WHICH FORM OF ACCOUNTABLE GOVERNMENT FOR THE EUROPEAN UNION?

Walter van Gerven *

In this contribution the question is asked, and tried to be answered, which form of accountable government the European Union should have in the future. The subject may seem to be of a speculative nature and, indeed, it is. However, complaints are often heard that political decisions are taken, jumping from one crisis situation to another, ending up in a political structure without any consistency. Consequently, it may be desirable to think about how a coherent political structure of the EU may look like. Surely, many will think that this is preposterous now that a constitution for Europe has been rejected. But, is it not exactly when the political decision making process has come to an halt and limiting itself, as it usually does, to taking punctual decisions in order to resolve daily problems, that some long term academic thinking is appropriate? That is what I intend to do herein, dividing my lecture in three parts: first, which proto-type forms of accountable government are available in democratic states, second, which form is preferable from a theoretical point of view, and third, what would be the most appropriate form of accountable government for the EU from a practical viewpoint. The whole exercise is about making the Union's structure more democratic, and the Union's decision making process more legitimate.

In line with the focus of this whole volume, the emphasis herein will be on *political* accountability of government rather than on legal accountability and responsibility. Political accountability of the *executive* government has two meanings: first, it refers to the duty of government to *render account* (and to explain) to an elected parliament in respect of action undertaken in the past or proposed for the future – render account is the traditional meaning of accountability as used in the private law of agency – and, second, it refers to the fact that the executive branch can be *held responsible* by parliament for action undertaken in the past. In the second meaning, (political) accountability and (political) responsibility are synonyms, responsibility being a concept however, which is normally used in a *legal* context where it refers

to assuming responsibility for wrongful acts, and creating *liability* to repair the prejudice caused thereby to others, through remedies such as compensation or restitution.

Political accountability (in its two meanings) is an essential characteristic of *democratic government* in that it refers to the *organisation* of public power in a democratic fashion, that is, in a way that makes government *answerable* to the people. It goes hand in hand with good governance which concerns the *exercise* of public power in the pursuit of the public good and justice for all. Both, democratic government and good governance, entail respect for the *rule of law* and *due process*, that is, submission of public authority to judicial review by an independent judge and compliance with proper procedures. They also require an *open and transparent* government, responsible citizens and civil servants and a vibrant civil society and public opinion initiated and stimulated by *responsible media*. As mentioned, this contribution focuses on political accountability and political responsibility, not on the rule of law or responsibility for illegal or wrongful behaviour, or on any of the other characteristics of democratic government, just mentioned.[1]

I. Comparing Systems of Accountable Government.

In sections A and B, I briefly compare four forms of democratic government: two *parliamentary* forms, the British and the German, and two *presidential* forms, the American and the French, indicating for each of them, in comparison with the others, how far executive government is answerable to an elected parliament. In section C, I will say a few words concerning the division in a *federal* state (the U.S, Germany and Belgium) between the federal and the state level.

A. The British Westminster and the German Chancellor parliamentary systems.

Typical for *British Constitutionalism* is the legislative supremacy of Parliament. "The details of the origins of Parliament are shrouded in a good deal of historical uncertainty.

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* Distinguished professor Tilburg University, emeritus KU Leuven and Maastricht, former Advocate General European Court of Justice.

[1] For more information on the foregoing, and more specifically on accountable government, the rule of law, good governance, open government and which form of government for the European Union, see my book on *The European Union. A Polity of States and Peoples*, 397 pages, published in 2005 by both Stanford University Press in the United States and Hart Publishing Oxford in the United Kingdom.

Nevertheless, in broad outline, the period between the Norman Conquest and the so-called Glorious Revolution of 1688 clearly witnessed a transition from absolute monarchy to constitutional monarchy."[2] As a result of a long evolution, sovereign powers were transferred to Parliament, leaving the monarch with limited powers and attributing executive powers to ministers who were made accountable to parliament. Two important elements characterize the powers Parliament currently enjoys. *First*, despite the transfer of power to parliament, power remained concentrated in the hands of one entity, that is "by slowly transforming the King-as-ruler into the King-in-Parliament … the absolute and central powers of the King [passed] into the hands of Parliament – first of the English, later of the British Parliament. Parliament inherited the King's position."[3] The essence of the doctrine of the sovereignty of Parliament is therefore that Parliament can, as a legislative body, do exactly what the King could have done in the sixteenth and early seventeenth century: act as he pleased. *Second*, and just as importantly, the doctrine of the sovereignty of parliament has only survived because it has been given democratic credentials as a part of the gradual democratisation of Parliament by gradually extending voting rights to new groups of voters in the early nineteenth century, and finally granting universal suffrage in the 20th century and establishing a cabinet government which gave the relationship between the electorate, the House of Commons, and the government its present form. [4]

