodopi, Amsterdam, New York, 2004
8 Rapcsák János: A vonakodó partner. Nagy-Britannia és az európai integráció. In: A huszonötök Európái. Kiss J. László (szerk) Osiris, Budapest, 2005
9 Rapcsák János: A vonakodó partner. Nagy-Britannia és az európai integráció. In: A huszonötök Európái. Kiss J. László (szerk) Osiris, Budapest, 2005
10 EU Enlargement and referendums. Szczerbiak, Aleks and Taggart, Paul (eds) Routledge, London, 2005. p.4

is a concept which does not include Great Britain. Europe is the Continent, where 'foreign' people speak different languages, drive on the other side of the road and eat different things for breakfast.

The feelings of 'otherness' has a well-grounded tradition in history and the historical perception of geopolitics. No other European state can claim the length of time being uninvaded by enemy forces, or the continuous governmental traditions; and in many Britons' view this means that European states, democracy, peace are unreliable. Moreover, Europe has long not been perceived as a source of new, worthy ideas, but rather as (from the Labour Party point of view, in the most of the second half of the 20th century) an obstruction to developing a British social model, or (by the Conservative Party) as bureaucratic and limiting to the valued devolution concept.[11]

Perceptions of the EU, or how new words are born

Feelings toward Europe as a general concept, covering all continental countries, while influence feelings toward the European Union in particular, obviously do not equal the latter. The British people (political elite, press and the public opinion) are rather well-known for feelings of resentment towards the Union, for thinking that Britain should leave the EU, in short, for being eurosceptic. The word 'euroscepticism' itself was born in the UK press, and has been used ever since to describe negative, not just doubtful feelings towards the European Union.[12]

The initial reaction to the integration project can be described as aloofness: not wishing to participate and finding the endeavour, at best, a doubtful attempt to preserve peace in Western Europe. As economic integration prospered, and with it, the Six grew wealthier, feelings of resentment appeared; this happened at the same time when Britain had to confront its loss of status as a world power, and consequently, the loss of its options in joining the evolving EEC.

After achieving membership, the resentment of loss of privileges from Commonwealth trade and the inequalities imposed by the nature of a budgetary system not designed with the UK's economy in mind, and most especially the reluctance of other Member States to change these was natural. The way these and other problems were handled, exposed a fundamental difference between the political systems and political thinking of Britain and the continental states. While the latter are very much used to the concept of coalition governments and compromises, the Britons' concept of politics is much more confrontational, adversarial. This style of 'negotiating' evolved in a national political system where the 'winner takes all', and is singularly ill-suited to a European structure seeking compromise.[13]

Another interesting, and from a 'continental' point of view, strange factor underlining the British anti-EU sentiment is the fundamentally different – and much more real – concept of sovereignty. In contrast with most continental countries, sovereignty in Britain lies not in the nation but in the Parliament, and through its long course of development, has become regarded as one and indivisible. Sharing this is a direct affront to centuries of legal and constitutional tradition.[14] Added to this is the fact that Great Britain is not one nation, but consists of English, Welsh and Scottish people, therefore the loyalty of its collective citizens is bound only to and by the Crown (King or Queen) in the Parliament. The loss of sovereignty concept was especially strongly resented and opposed by Margaret Thatcher.

Atlanticism, i.e., the maintenance of the – however one-sided – 'special connection' to the USA, the preference for enlargement, the strong influence of the British press and a seemingly contrary effectiveness in national implementation of European policies are also worth mentioning when discussing British attitudes to EUrope.[15] The fact that, although eurosceptic sentiments are popular, the main public finds the issue less important than many other problems, and therefore is passive in its euroscepticism, is also to be considered.[16] Many academics also point out that the feeling that Britain and its people are different *per se*, also influences feelings toward Europe.

Austria

History of relations with the integration project: haven't we done this before?

Austria (the Austro-Hungarian Empire), as opposed to other, colonialist empire-builders in Europe, achieved integration with states and regions directly in its neighbourhood in the second half of the 19th century. Having lost this in the First World War and denied unification with Germany, then losing the Second World War meant that Austria had to start anew and build a viable democratic state alone.

The first step was regaining sovereignty: this happened with the signing of the State Treaty in 1955, which ended a decade-long, four-power occupation period, during which, however, democratic and national, if not independent institutions functioned. Sovereignty – independence – was granted in exchange for permanent neutrality. This neutrality was interpreted by Austria as of a

11 Ludlow, Piers: Us or them? The meaning of Europe in British political discourse. In: The Meaning of Europe Malborg, Mikael af and Stråth, Bo (eds) Berg, Oxford, New York, 2002
12 Spiering, Menno: British Euroscepticism. In: Euroscepticism: Party Politics, National Identity and European Integration. Harmsen, Robert and Spiering, Menno (eds) Rodopi, Amsterdam, New York, 2004
13 Piper, Richard J.: The Major Nation-States in the European Union. Pearson, New York, 2005
14 Gálik Zoltán: Még a reggelijük is más… Brit nemzeti identitás és külpolitika. in: Nemzeti identitás és külpolitika az euroatlanti térségben Kiss J. László (szerk.) Teleki László Alapítvány, Budapest, 2005
15 Piper, Richard J.: The Major Nation-States in the European Union. Pearson, New York, 2005
16 Spiering, Menno: British Euroscepticism. In: Euroscepticism: Party Politics, National Identity and European Integration. Harmsen, Robert and Spiering, Menno (eds) Rodopi, Amsterdam, New York, 2004

strictly military nature, not preventing joining organisations as the Council of Europe or even EFTA. The Soviet veto on application for EEC membership was effective until the end of the Cold War, but did not prevent strong economic ties with members, especially Germany.[17] Once external pressure disappeared, Austria (at the same time as other permanently neutral countries, Sweden and Finland) applied for membership, due to its economic interests. The 1989 application was met with approval, enlargement followed relatively late because of the internal changes in the Community. At a 1994 referendum, 66.58% of voters decided to endorse membership,[18] which followed in 1995.

In the years since then, Austria had few conflicts with the EU or European affairs. The neutrality issue continued to be debated, but without any sense of urgency. The 2000 sanctions against the radical right *Freiheitliche Partei Österreichs*' inclusion in the Austrian government were also controversial; also an unexpected FPÖ campaign against eastern enlargement in spite of the Austrian mainstream political elite's support of the question.[19] The issues present in enlargement negotiations: environmental protection, transit and social policy did not disappear altogether, but do not constitute an overwhelming problem. With the accession of its eastern neighbours, Austria arrived 'back' to the centre of Central Europe.

Perceptions of Europe

Until the beginning of the 19th century and the end of the Holy Roman Empire, Austria (the Habsburg monarchy) thought in those terms – established in the centuries when it defended Christianity from the Turkish invasion – and not in terms of Europe. This latter was born in France and the revolution, and while the Habsburg emperors saw the need for enlightenment, they envisioned this in a top-down form and not via revolution. Therefore, Austria was *Mitteleuropa* between the radical West and the uncivilised East, wanting the best of both but often ending up with neither. This concept ended with the loss of the Empire in the First World War.[20]

Although not overly influential in its time, the idea of a Pan-European Union, a democratic and liberal union of continental European states, was developed by an Austrian, Richard Coudenhove-Kalegrie, in 1922.

Austria's struggles for national identity, seemingly impossible in the time of the First Republic, came to fructification after the Second World War, when collective forgetfulness of the unseemly German past, economic success, the embracement of neutrality and the long-term political cooperation brought about by the grand coalition of the two main parties[21] all helped establish an Austrian *persona* with which citizens could identify. Geopolitical realities kept reminding Austrians of the old *Mitteleuropa* concept, but identification with the democratic West was apparent in all possible terms. The idea of Europe as a civilizational project is suspiciously missing from the political terminology, though.[22]

Perceptions of the EU

Austria remains, in spite of some controversial issues mentioned above, a mainly Euro-optimistic Member State. Public opinion research at the time of discussion of Austrian EEC/EC/EU membership indicated that economic reasons were mainly behind the support for accession, that the organization was seen as the economic future of Austria. This perception has not changed: the main parties and the majority of the population remains pro-European, with Euroscepticism showing on the radical ends of the political spectrum.

If in Britain's perceptions of the EU, the concept of sovereignty plays an important role, the Austrian idea of neutrality is somewhat comparable to this problem. Although not as limiting a notion as the British sovereignty, the maintaining of neutrality was an important condition in securing popular assent to accession. As neutrality, at its conception, was instrumental in achieving independence, it became part of the national identity. Fortunately, the EU is no stranger to permanently neutral countries, and with the collapse of the two-bloc system, the importance of the question is somewhat faded. Nevertheless, Austrian Eurosceptics argue that membership in a supranational institution is contrary to the concept.[23]

Another traditional aspect in looking at the Union is the cooperative party and social partners' politics developed in Austria in the decades after gaining independence. In direct contrast with the adversarial British party system, Austrians are used to the idea of cooperation: coalition – even grand coalition – governments were a fact of Austrian life for long years.