The German political system is a variant of the Westminster parliamentary model. However, in contrast to both the British (and the French) systems, Germany is a federal State. The constitution of the *Federal Republic of Germany* is laid down in the Basic Law of May 23, 1949. Established in the immediate aftermath of World War II, it emphasizes the overarching importance of human dignity as well as the democratic and social nature of the State, and its federal structure, none of which can be changed by constitutional amendment.[5] In addition, the Basic Law contains a full list of basic rights that are binding upon the legislature, the

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[2] Ian McLeod, *Legal Method*, MacMillan, 3rd ed., 1999, 58-58.

[3] Tim Koopmans, *Courts and Political Institutions. A Comparative View*, Cambridge, Cambridge University Press, 2003) 19.

[4] Ibid., at 18 with reference to A.W. Bradley, "The sovereignty of Parliament" in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, fourth ed., Oxford, Oxford University Oxford, 2000, ch. 2. See also Joel Krieger on Britain in Kesselman & Krieger, *European Politics in Transition*, third ed., Boston, Houghton, 1997, at 55-56.

[5] The German Constitution is called the "Basic law" (*Grundgesetz*), allegedly because the draftsmen did not wish to use the term Constitution as long as East- and West-Germany were not united. See Christopher S. Allen on Germany in Kesselman & Krieger, supra n. 3, at 287. Yet after unification in 1990, the term Basic Law has been retained because it associates the country with its longest and most successful experience of democracy: id., at 303, fn. 3.

executive, and the judiciary as directly enforceable law. Finally, and most important in a context of European constitution making, the Basic Law deals with the difficult problem of delineating federal and national legislative and executive powers, and installs a constitutional court empowered to both adjudicate disputes concerning the interpretation or application of constitutional provisions, and to protect the basic rights of individuals.[6] It is not a two party system but a multi-party system which normally necessitates the participation of at least two parties in government which therefore is a coalition government. All these aspects show that, at first glance, the German system looks like a more suitable model for the European Union than the British or, as we will see, the French.

Although the Federal Republic of Germany has a Federal Chancellor, rather than a Prime Minister, the German constitutional structure strongly resembles the British parliamentary system. Both the British Prime Minister and the German Chancellor are the leader, in name or in fact, of the political party that won the elections, and so have the ability to choose their cabinet, mainly from fellow members of Parliament. They also set general policy with the help of their cabinet and are, with their cabinet, accountable and politically responsible for governmental conduct towards Parliament. Both need the support of a majority in parliament and would have to step down, together with their cabinet, if they were to lose the confidence of parliament, that is, of the majority in Parliament that supports the government. As pointed out above, since in the United Kingdom, this majority is made up of members who belong to the Prime Minister's own political party, the British Prime Minister has de facto a more solid position than the German Chancellor whose majority is normally made up of members of Parliament of different political parties that have formed a coalition to support the incumbent government.

The impact of the latter difference is reduced, however, by the fact that Article 67 of the German Basic Law provides in a so-called "constructive vote of no confidence" - according to which the *Bundestag* may express its lack of confidence in the Chancellor only by electing a successor with the majority of its members. If no majority for such a constructive vote of no confidence can be found, the President may, upon the proposal of the incumbent Chancellor,

[6] The German Basic law has been amended frequently. For a (not official) English translation of the consolidated text, up to and including the 50th Amendment of 2002, see Axel Tschentscher, *The Basic Law (Grundgesetz)*, Studien zu Jurisprudenz und Philosophie, 3.1 (Würzburg: Jurisprudentia Verlag, 2002). It can be found on Internet <www.jurisprudentia.de>

dissolve the *Bundestag* within twenty-one days.[7] Obviously, the system reinforces the Chancellor's position considerably, as it is more difficult to bring together a positive majority to agree on the new chancellor, than to assemble a negative majority to oust the government. [8]

B. The U.S Presidential and the French Semi-Presidential systems.

In 1776, thirteen English colonies signed the American Declaration of Independence, and ratified in 1781, after a peace treaty with England was signed, the Articles of Confederation under which they lived for seven years. The *American Constitution* was written in 1787 "to form a more perfect Union," and was ratified in 1788. Two years later the Bill of Rights was added.[9] More than any other constitution, the American constitution is characterized by the principle of separation of powers. Not unlike Montesquieu, Madison thought that

> " (i)n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

According to Madison, those precautions can only be taken "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[10]

In the American constitution those grand ideas about separation of powers were given a much more concrete form than Montesquieu could have dreamed. Article I, Section 1, provides that all *legislative* powers "shall be vested in a Congress which shall consist of a Senate and House of Representatives." [11] Article II, Section 1 (1) provides that the *executive* power "shall be vested in a President of the United States of America" elected (together with

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[7] See Article 68 (1) of the Basic Law;

[8] See further Giovanni Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, second ed. (London: MacMillan Press, 1997) 106-107 (hereinafter *Engineering*) where the British premiership system and the German *Kanzlerdemokratie* are further compared, at 104-108. The Federal Republic of Germany has had a history of generally strong chancellors: Konrad Adenauer, Willy Brandt, Helmut Schmidt, Helmut Kohl in Allen on Germany in Kesselman & Krieger, supra n. 3, at 290-293.

[9] See further Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law*, third ed., Aspen Law & Business, 1996, 1-2.

[10] The Federalist no. 51, reproduced in Geoffrey R. Stone, et al., n. 8 above, 15-17.

[11] But see Section 7 (2) with regard to the 'veto'- power of the President, which authorizes him to ask Congress to reconsider a law presented for his signature.

the Vice President) for a term of four years.[12] Article III, Section 1, provides that the *judicial* power "shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time establish."[13] The Constitution further lays out a federal structure, which divides powers between the union and the states. The framers regarded this federal structure, together with the separation of powers within the federal government, as an essential component of a system of checks and balances, which was and is necessary to protect the liberty of citizens against abuse of power. Later on, in its 1803 judgment *Marbury v. Madison*, the Supreme court gave full content to this constitutional theory, by providing that acts of Congress that violate the Constitution are subject to judicial review.

Whilst Montesquieu's theory of separation of power is neatly reflected in the American Constitution of 1787, it was not as well received in *France*, or at least is not as well reflected in the present constitution of the *Fifth Republic*, which dates from October 4, 1958. That Constitution was written after the Algerian drama and the May 1958 "coup" against the Republic by senior French officers.[14] This series of events prompted General Charles de Gaulle's return to power, and caused the new constitution to be written in accordance with de Gaulle's role as the first President of the Fifth Republic.[15] The Constitution that emerged transformed the weak parliamentary system - during the twelve years of the Fourth Republic twenty-four successive governments had been in power for an average of six months each [16] -

[12] The President and Vice President, after being nominated as candidates by their party's convention, are elected on a ticket by Electors designated in accordance with Article II, section 1 (2) – (4) of the Constitution and Amendment XII (1804). Each State appoints Electors, who then vote for the candidate who obtains the most votes in their State ('winner takes all'). The election of the President therefore comes very close to a direct election by universal suffrage.

[13] The American Constitution itself has only seven Articles. Besides those mentioned in the text, Article IV contains the "full faith and credit" clause that requires States to enforce judgments and laws of the other states. Article V concerns the power of Congress to propose amendments to the Constitution, and Articles VI and VII concern the implementation and ratification of the Constitution.

[14] The coup took place on May 13, 1958 and resulted in the institution of a *Comité de salut public* which was largely dominated by the military and which asked General de Gaulle to take power. In the following days, a large political majority called for his return to power, which was confirmed by President René Coty, who nominated de Gaulle for president on May 30, 1958. A large majority (329 v. 224 of the votes) in the *Assemblée nationale* approved de Gaulle's nomination. See Louis Favoreu et al., *Droit constitutionnel*, Dalloz, 4rth ed., 2001, p. 477

[15] The first task of the new government, headed by Charles de Gaulle was to prepare a new constitution. To enable the incoming government to do that, the change of regime - from a straightforward parliamentary regime into one fitting the new presidential situation - had first to be made legal, which happened by Constitutional Law of 3 June 1958: ibid.