Austrian Euro-optimism was tested in 2000, when the other 14 Member States imposed sanctions because of the FPÖ's inclusion in the coalition government: this, however, has not caused permanent damage

17 Dr. Kőrösi István: Ausztria új szerepe: közép-európai államként ismét az európai centrumban. In: A huszonötök Európái. Kiss J. László (szerk) Osiris, Budapest, 2005

18 EU Enlargement and referendums. Szczerbiak, Aleks and Taggart, Paul (eds) Routledge, London, 2005. p.4

19 Luther, Kurt Richard: Structural adjustment and incumbent elite empowerment. In: The Europeanization of National Political Parties. Poguntke, Thomas et. al. (eds) Routledge, London, New York, 2007

20 Weiss, Gilbert: Austria Europae Imago, Onus, Unio? In: The Meaning of Europe Malborg, Mikael af and Stråth, Bo (eds) Berg, Oxford, New York, 2002

21 Luif, Paul: The Austrian View of Nationality. In: Nationality versus Europeanisation. The National View of the Nation in Four EU Countries. Goldmann, Kjell and Gillerd, Karin (eds) Department of Political Science, Stockholm University, Stockholm 2001

22 Weiss, Gilbert: Austria Europae Imago, Onus, Unio? In: The Meaning of Europe Malborg, Mikael af and Stråth, Bo (eds) Berg, Oxford, New York, 2002

23 Pelinka, Anton: Austrian Euroscepticism. In: Euroscepticism: Party Politics, National Identity and European Integration. Harmsen, Robert and Spiering, Menno (eds) Rodopi, Amsterdam, New York, 2004

in public opinion, even though it was very indicative of the relative powerlessness of small states and Austria in particular in 'Brussels'. This ended as an incentive to seek partners in the region, mostly the accession states of 2004.[24]

Conclusions

Although an examination of all Member States, prospective members and other European states is necessary to develop a complete framework of reasons for attitudes to integration, from the example of two similar-but-different countries, we can draw the conclusions that any communication policy designed for the whole Union and not making concessions for national and regional differences, is probably doomed to failure. Therefore, a deeper understanding of each type of attitude is necessary to ensure the continued success of the European project.

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Timea Kovacs

The EU's Equal Treatment Directives and equality in practice

I. Introduction

In recent years, two measures against discrimination have been taken in Europe: the European Union adopted a Council Directive implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin in June 2000. Besides, in the same year in November, the Union enacted a Council Directive establishing a general framework for equal treatment in employment and occupation. This article reviews these two instruments, which show many resemblances, and mentions some differences. (The differences are mainly their grounds for discrimination.) The relationship between the two directives will be discussed, and how they influence and strengthen one another to increase the pressure for adequate and effective legislation within the Member States of the European Union. Next to this goal, we would like to draw attention to the equality programs of the EU, namely the Community Action Programme to combat discrimination 2001–2006.

II. The Equality Directives

Employment and occupation have been recognised by the European Union as key elements in guaranteeing *equal opportunities* for all. They contribute strongly to the full participation of citizens in economic, cultural and social life, and to realising their potential. Since it has been established, the EU has encouraged Member States to work towards

24 Kiss J. László: A birodalomtól az integrált kisállamig. A „német nemzettől" az osztrák nemzetig az EU-ban. In: Nemzeti identitás és külpolitika Közép- és Kelet-Európában. Teleki László Alapítvány, Budapest, 2003

achieving a high level of employment and social protection, increased standards in living and quality of life, economic and social cohesion and solidarity. *Discrimination* can seriously undermine these achievements, and damage social integration in the labour force. That is why it is a significant issue in the EU not only in the past, but also nowadays. Although the key points of this topic have been changed through the years.

For many years the focus of EU action in the field of non-discrimination was on preventing discrimination on the grounds of nationality and sex: the European Commission refers to sex discrimination as 'gender' discrimination. In 1997, however, the Member States approved unanimously the *Treaty of Amsterdam*. Article 13 of this new Treaty granted the Community new powers to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The Treaty of Amsterdam came into force in 1999. As part of a comprehensive legal framework to establish equality in 2000, the European Union enacted two so-called Equality Directives. These are the *Racial Equality Directive* to implement equal treatment irrespective of racial or ethnic origin (2000/43/EC of 29 June 2000) and the *Employment Equality Directive* establishing a framework for equal treatment in employment and occupation (2000/78/EC of 27 November 2000).

Council Directive 2000/43/EC implements the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation. The directives show similarities in their core concepts. One of the main idea of the Directives is 'direct and indirect discimination'. Article 2 of the Racial Equality Directive and Article 2 of the Employment Equality Directive prohibit *direct discrimination*. The directives give the same definition of this kind of discrimination. It occurs when a person is treated less favourably than another actual person in a comparable situation is being treated or has been treated in the past, or a hypothetical person would be treated, on the grounds of racial origin, religion or belief, disability, age or sexual orientation.

Besides, both directives prohibit *indirect discrimination* as well. It shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. With respect to the concept, there is a difference between the definitions given by the Directives. The Racial Equality Directive 2000/43/EC deals equal treatment only between people irrespective of racial or ethnic origin, that is why this directive definites direct discrimination not exactly the same as the Employment Equality Directive does. The Employment Equality Directive definite indirect discrimination: it shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

The scope of the Directives as it was mentioned above are different. The Racial Equality Directive 2000/43/EC gives protection against *racial discrimination* in employment and training, education, social protection (including social security and healthcare), social advantages, membership and involvement in organisations of workers and employers and access to goods and services, including housing. The Employment Equality Directive 2000/78/EC implements the principle of *equal treatment in employment and training* irrespective of religion or belief, disability, age or sexual orientation in employment, training and membership and involvement in organisations of workers and employers.

Considering the *similarities* between the two Directives it can be said that they include identical provisions on definitions of discrimination and harassment, the prohibition of instruction to discriminate and victimisation, on positive action, rights of legal redress and the sharing of the burden of proof.

Article 8 (1) of the Racial Equality Directive and Article 10 (1) of the Employment Equality Directive establish the *burden of proof*. This provides that Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. So the rules of the two Directives share the burden of proof between the complainant and the respondent in civil and administrative cases.

Under Articles 7 (2) of the Racial Equality Directive and 9 (2) of the Employment Equality Directive Member States shall ensure that associations, *organisations* or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of the Directives are complied with, may engage. It is allowed either on behalf or in support of the complainant, with his or her approval in any judicial and/or administrative procedure provided for the enforcement of obligations under the Directive.

Article 15 of the Racial Equality Directive and Article 17 of the Employment Equality Directive require Member States to provide *sanctions* for infringements of national provisions which are adopted to implement the Directives and to take all measures necessary to ensure that they are applied. The sanctions must be effective, proportionate and dissuasive. They may include compensation. A wide range of remedies exist at national level depending on whether discrimination is criminal (fines) or civil (re-instatement in your job or damages in the form of compensation for loss of earnings or damages for injury to feelings or moral damages.

Next to the similarities, some diffrences can also be mentioned, mainly in connection with the discrimination areas of the directives. The Employment Equality Directive 2000/78/EC requires employers to make *reasonable accommodation* to enable a person with a disability who is qualified to do the job in question to participate in training or paid labour. Besides, it allows for *limited exceptions* to the principle of equal treatment, for example, where the ethos of a religious organisation needs to be preserved, or where an employer legitimately requires an employee to be from a certain age group to be recruited. The Racial Equality Directive 2000/43/EC provides for the establishment in each Member State of an *organisation* to promote equal treatment and provide independent assistance to victims of racial discrimination.

III. Equal treatment and anti-discrimination in practice

The Community has developed a three part strategy to combat discrimination: next to the two Directives analysed above there are the so-called 'Community Action Programme to combat discrimination 2001–2006'. Between 2001–2006, the Community Action Programme has played a key role both in raising awareness of the issues surrounding discrimination and in developing the ability of stakeholders to tackle discrimination according to the external evaluators of the Action Programme. 2007 has been declared the European Year of Equal Opportunities for All, to give a fresh impetus to fighting discrimination and promoting diversity, tackling discrimination on the grounds of sex, ethnic or racial origin, age, sexual orientation, disability, religion or belief. At the same time it will continue and build on the work of the Community Action Programme to combat discrimination, with a new emphasis on reaching out to a broad public and making people aware of their rights to equal treatment. New tools and new approaches will help Europe to continue to move forward with its efforts in the field of equality and non-discrimination. The EU's PROGRESS programme – to fund activities in employment and social affairs from 2007–2013 – is expected to take up some of the best ideas generated during the European Year, ensuring they make a real impact in the long term as well.

IV. Conclusion

In my view, European Union has a very complete set of legislation in the field of equal treatment. The European Union's anti-discrimination legislation is one of the most ambitious and far-reaching in the world. Besides, in 2000 a real progress has been made in the field of equal treatment law. As I see, the principle rules laid down in the two Directives show an anti-discrimination law which would like to have a much more intensive and much greater influence than ever in the Member States. The EU has made a great step forward with implementing this Directives, but according to the practice and lessons learned from the programmes, there are even new ways and possibilities in this field, that is why it has to be improved in the forthcoming years.

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The „State or the Union" Addressed: From Identity Concepts to Polity Blueprints

The theoretical foundations of the constitutional future of Europe: Cosmopolitanism, communitarism and pluralism

1. Introduction

One of the major developments in contemporary constitutional scholarship was the gradual emergence and intensification of a scientific discourse devoted to the study of 'constitutional aspects' of European integration. This area of research soon became one of the favourite playing fields of predominantly political and legal scholars, indeed, inviting a multidisciplinary approach to address its core issues. One of the key questions of European constitutional discourse concerns the relationship between the Union and its Member States: where should future integration place the emphasis in the balance between the nation-states and the Union? Has sovereignty transcended the confines of the nation-state? What is the European Union, and what should it become? Do democratic standards impose limits on the depth of integration? Do cultural differences within the European Union play a role with regard to the depth of integration, or to the capacity for enlargement? Political theory has yielded but many an answer to these questions. Interestingly, these answers can all be traced back to a certain concept of the nature of identity. Imagining feasible future communities implies a clear-cut opinion of who we are, and who we are capable of becoming, thus basing normative conclusions on empirical assessments. It is for this reason that all various political and theoretical representation on the future construct of the European Union expressly or implicitly relies on a specific idea of the person, of its identity. In the following I shall attempt to highlight the general, lesser disputed functions of identity for polity. Then I shall turn to a critical analysis of the various theories on the implications of identity for the European polity. Finally, I shall briefly map the identity politics of European integration classifying it under the terms of the existing theories.

2. Functions of identity for polity in general

What is the role of identity for any given polity? Why has identity been attributed such relevance for the design of political orders? When answering these questions one must bear in mind the fact that although there has been a "rapid rise of the identity concept"[1] the term identity is heavily disputed and, to say the least, "fuzzy".[2] "Identity has become a popular concept in many disciplines (…). At the same time, the notion of identity means quite different things to different people."[3] As Kantner points out: "After decades of intense discussions about national, ethnic, and European identities, the concept of 'collective identity' seems to have lost all clear-cut analytical contours."[4] In the following, I shall attempt to overcome the problems of definition by presenting identity in functional terms: as the pre-condition and means of societal self-constitution, as an inclusive and exclusive force and finally, as a source of individual and collective motivation.

According to ALLOTT "societies form themselves by way of ideals, by collectively defining their identity, unity and destiny."[5] Some form of a *collective* identity is thus the starting point for the formation of any given community. Communities are more than mere physical entities or loose groups of detached persons because of their underlying identity. They are very much like living organisms, with a moment of birth, a life-span during which they undergo constant transformation and a point of death where they perish exiting social reality. They are the product of collective self-reflection, the expression of a common consciousness dependent upon continuous rethinking and reinvigoration. Communities are not given, they are the creation of man, a common effort with a view to establish a common consciousness, and at

1 Peter A. Kraus: Cultural Pluralism and European Polity-Building: Neither Westphalia nor Cosmopolis, JCMS, 41 (2003a) 4, 666.
2 "Identity (…) has to be seen as a value which is highly complex, fuzzy, and allowing for degrees, nuances, and trade-offs," Claudio Luzatti: Matters of Identity, Ratio Iuris 18 (2005) 1, 107.
3 Richard K. Herrmann, Marilynn B. Brewer: Identities and Institutions: Becoming European in the EU, in: Richard K. Herrmann, Thomas Risse, Marilynn B. Brewer: Transnational Identities – Becoming European in the EU, Rowman & Littlefield Publishers, (2004), 4. Kraus points out that: „[I]dentity studies have flourished within and across several academic disciplines during recent years. It should be noted that the rapid rise of the identity concept that can be observed in the social sciences during the last two decades is an obvious symptom of a period of sweeping social and political change." Kraus (2003a), 666.
4 Kantner citing Lutz Niethammer: 'Kollektive Identität': Heimliche Quellen einer unheimlichen Konjunktur, in: Cathleen Kantner: Collective Identity as Shared Ethical Self-Understanding – The Case of the Emerging European Identity, European Journal of Social Theory, 9 (2006) 4, 506.
5 Philip Allott: Epilogue. Europe and the dream of reason, Joseph H. H. Weiler, Marlene Wind: European Constitutionalism Beyond the State, Cambridge University Press (2003), 203.

the same time they are an effort of the common consciousness to shape human reality. GIESEN sees identity as a community shaping force and program, a concept of utter openness, allowing for infinite possible formations regarding the definition of common points of identification.[6]

VON BOGDANDY illustrates social identity as a product of 'writing' a 'common dictionary'[7] innate only to one given group. Only the members of the community to which it belongs need no translation of this 'common dictionary'. Thus, identity may be construed along the lines of similarity and difference, inclusion and exclusion. "Identity is essentially janus-faced: it is as much about differentiation and individuality as it is about commonality".[8] Identity in this sense is a *relational* term, showing us who we are, in relation to others. "To have social identity means to identify oneself with a given community, (…) and to see things from the perspective of a given community."[9] The commonality in the individual identities of persons serves as the basis of collective identity,[10] the cohesive force underlying any community. It is the tie that binds together the members of the imagined and construed, rethought and then readjusted community. Any articulation of identity is a statement on the community itself and everyone else, a narrative on those admitted, and those barred from the inner circle. One facet of identity is therefore inclusion: group formation based on some assumed 'homogeneity' as well as recruitment by way of socialization[11] as a means of self-sustenance and reproduction. Identity strengthens the feeling of togetherness of the members of the community by building inner-group solidarity and drawing a sharp line between them and strange groups. Solidarity manifests itself in the recognition of common interests and the resulting efforts to build a common future, to achieve common aims together. In this sense, solidarity is a phenomenon defining the relationship of the members of a community encouraging present sacrifices of individuals sharing a common identity devoted to the realization of a common future. Identity thus sustains the polity by forging solidarity amongst its members, facilitating political processes and also by providing a common destiny for the community in question.[12]

Identity not only offers community values and goals but encourages members to live a life in accordance with these values and live a life for the achievement of these goals. According to HAUSER "identity contains the cognitive factor of self-perception, the emotional factor of self-estimation and the *action orientated* factor of self-control".[13] With other words, identity is not merely "the result of actions, but rather an incentive for action of its own, which shall at the same time be determinate of the individual's identity,"[14] i.e. identity serves as a motivation and at the same time it becomes the result of individual or collective action. Identity thus provides the self-consciousness and self-esteem as a necessary impulse for action, and at the same time it shall determine the course of the action thus induced.[15] The collective identity defining the coordinates of actions directed at shaping a common future is therefore not only a depiction of the common goals but also the object of renegotiation, a hot topic of social discourse.[16]

3. Identity and the European polity

Do we need a European identity? According to VON BOGDANDY there is no clear scientific answer to the question, whether "an identification with the Union is actually necessary", however "the formation of a collective identity *may* prove to be helpful for the stability and resilience of a polity."[17] HERRMANN and BREWER further substantiate this assumption by stating that a "common identity and the idea of community are seen as providing diffuse support that can sustain institutions even when these institutions are not able to provide immediate utilitarian payoffs. Identification with a common com-

6 Bernhard Giesen, Schmuel Noah Eisenstadt: The Construction of Collective Identity, European Journal of Sociology 26/1 (1995), 72–102.
7 Armin von Bogdandy: Europäische Verfassung und europäische Identität, in: Gunnar Folke Schuppert, Ingolf Pernice, Ulrich Haltern (ed.): Europawissenschaft, Nomos (2005), 339.
8 Franz C. Mayer, Jan Palmowski: European Identities and the EU – The Ties that Bind the Peoples of Europe, JCMS 42 (2004) 3, 577.
9 Florian Pichler: Affection to and Exploitation of Europe. European Identity in the EU, Reihe Soziologie, Institut für Höhere Studien (2005), 11.
10 "The phenomena of social identity are regarded, in the aggregate, as a collective identity and establish a 'we', insofar as human beings understand themselves to be members of a group. The essential element of collective identity is – according to social psychology – a mutual perception of belonging." Armin von Bogdandy: The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe, Symposium on the proposed European Constitution – Part II – A constitutional identity for Europe? 3 Int'l J. Const. L. 295 (2005), 297–298.
11 On the processes of socialization see: Andreas Greis: Identität, Authentizität und Verantwortung. Die ethischen Herausforderungen der Kommunikation im Internet, KoPäd Verlag (2001), 236.
12 „In order to realize grand collective projects in ethically sensitive policy fields, a political community needs not only rational agreement, but also some enthusiasm among ist members." Kantner op. cit., 506.
13 Karl Hauser: Identitätspsychologie, cf.: Greis, op. cit., 236.
14 Ibid, 236.
15 Ibid, 236.
16 „[Identity] is the result of communication and always 'innate to an institutional order and a social group characterized by this order'" Gerard Delanty: Die Transformation nationaler Identität und die kulturelle Ambivalenz europäischer Identität. Demokratische Identifikation in einem postnationalen Europa, Cf.: Simon Donig, Tobias Meyer, Christiane Winkler: Europäische Identitäten – Eine europäische Identität? (2005), 16.
17 Armin von Bogdandy: Europäische Identität und europäische Verfassung, http://www.planck.de/bilderBerichteDokumente/dokumentation/jahrbuch/2004/voelkerrecht/forschungsSchwerpunkt/pdf.pdf., 1. (27. 03. 2007.) See also: "The long term stability and efficiency of the European polity depends to some extent on European citizens developing a sufficiently strong commitment to and identification with it." Matthias Kumm: To be a European Citizen: Constitutional Patriotism and the Treaty Establishing a Constitution for Europe, in: Erik Oddvar Eriksen, John Erik Fossum, Matthias Kumm, Augustin José Menéndez: The European Constitution: The Rubicon Crossed? ARENA Report, No. 3/05, Oslo (2005), 1. A similar point is made by Kantner, Kantner op. cit., 506.