[16] Ibid., p. 357.

into a strong, but hybrid, presidential system, especially when, in 1962, the 1958 Constitution was amended to require that the President be elected by popular vote.[17]

Under the 1958 Constitution, as amended in 1962, the elected President enjoys important autonomous powers. Most important among these are the abilities to appoint the prime minister and his or her cabinet ministers, to preside over the cabinet, to act as chief of the Army, and to call a referendum. The power to preside over the cabinet, far from being merely ceremonial, is of crucial significance, particularly in periods of so-called "non-cohabitation," where the President and the dominant fraction in Parliament were elected by the same or affiliated political parties.[18] In such a situation, the President can designate a Prime Minister who belongs to the same political majority as him- or herself, which allows the President to weigh heavily on governmental policy. By contrast, in periods of "cohabitation," when the President and the Parliamentary majority have been elected by disparate political majorities, the President will be obliged, to designate a Prime Minister from a different political majority in order to obtain Parliament's approval of his candidate. Even then, though, the President still has a great deal of influence, particularly over matters of national defence and foreign affairs, which are the so-called "privileged" powers of the President.[19]

The American constitutional system shares common threads with the French constitutional systems. Both the American and the French systems have a president elected by universal suffrage, which bestows legitimacy on the elected leader and prevents Congress or Parliament from forcing him or her to resign. The American constitutional system shares also common threads with the German constitutional system. They both establish a federal state and therefore divide powers between the federal government and those of the states. They have both a constitutional court, which is charged with deciding cases in which conflicts of power

[17] The amendment, approved by a referendum in accordance with Article 11 of the Constitution, was promulgated by constitutional law of November 6, 1962 amending Article 7 of the Constitution: see Favoreu et al., supra n. 14, 558. By granting popular legitimacy to the Presidency, the amendment changed the physiognomy of the Constitution significantly. Many other revisions of the Constitution have been effected since, though in accordance with the regular procedure of Article 89 of the Constitution: ibid., at 655-657. As a result of the 1962 amendment, the President is now directly elected by the people, in two rounds, for renewable periods of five years.

[18] For a description of how the French system came into existence and how it evolved in the years thereafter, see Ezra N. Suleiman, "Presidentialism and Political Stability in France," in *The Failure of Presidential Democracy* (Juan J. Linz and Arturo Venezuela eds.) (1994), at 136-163. See also: Alfred Stepan & Cindy Skach, "Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism," 46 *World Politics*, 1993, 2.

[19] On the presidential powers and the relationship between the President and the Prime Minister in France, see Favoreu, et al., n. 14 above, 564-574 and 580-584.

arise between the federal and the state levels. As for the American and the British systems, they have, at first glance, little in common – which is not surprising, given that the American Constitution was ordained in reaction to the British Parliament and Monarchy. The British system is a parliamentary (not a presidential) regime; it is a unitary (rather than federal) state with a monarch at the top. It has no written constitution, nor a constitutional court. Actually, on most of these points, the British system differs from both the French and German systems as well.

If one looks at political realities though, the American and the British systems share one characteristic that the American, French, and German systems do not share - both are (basically) two-party political systems.[20] Characteristic of such a system is, that it provides the Prime Minister of the United Kingdom, as the effective leader of the winning political party in the most recent election, with almost the same lasting political support that a popularly elected president, like the American, enjoys during his or her tenure in office. Both can rely on a majority in Parliament or Congress to push legislation through – even though, theoretically, in the United Kingdom the Prime Minister can be forced to step down, however only when he loses control of "his" or "her" political party. Characteristic of a two-party system is also that it leads to a "one-party government." By contrast, in countries with a 'multi-party' system, like Germany, Italy, Belgium or the Netherlands, even the largest party will normally need the support of at least one other party to form a "coalition government," which will make the position of the Chancellor or Prime Minister less powerful than in the case of a "one-party government" and also less stable – even when it requires a constructive vote of no confidence to replace him or her, as in Germany or Belgium.