munity, such as Europe, is also seen as valuable for sustaining mass-based support when institutions at the international level make decisions that promote the European good but may demand sacrifice from particular national communities."[18] With other words, identification with Europe would foster trans-boundary solidarity amongst citizens of the Member States accepting that they belong to the same polity, and would also breed faith toward the polity providing the consensus necessary for the efficient functioning thereof. However, the question arises: is the construction of a European identity a real possibility at all, or is it much rather a euro-enthusiast illusion? The following theories proposing blueprints for the future European polity offer various answers to this question.

4. Theories

In the political West, burdensome historical experiences seemed to have left the political paradigm of democracy unchallenged, indeed "there is abundant evidence that the citizens of Europe – while they may not agree on its existent practices or even know what 'it' really is – will not tolerate non-democracy".[19] Premised on the notion of democratic rule and based on specific concepts of identity, the theories outlined briefly in the following describe three different blueprints for constructing the future European polity. These theories shall be presented in ideal type way focusing on the common tendencies of each, and overlooking nuanced differences certainly present within the theories themselves.

4.1. Communitarism – 'spill-back' to intergovernmetalism

Communitarists (occasionally also referred to as westphalians)[20] see democracies as deeply embedded in culture. Common culture, and most importantly a common language as well as further elements of a shared identity that "binds the people together (…) spiritually, socially and politically"[21] are indispensable for the formation as well as the functioning of a public sphere where responsible democratic debate – the *conditio sine qua non* of democracy – can take place.[22] Without a viable public sphere facilitating democratic debate or "will formation" there is no democracy which presupposes "linking the institutions, as the framework that exercises state power, to the people, as the possessor of state power."[23] Correspondingly there is no demos formed in lack of the democratic politicizing forces necessary to establish a viable political community.[24] According to Killian Brewer "political theory holds that a democracy must have a demos, or a people bound together by *culture, language or other factors which make them recognizable as a cohesive group*."[25] Communtarism stipulates a demos which is not only a political community but a community of common culture, in which popular sovereignty is vested. Thus, communitarism "conceives of a demos as an ethno-cultural, organic and static concept, characterised by a certain degree of homogeneity,"[26] or with other words a 'thick' common identity[27] which is 'essentiali-

18 Herrmann, Brewer, op. cit., (2004), 3.

19 Philippe C. Schmitter, Alexander H. Treschel: The Future of Democracy in Europe – Trends, Analyses and Reforms, A Green-Paper for the Council of Europe, Commissioned by the Secretary General of the Council of Europe, Integrated project "Making democratic institutions work" http://www.coe.int/t/e/integrated_projects/democracy/05_Key_texts/Green_Paper/D_Word%20Version.asp#TopOfPage (27. 03. 2007.), 14. The paper also goes on to state that „liberal democracy has become the norm throughout Europe and overt autocracy persists only in countries with markedly different cultures and social structures," 15.

20 Kraus (2003a), 668.

21 Passage of the Maastricht judgement of the Bundesverfassungsgericht of 1993 (BverfGE 89,155) as cited by Michiel Brand in: Affirming and Refining European Constitutionalism: Towards the Establishment of the First Constitution for the European Union, EUI Working Paper LAW No. 2004/02, 7.

22 Drawing an analogy between the EU and the multicultural state Kraus cites Mill: "Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist. The influences which form opinions and decide political acts are different in the different sections of the country. (…) The same books, newspapers, pamphlets, speeches, do not reach them. One section does not know what opinions, or what instigations, are circulating in another." John Stuart Mill: Considerations on Representative Government, in: John Stuart Mill: Utilitarianism. Liberty. Representative Government; cf.: Peter A. Kraus: Between Mill and Hallstein. Cultural diversity as a challenge to European integration (prepared for the Francqui Prize Conference, „Cultural diversity versus economic solidarity", Brussels, 28 February-1 March 2003), Revised version (2003b), 4-5. For a more balanced narrative see: Hartmut Kaelble: Eine Europäische Gesellschaft?, in: Gunnar Folke Schuppert, Ingolf Pernice, Ulrich Haltern (ed.): Europawissenschaft, Nomos (2005), 316-322. Kaelble writes that European identity has been reflected upon from two perspectives, the political identification of union citizens with European institutions on the one hand and cultural identification of the European citizens based on common history and cultural values on the other. He asserts that with the extension of EU competences beyond the economic domain the focus of identity has shifted more and more toward its political understanding; ibid., 319.

23 Brand referring to Dieter Grimm: Does Europe need a Constitution?, in: Brand, op. cit., 8.

24 "A constitution without demos would lack its fundamental element, that is, its subjects. This element cannot easily be constructed or produced – assuming it might be desirable – partly on account of the lack of a European public space." Gianluigi Palombella: Whose Europe? After the Constitution: A Goal-Based Citizenship, 3 Intl' J. of Const. L. (2005) 357, 358.

25 Mark Killian Brewer: The European Union and Legitimacy: Time for a European Constitution, 34 Cornell Intl'l L. J. 555 (2001), 563–564. (Italics by me.)

26 Brand (2004), 7. Kraus sums up John Stuart Mill´s arguments as follows: „His view is grounded on the assumption that a liberal democracy will only be able to cope with situations of intense political conflict as long as its citizens share some fundamental identity patterns, as manifested by language and culture. In Mill's model, language works as the cement of a shared political culture. Such a shared culture is needed if the institutions of a liberal democracy are to function in a proper way. Thus, to a substantial extent, cultural homogeneity or at least a minimum degree of cultural affinity become a requisite for the exercise of civic solidarity." Kraus (2003b), 5. He points out that "Mill's legacy in contemporary thinking on democracy and diversity has remained strong. Thus, in the debate on Europe's political future, it is frequently assumed that the high degree of cultural heterogeneity within the EU acts as a factor obstructing the making of a common civic identity among Europeans." Ibid, 6.

27 For the concepts of 'thick' and 'thin' identity see: Dora Kostakopoulou: Thick, Thin and Thinner Patriotisms: Is This All There Is?, 26 Oxford Journal of Legal Studies (2006) 73. Kantner classifies this perception of a communitarist identity as a "particularist we-identity" of the "we-communio" type framing groups that "are smaller than mankind and their members pursue collective projects based on a commonly shared ethical self-understanding". Kantner, op. cit., 510.

zed'[28] to equate national cultural identity.[29] It follows from the above, that neither a demos, nor democracy is conceivable beyond the framework of the nation-state. Accordingly, there is no hope of the democratization of the European Union, a construct multicultural by definition, and there can be no European demos because of the "weakly developed collective identity' of the Union citizens".[30] For these reasons integration that transfers sensitive political decisions to a trans-national level, such as the European Union results in the weakening of national democracy by disempowering the sovereign people[31] and the parallel empowerment of an undemocratic, illegitimate form of power. In this reading European integration should retreat to the ambit of 'sovereignty-safe' intergovernmental forms of cooperation to overcome its 'structurally determined democracy deficit'.[32]

Critics point out that nation-states are culturally by far not as homogenous as communitarists allege them to be.[33] Although historically nation-states have tended to homogenise their population along the lines of some assumed national culture,[34] the multicultural societies of today characterized by multiple identities negate the presumption of culturally uniform nation-states in Europe. However, communitarism not only conflates nation and culture, but also nation and democracy.[35] Due to the historical circumstance that modern democracy was first established within the confines of the nation-state, some are tempted to draw the conclusion that democracy may only be achieved within the auspices of the nation.[36]

4.2. Pluralism – the road to federalism

The theory of pluralism[37] offers a more nuanced approach to the democratic constitution of multicultural societies.[38] Pluralism also attributes an important role to culture however, as opposed to communitarism it contends that identity should not be perceived as a monolithic phenomenon. Although cultural conditions do have an impact on political attachment, cultural and political identity may be reasonably separated. As a starting point the democratic order must recognize all, national, sub-national and other forms of cultural identity as well as their manifestations within a polity of equal citizens.[39] The institutional recognition of cultural communities is to form the basis[40] of a federal-type polity where subsidiarity[41]

28 Kraus (2003a), 680.

29 In his account of liberal nationalism, Nicholas W. Barber highlights the communitarist concept of the nation: "A national group is a collection of individuals bound together by mutual recognition; a belief, whether justified or not, in common kinship. Flowing from this is a belief that, in some sense, membership of this group is of normative significance: the moral obligations that exist between nationals are different, and, all else being equal, stronger than, those owed to non-nationals. (…) This heightened moral sense is sometimes presented as a necessary prerequisite for activities that will require sacrifices from some of the participants." Nicholas W. Barber: The Limited modesty of Subsidiarity, European Law Journal 11 (2005) 3, 312–322.

30 Brand citing Dieter Grimm, in: Brand, op. cit., 8.

31 In his critical account of the communitarian position, Palombella recalls the 'sovereigntists' fears: "[I]n the Union, the member states' commitment to relinquish totally autonomous choices has not been compensated by the creation of a new sovereign (European) state. This gives the impression that uniqueness, exclusiveness, and absoluteness lost on the national level are not transferred to the higher plane of European institutions. It thus appears as if sovereignty has, in part, evaporated." He goes on to state that therefore the traditional image of sovereignty is outdated and should be replaced by a new concept of sovereignty "within the European context, to make a distinction between popular sovereignty, or, better, the sovereignty of the citizens, and the sovereignty of the state proper." Palombella, op. cit., 365.

32 Brand citing Dieter Grimm, in: Brand, op. cit., 9.

33 Kraus (2003a), 669, 670.

34 Ibid., 671.

35 Ibid., 672.

36 On the "artificiality" of the nation state and its consequences see: Jürgen Habermas: Why Europe needs a Constitution, New Left Review 11 (2005), 16.

37 An early manifestation of the pluralist argument may be found in Campagnolo´s Repubblica federale Europea: „This movement believes that notwithstanding its deep internal cleavages Europe constitutes a spiritual and moral unity. It believes that today it has become impossible to maintain the balance between European nation-state that has rendered their co-existence especially productive. It believes that the moment has arrived for Europe to define its new order within which the embittered antagonisms may be relieved and the national capacities and efforts may be redirected to the highest goal, namely the protection of the highest values that are faced due to violence and conflict with demolition. It believes that this new order which is to replace the past definitely should form the basis of the construct of Europe, already a unity of culture and destiny, a political union. (…) As in the past a solid concept of the state and its external relations should provide the basis (…). This unity should not be perceived as a result of a coincidental or deliberate mixture of different national characters; it is much rather sustained by a uniform, ideational principle, which, due to its ubiquitous nature has penetrated all nations to the same degree (…)."Umberto Campagnolo: Der Europäische Bundesstaat – Die juristische Einigung Europas, A. Francke AG. Verlag Bern, 1945, 11-12. (Translation by me). For Habermas´ pluralist conception of the European constitutional framework see: Habermas (2005), 21–24.

38 "The variety of diverging national cultures and languages was not always and still is not an advantage for an efficient European integration process. There was, however, no choice other than making the best out of this situation by declaring that the very diversity of national cultures is something to be proud of, something which makes Europe so special." Gabriel Toggenburg: "United in diversity": Some thoughts on the new motto of the enlarged Union, II Mercator International Symposium: Europe 2004: A new framework for all languages? 27–28th of February 2004, Tarragona, 3.

39 See the Weiler´s parabolic text on uniformity and the Tower of Babel: "It is one thing, not particularly nice, to believe so in one´s power and superiority as to want to broadcast it to all nations. It is quite another for that hubris and power to flatten the richness bred in difference (…). The deep meaning of integration is a project of tolerance. Tolerance is about mediating difference, not eradicating it." Joseph H. H. Weiler: Babel – One Language and One Speech, in: Armin von Bogdandy, Petros C. Mavroidis, Yves Mény: European Integration and International Co-ordination, Kluwer Law International (2002), 484.

40 See for example The Venice Declaration of the 5th of July 2002 of the EPP Group of the Committee of the Regions: "2.1. Citizens only will accept the European integration process if local and regional diversity and people's links with their roots and their cultural heritage are guaranteed. (…) 2.2 Regional and local authorities are a crucial part of Europe's political culture. (…) Autonomy and local self-government must be seen as the basic prerequisites for a Europe that creates unity in diversity".

41 "[Subsidiarity] is a principle about the functioning of democracy, even if it is not a principle of democracy. (…) Most obviously, the European principle of subsidiarity is concerned with the allocation of powers to pre-existing institutions (…). [The] principle sets the EU against the quest for a distinctive 'European' national identity and additionally, against those who present the European project as a mechanism to protect the national identities of the Member States." Nicholas W. Barber, op. cit., 308, 309.

operates as the legal puffer of cultural conflict and as a constitutional principle indicating the boundaries of self-determination and the adequate level of political decision-making.[42] It is the political identity, the shared "political culture"[43] of the culturally diverse groups and their members that is to bind them together in one and the same polity. In its radical form pluralism advocates consociationalism, offering institutional recognition to all identifiable groups within a given polity.[44] In the case of the European Union, pluralism offers a federal vision for the accommodation of a multicultural society of "structural minorities",[45] where the nation is but one of the cultural communities among others. Pluralism believes in the co-existence of multiple identities where a possible 'thin' European identity[46] fits well with national and other identities: "this shared identity, this single European demos, by no means precludes the existence of a plurality of diverse European peoples on which it is based."[47] Pluralism pays tribute to the notions of postnational and multicultural citizenship. The former is based on the observation of "the disruption of the affinity between national community and rights enjoyment, and the extension of civic participation beyond the bounds of national spaces" such as those provided for by union citizenship or the status of long-term resident migrants in Europe. The term multicultural citizenship[48] describes a citizenship of multiple ties, where a shared belonging within a given polity is complemented by institutionalized forms of cultural affiliations.[49]

Although pluralism offers a general theory proposing a federal-type polity for the EU which more or less coincides with its current structures and tendencies, it fails to give a concrete suggestions as to the precise coordinates of the identity-groups to be recognized, or to what the institutionalized forms of group-recognition would exactly look like. The issue of definition which must precede group-recognition within the polity poses difficult questions, problems that are very similar to those experienced by multicultural states. Furthermore, any definition of factors relevant for the recognition of any entity as a constituent group eligible for institutional recognition would but discriminate against groups not fulfilling the requirements laid down and at the same time it would produce a static system of cultural policy cementing institutionalized cultural communities for the future.[50] Another question which remains unaddressed by pluralists is the problem of how exactly the so-called democracy-deficit of the European Union should be tackled.

4.3. Cosmopolitanism[51] – a principled federation of peace

Finally, cosmopolitans[52] share the pluralist view of multiple identities and stipulate that political and cultural identities must be strictly separated. A polity composed of various states may be based on sterile, 'thin' political identity of shared general principles.[53] Derived from the Kantian idea of a world order of perpetual peace, it offers an alternative to communitarist intergovernmentalism and pluralist federalism. "[C]osmopolitan law is part of a system of principles that require that states are republican, that they are joined in a federation of peace and

42 A strictly territorial definition of institutionalized cultural units are regions and further local entities. As Bourne points out: "The rise of the (sub-state) region is a characteristic of the contemporary period in Europe. Devolution of power within European states is now commonplace in both the west and east. Changes in cultural, political and governance norms emphasize a more positive role for regions in economic and democratic life. A heightened awareness of local and regional dimensions of identification is also apparent." Angela K. Bourne: The Impact of European Integration on Regional Power, Journal of Common Market Studies, 41 (2003) 4, 597.

43 Habermas (2005), 19–21.

44 See for example: Heidrun Abromeit: Contours of a European Federation, Regional and Federal Studies, 12 (2001) 1, 1–20; Joseph H. H. Weiler: European Democracy and its Critics: Polity and System, The Constitution of Europe, Cambridge University Press (1999), 279–282.

45 Habermas (2005), 23.

46 In Kantner´s terms such an identity would belong to the category of the particularistic „we-commercium", where the "groups are smaller than mankind and their members interact or co-operate with each other forced by the situation or for the purpose of common interest without sharing an ethical self-understanding." Kantner op. cit., 510.

47 Brand op. cit., 11. See further: "If constitutional pluralism has any meaning in relation to institutional multilevel cooperation, (…) then this pluralism depends on the fact that the European citizen and the national citizen do not exercise a single identical political autonomy, but two different ones, different by extension and goal. A person can belong to several demoi, or to several unions, but must do so in accordance with a principle (to be defined) of addition." Palombella op. cit., 369–370.

48 Habermas highlights the justification and model of cultural recognition by stating that „like the free expression of a religious belief, cultural rights serve the goal of guaranteeing equal access to one's own community's forms of communication, traditions, and practices that people require in order to maintain their personal identity. For members of racial, national, linguistic, and ethnic minorities, the means and opportunities for reproducing their own language or way of life are often just as important as the freedom of association, doctrinal teaching, rituals and ceremonies for religious minorities. For this reason, the struggle for equal rights for various religious communities provides both political theory and jurisprudence with ideas for realizing the concept of an expanded 'multicultural citizenship.'" Jürgen Habermas: Intolerance and Discrimination, 1 Intl´l J. Const. L. 2 (2003), 9.