C. Different Forms of Executive federalism.

The foregoing description concerned the horizontal division of powers, i.e., the division of power between the legislature and the executive. In parliamentary systems, only the first enjoys

[20] To call the British system (or the American system for that matter) a two party system is somewhat deceiving since, in the post-war period, a variety of parties other than the two predominant parties have participated in elections and won approximately (in the UK) one-fifth of electoral support: Joel Krieger on Britain in Kesselman & Krieger, supra n. 3, 107-108. On the origin of a two-party system in England and the United States which developed in England, during the second half of the 17th century along with the lower house of Parliament, around the issue of royal prerogatives, and in the United States around the issue of federal v. state power, see Hartmut Maurer, *Staatsrecht I*, third ed. (München: Verlag C.H.Beck, 2003) 336. The author observes that a two-party system failed to take root on the European continent, because of the existence there of many societal differences and the resulting lack of a polarizing and simplifying issue.

the highest form of democratic legitimisation through universal elections. In a presidential system, both (one chambers or both chambers of) the legislature *and* the executive enjoy such highest form of legitimisation through universal elections. Moreover, in a federal state public power is also vertically divided, that is between the federal and the state level – which holds true for both forms of federalism: integrative and devolutive federalism. The first refers to federalism resulting from the bringing or growing together of formerly independent countries or regions, as the U.S., Switzerland and Germany; the second refers to the splitting of what was before a unitary state into a federal state, as in Belgium or Canada, but also Spain and even the U.K. The distinction is not always clear-cut: many unitary states, such as the U.K., witness a slow process of devolution which, sooner or later, may or may not result into a federal state.[21]

In a devolutionary kind of federalism, it is predictable that the separation between the two levels will be more messy than in the case of integrative form of federalism. In the former the devolution will mostly take place gradually and as a result of a lot of bargaining whereby the federal level will try to remain as long, or as much, unitary as possible – which, in the end, is of course a matter of where most of the power of the purse (taxation) goes to: remaining with the federal level or being transferred together with large areas of competences to the regions. In the latter, the process will be the reverse: the formally independent countries or regions will first transfer certain areas of competence and will later on, often reluctantly, be convinced to transfer additional areas and financial resources to the federal level. The EU belongs obviously to the integrative kind of federalism, albeit in rather slow motion.

One of the aspects of vertical division of power is the way in which federal legislation is implemented in the countries or regions of the federation.[22] The American and German systems are completely different in that respect. In Germany the *Länder* have kept this competence to themselves, subject only to exceptions laid down in the Constitution, which means that not only a State's own legislation but also the federal legislation is implemented by the state administration in accordance with that state's procedural rules but, as regards federal legislation, under the supervision of the federal authorities.[23] By contrast, in the U.S. both the Federal and the State legislation is implemented by its own administration. Whereas

[21] On the distinction see K. Lenaerts, "Constitutionalism and the many faces of Federalism" 38 *The American Journal of Comparative Law*, 1990, 205-263.
[22] For a comparison of the American, German, Belgian and EU situation, see W. Van Gerven, "Executief Federalisme", *Liber Amicorum Jean-Pierre De Bandt*, Brussels, Bruylant, 2004, 923-941
[23] See Articles 83-87 of the German Basic law.

in Germany, the principle of loyal cooperation governs the relations between the federal and state executive level, in the U.S. the separation between federal and state level is sharply drawn so much so that "no commandeering" is allowed on the part of the federal authorities, whether legislative or executive, at least not in a direct way.[24] In Belgium, now a federal State but formerly a centralized State, each federal and regional administration implements its own legislation, as in the U.S., but federal and regional administrations are bound by a duty of loyal cooperation, as in Germany.[25] In the European Union (Community) the system of vertical division of powers follows the German model: Article 10 EC obliges the Member States to ensure the fulfilment of Community obligations and the implementation of Community law whereas the case law of the European Court of Justice has imposed, on the Member States and on the EU institutions, the duty to cooperate loyally. [26]

II. Weighing presidentialism and parliamentarism as an appropriate form of accountable government.

A. Assessing pure and semi-presidentialism.

The American presidential system has been widely recognized as a successful form of government for the United States, and indeed it cannot be denied that it has served the nation well. As noted by political scientists Alfred Stepan and Cindy Skach, the system has been emulated by many countries: "In the 1980s and 1990s, all the new aspirant democracies in Latin America and Asia (Korea and the Philippines) have chosen pure presidentialism. And to date, of the approximately twenty-five countries that now constitute Easter Europe and the former Soviet Union, only three … have chosen pure parliamentarism."[27] Nevertheless, as another political scientist, Juan L. Linz has pointed out "… with the outstanding exception of the United States, most of the stable democracies of Europe and the commonwealth have been parliamentary regimes and a few semi-presidential and semi-parliamentary, while most

[24] *New York v. United* States, 505 US 144*; Printz v. United States*, 521 US 898. For comment see Kathleen M. Sullivan & G. Günther, *Constitutional Law*, 14th ed., 2001, 184. For a comparison between the U.S. and the EU, and an explanation for the totally different situation, see W. van Gerven, *The European Union. A Polity of States and Peoples*, Stanford University Press and Hart Publishing Oxford, 2005, 20-22.