49 Kostakopoulou op. cit., 84, 85.

50 An opposite view is put forward by Kraus: "Ultimately, the politics of recognition evidences that the citizens themselves can't be regarded as something "given", as a factor that is exogenous to democratic processes. Rather, citizenization" (…) and its institutional regulation must be seen as constitutive aspects of democratic politics. From this perspective, recognition is not seen as a mechanism institutionalizing a static politics of "being", but rather as a device supportive of a politics of "becoming". Kraus (2003b), 21.

51 For the sake of completeness, it must be pointed out that the variety of cosmopolitan theories range from those advocating the association of states (see: Eleftheriadis, below.) to those proscribing the establishment of a world state, "a world legal order to replace that made by nations" described by Palombella op. cit., 372.

52 For a general account of cosmopolitanism and its application to the European Union, see: Pavlos Eleftheriadis: Cosmopolitan Law, European Law Journal, 9 (2003) 2, 241–263.

53 Eleftheriadis (2003), 261. In Kantner´s categories the cosmopolitan view would opt for the universal we-identity, embracing „all beings capable of talk and action", Kantner op. cit., 510.

that they respect the rights of each other's citizens through the right of hospitality."[54] With other words the states cooperating under *ius cosmopoliticum* must have a representative political order respecting the separation of powers, they shall mutually recognize the freedom and security of the other states and finally, they shall guarantee respect for the rights of each other's citizens within their own territory.[55] This 'principled federalism' does not create a world state, indeed, independence and sovereignty of the states are to be retained. Instead, the states enter into an agreement, a cosmopolitan constitution beyond traditional international law fixing the principles of association and establishing common institutions. According to cosmopolitanism the European Union "can be a principled federation of peace under which the members resolve their differences according to political institutions (…) as well as judicial procedures whenever that is necessary (…). They undertake to each other to be good democracies and to respect the rights of their own citizens. Member states also undertake to recognize extensive rights to the citizens of the other members"[56] guaranteeing union citizens non-discrimination as well as fundamental rights under the scope of EU law. European integration would leave democratic regimes of the member states intact only intruding upon their constitutional systems with respect to the 'common law' of shared principles which are to be accorded supremacy within each domestic legal order. Hence, the cosmopolitan association of the member states not only leads to economic prosperity and secures peace, but at the same time it guarantees justice and self-determination for its member states. This way "the Union may be able to become more democratic and more just, without becoming a democracy or a state."[57] The concept of the so-called transnational citizenship suits cosmopolitanism best, where "international migration and the ensuing interactions between receiving and sending countries result in the creation of mobile societies beyond the borders of territorial states without dissolving these borders," however, as a consequence of the operation of such a citizenship the "external boundaries would become more relaxed."[58]

Cosmopolitanism has been criticized on the basis that it overlooks the relevance of cultural pluralism and cultural identity for the formation of political identity.[59] Its neutral stance toward culture may even lead to a tacit support for dominant cultures 'oppressing' groups in the minority by denying institutional forms of recognition for the latter. Cultural groups finding themselves in a minority position shall in turn be reluctant to accord loyalty to a polity ignorant towards their interests.[60] Within the European Union this would mean that all issues concerning the position of cultural groups would be left to the member states to determine turning a deaf ear on minority claims.

Summing up, it seems reasonable to state that the "views of the relationship of cultural diversity, [identity] and political integration in Europe seem inclined to conflate normative preferences and empirical assessments."[61] However the theories provide us with useful guidance on what the future European polity could and should look like, and at the same time they also offer us a framework for analyzing and classifying the existing 'identity politics'[62] of the EU.

5. Analyses of the identity-politics of the EU

Delgado-Moreira argues that since Maastricht "the European Union has been trying to sponsor a coming age of European Identity awareness across national borders. In doing so, EU administration intends to square the circle of European Union as the super nation-state of the nation states of Europe."[63] But did the age of European identity-politics only commence with the Maastricht treaty-revision, or have there always been identity-building elements built in into the process of integration? And is the EU necessarily building a polity fashioned after the nation states, or is it considering further options? In the following I shall briefly analyse the legal framework mirroring the so-called 'identity-politics' of the European Union. The assessment shall cover only primary law and related principles established in the case-law of the European Court of Justice (ECJ). In the course of the analysis I shall attempt to classify the individual identity-policies in accordance with the framework provided by above theories with the intention of discovering which theory is most characteristic of European identity-politics and which type of polity the EU is pursuing.

5.1. The motto and telos of the EU

The motto of the European Union incorporated into the Treaty

54 Eleftheriadis op. cit., 256.
55 Ibid., 244.
56 Ibid., 259.
57 Ibid., 260.
58 Kostakopoulou op. cit., 85, 86.
59 "Arguably, although the existence of political ties uniting individuals and groups in a common venture may be a necessary condition for the existence of a political community, it is by no means sufficient. Indeed it has been observed that without either an emotional bond and the affective identity provided by nationality or, alternatively, a thin national identity which motivates citizens to feel that particular institutions are somehow 'theirs ', in a meaningful sense, and makes them feel that they belong to a 'self-determining political community', communities are vulnerable to fragmentation." Kostakopoulou op. cit., 77-78.
60 Kraus (2003a), 670.
61 Kraus (2003b), 10.
62 Armin von Bogdandy: The European Constitution and European Identity: Potentials and Dangers of the IGC's Treaty Establishing a Constitution for Europe, Jean Monnet Working Paper 5/04 (2004), 3.
63 Juan M. Delgado-Moreira: European Politics of Citizenship, Qualitative Report, Vol. 3., No. 3, September, 1997 (http://www.nova.edu/ssss/QR/QR3-3/delgado.html), 1.

Establishing a Constitution for Europe (constitutional treaty) 'united in diversity' reveals an explicitly pluralist concept of integration. Although the constitutional treaty has not yet come into force, and indeed may altogether fail to do so, I argue that in its basic structures and values it does represent the current consensus on the future of European integration. From this perspective it seems very telling that the motto 'united in diversity' is shared by various multicultural states striving to accommodate respect for difference in a common political framework.[64] Contrary to TOGGENBURG who states that "the new EU motto is thought to strengthen the [national] identity protection clause rather than to threaten the member states with a sort of multicultural EU vision"[65] I understand 'united in diversity' as a manifestation of respect for all articulations of diversity within the Union, be it of national, sub-national or other character. At the same time it bridges differences by forging political unity and a shared political identity. In this sense, the motto of the EU foresees a pluralist form of integration and consequently implies a federal type polity.

"In the most fundamental statement of its political aspiration, indeed of its very telos, articulated in the first line of the Preamble of the Treaty of Rome, the gathering nations of Europe 'Determined to lay the foundations of *an ever closer union among the peoples of Europe*'"[66] writes WEILER. The 'telos' of European integration expressly negates procuring the fusion of the diverse peoples of Europe to one European people but stipulates their future existence in an ever closer union. This proviso in itself would not exclude building a European state of diverse peoples, however, as WEILER goes on to state, Article 2 EC determining the tasks of the Community requires construing stronger ties between the *Member States* themselves. Consequently, Member States are to be retained, thus, the goal of integration is "not one people, then, nor one state, federal or otherwise."[67] A further guarantee of the Member States is enshrined in Article 6 paragraph 3 EU according to which the Union shall respect the national identity of its Member States. This paragraph secures respect for Member States' political orders and institutions, stipulating the so-called *Wesensgehaltsgarantie*.[68] The consistent preservation of the Members States within the European polity refers to a cosmopolitan view of integration: a cooperation of states in a principled federation.

5.2. The system of competences in the EU

The system of community and union competences displays typically federal traits. The principle of limited legislative power of the European legislator, the enumeration of European competences[69] as well as the categories of Community competences linked with the principles of supremacy and pre-emption strongly resemble the order of competences in federal settings. But the most revealing feature of the federal order of the Union is the explicit reference to the principle of subsidiarity.[70] While subsidiarity plays an important role in preserving diversity, coupled with the principle of loyalty[71] it may also foster harmonisation or unification in matters of common political interest.[72] "In the EU competence system, political, legal and institutional dynamics interact aiming to produce an overall balance between national and Community interests."[73] Although the current system of subsidiarity reduces the operation of the principle to the relation of European and Member State competences[74] and takes no account of further culturally determined groups it is highly indicative of pluralist considerations.

5.3. Union citizenship75

WEILER points out that "if, indeed, the traditional, classical vocabulary of citizenship is the vocabulary of the state, the national and peoplehood, its very introduction into the discourse of European integration is problematic for it conflicts with"[76] the telos of European integration, the ever closer union among the *peoples* of Europe. However, WEILER shows, that the traditional understanding of "national membership", state and sovereignty have shifted to allow for a new concept of citizenship beyond the state. At the same time "European citizenship emphatically does not mean what it has come to mean in all federal states: a 'communitarization' of the actual grant of citizenship or even a harmonization of Member State conditions for such a

64 Papua New Guinea, South Africa, Indonesia, see: http://encycl.opentopia.com/term/List_of_state_mottos; Toggenburg (2004), 5.
65 Ibid, 5.
66 Joseph H. H. Weiler: In Defense of the Status-Quo: Europe's Constitutional Sonderweg, in: Joseph H. H. Weiler, Marlene Wind, op. cit., 10., referring to the first recital of the Preamble of the Treaty Establishing the European Community, (italics by me).
67 Ibid., 10.
68 Gabriel Toggenburg: Cultural Diversity at the Background of the European Debate on Values – An Introduction, in: Francesco Palermo, Gabriel Toggenburg: European Constitutional Values and Cultural Diversity, Eurac Research (2003), 22.
69 Article 3 EC and Articles 11 and 29 EU respectively.
70 Twelfth recital of the Preamble of the Treaty Establishing a European Union as well as Article 2 paragraph 3 EC and Article 5 paragraph 2 EC.
71 Article 10 EC; however a principle of loyalty operates also under the third pillar as the ECJ pointed out in Case C-105/03, Pupino, 2005 E.C.R. I-0000, paras.39–42.
72 Kraus (2003a), 681.
73 Anna Vergés Bausili: Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments, Jean Monnet Working Paper 9/02, 2.
74 Protocol No. 30 on the application of subsidiarity and proportionality makes no mention of regional or other sub-national entities. In contrast Article 2 of the new protocol attached to the constitutional treaty stipulates taking into account the regional and local dimension of envisaged legislative actions. For criticism of the reduced scope of subsidiarity see: Kraus (2003a), 678–681.
75 Articles 17 through 22 EC.
76 Joseph H. H. Weiler: To be a European Citizen: Eros and Civilization, in: Weiler, op. cit., 327.

grant. The exclusive gate-keepers remain the Member States."[77] Bound to Member State definitions of the prerequisites of citizenship, union citizenship becomes the shared European status of Member State citizens opening for them not only the realms of entitlements granted by directly effective European law but also certain rights under Member State legislation. Article 17 EC stipulates that the "citizenship of the Union shall complement and not replace national citizenship." Thus, Union citizenship is a genuine expression of a pluralist concept of a federal polity where union citizenship fits well with its national counterparts, establishing a European political community of culturally diverse constituents.[78]

5.4. Human rights in the European Union

In its case-law the European Court of Justice has elaborated *sui generis* regime of human rights, "inspired" both by constitutional traditions common to the Member States and the jurisprudence of the European Court of Human Rights without being identical with these. Codified in Article 6 paragraph 2 EU, the European human rights regime and its 'unwritten' judicially developed catalogue of fundamental rights, and finally the "constitutionalisation of the Charter of Fundamental Rights of the European Union is an important step in the process of institutionalising a framework of cosmopolitan order."[79] By extending the force of a 'universal ethics' of human rights on the dealings of states with not only aliens but their own citizens with a European mechanism of human rights enforcement[80] the European Union has incorporated a "common law of political justice" into the constitutional structures of its Member States.[81] This system of fundamental rights forms one of the basic features of the European federal polity, where Member States secure a hospitable treatment of aliens within their own jurisdiction. Hence, the European human rights regime reveals genuine cosmopolitan tendencies of integration.

6. Conclusion

Political theory has yielded various models for future European integration based on specific concepts of collective identity and their consequences for a trans-national political order. Applying these models as a framework of analysis to the identity-politics of the European Union manifested in its primary law, it becomes clear that European integration combines the federal concepts of both pluralism and cosmopolitanism. It seems that pluralism figures more markedly in the Union construct allowing for the conclusion that the EU is encoded for realizing the concept stipulating the highest form of integration. As pluralism regards the nation to be but only one of the many institutionally recognized groups within a multicultural polity of several levels of political decision-making, a process of denationalization, a possible future degradation of the nation-state within the European construct seem inevitable. But are the 'Masters of the Treaties' really ready to retire?

Móré Sándor

The constitutional development of Romania before and after the change of regime

(compared with the Hungarian constitutional development)

Introduction

I think that it is not too much to say that civic education should consist of a basic knowledge concerning Romania in Hungary. Why do I say this? On one hand since Hungarian literature, history, culture, economy form an integral part of Romania through Transylvania, on the other hand, because Romania has been a member with full rights of the European Union since the beginning of this year, of which Hungary has also been a member since 1st May, 2004. We cannot turn back the wheels of history, but the European integration of Romania has historical significance for us, too, since the borders of Trianon have somewhat faded.

I consider important the knowledge of the Romanian constitutional development because through it we can become familiar with the defining elements of the country's historical, political, juridical and social characteristics.

I would like to throw light upon this subject in three sections: in the first section I study the historical pre-

77 Ibid., 326.

78 "One of the issues at stake is how to build a political union and a concept of European citizenship that hold the pieces together without threatening them with homogenization, loss of sovereignty or lack of democratic federal institutions", Delgado-Moreira, , op. cit., 3.

79 Erik Oddvar Eriksen: Towards a Cosmopolitan EU? Arena Working Paper No. 9, February 2005, 1.

80 Its 'soft' form is constituted by the new European Human Rights Agency replacing the European Monitoring Center on Racism and Xenophobia, whereas its 'hard' forms are laid down in Article 7 EU and protected by the system of european courts.

81 Eleftheriadis, op. cit., 252, 254. See further: Joseph H. H. Weiler: Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space, Weiler, op. cit., 119 et seq.

liminaries of the formation of Romania; the characteristics of the constitutional development in the country in the second, and the constitutionality of Romania after the change in the regime in the third section. At the end of the second chapter I will also draw a parallel between the recent constitutional development of Romania and Hungary.

Historical Preliminaries

It was due to the revolutions of the 1848's affecting all Europe that three new nation-state have appeared on the map: Germany (1870), Italy (1870) and Romania (1859). These states came to be through the union of smaller regions and provinces of the states.

In the Parisian Treaty which closed the Crimean War the Romanian provinces (Wallachia, Moldavia) became the subjects of the negotiation between the European Great Powers for the first time under the name of principalities of the Danube. The institution of a collision state between the three Great Powers (Russia, Turkey and Austria) came up. The treaty specified that "there have to be held ad hoc meetings in both principalities under the sultan's authority, during which the representatives of the people can decide the organizing form of the principalities".[1]

In 1857 these ad hoc meetings were held in Wallachia as well as in Moldavia, which in their main points were homogeneous:

– The principalities shall be entirely independent from the Turkish Porte;
– The two provinces shall unite based on the principle of nationality in a country called Romania;
– On the throne of Romania a prince shall be called with a West-European royal origin, whose heirs shall be brought up in the state religion of the country;
– The forming of an electoral meeting with the widest foundation possible;
– the ad hoc meeting of Moldavia beside these added the neutrality of the country.[2]

In the Parisian Convention of 1858 the Great Powers only partly accepted the aspirations of the principalities of the Danube expressed during the ad hoc meetings. The newly named "united principalities of Moldavia and Wallachia" gained self-government under the sultan's authority, it was freed from the Russian protectorate, and it was put under the common protectorate of the Great Powers. There were appointed separate rulers in both principalities (hospodar) who could be only of domestic origin, their function weren't heritable and they have been chosen for life.[3]

Violating certain regulations of the Parisian Convention the representatives of the principalities chose the same man as ruler in the person of General Alexandru Ioan Cuza in 1859. In 1861 the two principalities of the Danube who got in the personal union, were united bearing the name of Romania with the capital city of Bucharest.

The Parisian Convention of 1858 has a remarkable significance in the history of Romania, not only because it created the settings for the formation of the Romanian state, but because it gave a fundamental law created according to the example of the Western states to this new state, which served as basis for a parliamentary democracy. Beside the regulation of the relationship between the two principalities, the document of the basic law also gave orders concerning the separation of the power branches, and the rights of the citizens, too, thus it was a real constitution. Some people cast doubts on this[4], because this constitution didn't fill every requirements of the ad hoc meetings, it wasn't the inner document made by the two principalities.

The Characteristics of the Romanian Constitutional Development

The Romanian constitutional development beginning with the union on 24th January 1859 until the revolution on 22nd December 1989 is divided into four separate periods.

The *first period* means the establishment of the constitutional institutions in the country, which were preceded by the works of the ad hoc meetings, begins with the union of the principalities on 24th January 1859 and ends with the constitution[5] of 1st July 1866. This period was characterized by inner wars, which can be found at the constitutional establishment of any country, which at the same time had to create a civil society on the level of the initiated modern institutions. The conscious efforts of the politicians of those times should be highly esteemed, aiming to accomplish, step by step, but surely, the total union of the two principalities with the leading of a foreign crown prince,[6] in spite of the protests of the neighbour countries.

The *second period*, which begins with the constitution of 1st July 1866 and closes with the putsch (done by king Charles II) of 20th February 1938,

1 Ghenadie Petrescu, Dimitrie A. Sturdza and Dimitrie C. Sturdza, Acte ºi documente relative la istoria renaºterii României (Acts and documents concerning the history of the rebirth of Romania), Bucureºti, 1889. pp. 1086-7. (translated by the author)
2 Monitorul Adunări Ad-Hoc (The Gazette of Ad Hoc Meetings), nr. 1 din 30 septembrie 1857.
3 ConvenÞiune pentru reorganizarea definitivă a Principatelor Dunărene Moldova ºi Valahia (Convention on the final reorganization of the principalities of the Danube, Wallachia and Moldova), Tipografia Buciumului Român, Iaºi, 1858. p. 195. (translated from French by Eleodor Focseneanu)
4 Barbu B. Berceanu, Istoria ConstituÞională a României in Context InternaÞional, (Constitutional Development of Romania in International Context), Rosetti, Bucureºti, 2003. p. 126.
5 Mononitorul Oficial (The Official Gazette) nr. 142 din 1/13 iulie 1866.
6 Both houses of legislation chose Philip, the Flemish prince, the younger brother of Lipot II, as ruler of Romania. But he didn't accept the election, after which based on a referendum Charles, the hohenzollern-sigmaringen prince was invited to the throne. The new ruler came in secret and under pseudonym in his new country through Hungary because of the Prussian – Austro-Hungarian war. He marched in Bucharest on 22nd May 1866, and he took the oath of office. His Sultanship and the European powers acknowledged the new ruler on 24th October 1866. Since Charles I didn't have any children, in 1889 the son of his older brother, Lipot, the hohenzollern-sigmaringen prince, prince Ferdinand was recognized as heir to the throne.

is the period of the perfectly continuous constitutionality of Romania. From a historical point of view this period coincides with the great political accomplishments: with attaining the national independence (10th May 1877), with the uniting with Transylvania (1st December 1918), and, at the same time, the attaining of a good economical, social and cultural development.

The *third period*, the most difficult from a political point of view, with many structural and political changes, can be called the period of "putsches". This begins with the putsch of 20th February 1938, done by King Charles II (then there followed eight years characterized by seven putsches, six out of these were successful), and it ends with the communist putsch of 30th December 1947. This is the time of big national catastrophes. The reasons for the regression of development were partly internal. The inner unstable political situation reflected the unstable European politics, which was brought about by the revisionist efforts of certain states and the increase of right-wing and left-wing dictatorships. The inner cause which had an accidental character was constituted of the crisis of the dynasty.[7]

The *fourth period* is the darkest in the history of Romania, beginning with the miserable putsch of 30th December 1947 and ending with the revolution of 22nd December 1989. This is the time of communist dictatorship; the country totally lies at the mercy of the Soviet Union until 1964; though from now on more tinged, the period is characterized by a continuous inner oppression and the total disregard of the constitutional norms and human rights.

Obviously, beginning with 22nd December 1989 a new chapter started in the constitutional history of Romania, the characteristics of which don't correspond totally to the requirements required from a Rechtsstaat, but the aspirations of the new power are worthy of respect from the point of view of conformity to the regulations of a Rechtsstaat.

The conclusion that can be drawn from the short preview of the constitutional history of Romania is that each antidemocratic putsch was followed by another as a response for the restoration of democracy in a series of surprisingly symmetrical alternation. The period between the retorts, which at the beginning was short, only two years in the first two cases, increased to four years, then to forty-four years, when the democratic spirituality changed and the foreign influence became decisive for domestic politics.

If we compare the recent constitutional development of Hungary with that of Romania, we can say that though both countries were under Soviet/Communist suppression, in Hungary the constitutional change of regime was realized not revolutionary, but peacefully, through negotiations.

It can be stated as a fact that the more important constitutional revisions in the constitutional history of Hungary were preceded by political agreements, and they were accomplished not through putsches or through the reactions to these. Consequently, the acceptance of the laws which resulted in amendments of the constitution generally was realized by a big parliamentary consensus. At the same time many critical remarks could be made on the total constitutional revision from 1989, which was characterized by many inconsistencies and political bargain. The later constitutional debates were also the consequences of these.[8]

The laws proposed for the amendment to the constitution were/are accepted by the prevailing legislative power, the Hungarian Parliament with two-thirds of the majority. Thus, in Hungary the constituent power hasn't detached/doesn't detach itself institutionally from the legislative power, "only" from the majority of the government. In a constitutional sense hasn't been established an independent constitutional assembly.

The Romanian Constitution of 1991, breaking with the previous constitutional tradition (by the constitutional assembly), binds the constitutional revision to the prevailing legislative power, to the two-thirds majority of the parliamentary Chambers, and to the permission of the referendum.

In Hungary today the Law XX of 1949 is still in force. However, I also have to emphasize that the lack of the new constitution is true only from the point of view of the constitution's structural idea, in the sense of content a new constitutional system has been established in Hungary, which fills the requirements of the principles of the democratic constitutionalism. The text of the Hungarian constitution was laid down by a series of laws proposed as amendments to the constitution in the process of continuous constitutional reforming. Contrary to Romania in Hungary the amendments to the constitution weren't sanctioned by the referendum.

Romania after the change of regime and the Rechtsstaat

In order to characterize the Rechtsstaat, we have to make distinction between legality and rightfulness, between the law (*lex*) and the right (*jus*). The law, as an obligatory regulation, has the same term both in the dictatorial and the democratic systems. Therefore the expression *"rule of the law"* or *"the supremacy of the law"* doesn't distinguish dictatorship from democracy. In order to define the Rechtsstaat we have to start off from the existence of a basic agreement between the people and the power, according to which the citizen commits oneself to observe the law out of free will.

In the moment of acceptance the constitution is a social contract, which only after publication becomes a law. In case of the normal development of society the constitution can be only modified, not abolished, because the cancellation of the contract between the people and the power would

7 In 1927 after the death of Ferdinand I, prince Charles resigns to the throne because of personal reasons, and leaves the country. But he returns in 1930, he dethrones his son, Michael I, and takes up as his name Charles II.

8 Kukorelli István (szerk.), Alkotmánytan I, (Principles of Constitutional Law I), Osiris Kiadó, Budapest, 2002. 65. o. (translated by the author)

mean the getting away of the power, which in turn would lead to dictatorship and oppression without limits.

In a Rechtsstaat, from the moment when a state document is considered illicit, arbitrary, it has to be declared absolutely invalid, non-existent, and its consequences have to be totally eliminated. The Romanian power condemned the drastic document of communist taking over of power, but it spares its consequences: the abolition of the constitution[9] from 29th March 1923 and the monarchy.

The code of the constituent assembly, which was passed on 11th July 1990, not less than three times was changed when the work was in progress, before each new step of the passing of the constitution, with the purpose of enlightening and quickening the work. The deliberate change of the passing of a bill, exactly when the work is in progress, is a dictatorial procedure – voting laws which according to the current procedure couldn't have been voted.

Finally, it was the violation of the common norms of the Rechtsstaat, and actually of all states, regardless of the fact if it is about a totalitarian or a democratic state, that the president of the state didn't published the Constitution of 1991.[10] Without publishing such a document remains a simple judicial text without any legal value. Consequently, he applied in Romania a constitution which has never come into force, while he disregarded a constitution which is rightful and valid from every constitutional point of view, that is, the constitution of 29th March 1923.[11]

Conclusion

Romania doesn't have the right to the term Rechtsstaat at the acceptance of the constitution of 1991: the conscious disregard of the analyses of the drastic document of 1947, the frequent mixing up of the constitutional and the regular laws, the modification of the acceptance process of the constitution, and its continuous modification during the works, the omission of certain elements, for example the announcement, the publication of the law characterize the entire activity of the state power after the revolution, which is the forceful continuity of the communist power.

It also has to be emphasized that during the last years the power, for the conformity to the requirements asked by the European Integration, significant advances have been made as to the conformity to the rules of the Rechtsstaat. In 2003 there was an amendment to the constitution,[12] in the formation of which the legislators the following main goals had in mind: the reform of the state organism based on the functional experiences; the consolidation of the basic rights' system of guarantee; and the building the constitutional basis for the European-Atlantic Integration.

In October 2006 the prime-ministers of the twenty-five consented to the recommendation of the European Committee at the end of September, according to which Romania and Bulgaria can join the Union on 1st January 2007. At the same time the prime-ministers have given a warning: the two countries have to continue their political transformation. They reminded them of the fact that severe defensive clauses are at the European Union's disposal which make possible even the suspension of cooperation with the two countries, if the reforms come to standstill.

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9 The constitution of 29th March 1923, in spite of being the amendment to a previous constitution, was considered new, referring to the fact that the constitution should express the will of every citizen in the country, thus, also the will of the inhabitants of Transylvania, annexed to Romania [Mon. Of. nr. 282 din 29 martie 1923].

10 According to 149th article of the constitution from 1991 „the current constitution will come into force from the moment of the referendum's permission" (translated by the author) – thus, this was about an automatic coming into force bound to a future, doubtful event: if the people approves at the referendum.

11 Eleodor Focºeneanu, Istoria constituÞionalã a României 1859–1991 (The Constitutional History of Romania 1859–1991), Humanitas, Bucureºti, 1998. p.188.

12 Mon. Of. nr. 758 din 29 octombrie 2003.