[25] For a brief but clear description of Belgian federalism, see P. Peeters, "The fifth Belgian State Reform ("Lambermont"): a General Overview", 9 *European Public Law*, 2003, 1-12.

[26] See further W. van Gerven, supra n. 1, at pp. 19-22.

[27] Alfred Stepan and Cindy Skach, "Presidentialism and Parliamentarism in Comparative Perspective," in *The Failure of Presidential Democracy* (Linz & Venezuela, eds.), n. 18 above, 119-136, at 120.

of the countries with presidential constitutions have been unstable democracies or authoritarian regimes …"[28]

The statement requires some explanation as to the way in which presidential and parliamentary regimes are characterized.[29] The presidential system is a system of "dual democratic legitimacy," since both the president and the legislature are elected by the people. Both are elected for a fixed term during which their survival is independent from each other: this leads to "rigidity" and "mutual *in*dependence." In a parliamentary system, only the legislature is elected by the people, as the chief executive must be supported by a majority in the legislature. The executive can fall if it receives a vote of no confidence from the parliament, while the head of government has the capacity, normally in conjunction with the head of state, to dissolve the legislature and call for elections. As a result, a parliamentary system is characterized as having "single democratic legitimacy," "less rigidity" and "mutual dependence,"[30]

The *drawbacks* of the presidential regime follow from the above characteristics. "Dual legitimacy" implies that a president elected by a majority, sometimes a plurality only,[31] enjoys the same democratic authority as elected legislators, even though the latter represent a variety of political choices that were submitted to the electorate as alternatives by the political parties to which they belong; they are therefore better qualified to represent the people as a whole.[32] Most importantly, when a conflict between these two equally legitimated actors comes to loggerheads, there are in a presidential system no deadlock-breaking devices, because of their "mutual independence." In unstable democracies this "rigidity" may lead to a propensity for military coups.

Another and related drawback of the presidential system is its "ambiguity," in that the office of elected president is acting as a head of state (and not just government) and is therefore expected to represent the whole people, internally and externally. However, in situations of

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[28] Juan J. Linz, "Presidential or Parliamentary Democracy: Does it Make a Difference?" : ibid., n. 18 above, 3-87, at 4. Indeed, in the words of Stepan and Skach, "numerous different sources of data … point in the direction of a much stronger correlation between democratic consolidation and pure parliamentarism than between consolidation and pure presidentialism" : Stepan & Skach, n. 27 above, 120.
[29] The terms quoted in the following sentences are from Linz' article, n. 28 above
[30] Linz, n. 28 above, 6. See also Stepan & Skach, n. 27 above, 120.
[31] Majority refers to an absolute majority (of at least 50.01 percent); plurality refers to a relative majority, *i.e.* the highest vote in case of a more than two-person race.
[32] Linz, n. 28 above, 7.

crisis or war, or when controversial decisions are to be taken, presidential action may alienate large numbers of citizens who cannot identify themselves with what they see as "imperial" action taken in a partisan way, and often driven by purely electoral considerations.[33] During the president's time in office, those citizens have no political recourse. In a parliamentary regime, that ambiguity does not arise in the same manner because the two functions, head of state and head of government, are not exercised by the same person.[34] While the head of government, prime minister or chancellor, represents the partisan view of the incumbent government (and can be forced to resign), the head of state, president or monarch, incarnates the nation in a non-partisan way - a role that allows the latter to give discrete counselling to the former with a view to moderating extreme positions, but can also take a more decisive form in exceptional circumstances.[35]

By contrast, one of the presumed *advantages* of "mutual independence" inherent in a presidential system is that it assures the stability of the executive, as compared with the alleged instability of a parliamentary regime. This weakness of parliamentary systems, however, can easily be overcome by providing in a "constructive vote of no-confidence," as explained previously.[36] Moreover, in a presidential system, the price for stability is a higher degree of "rigidity" and "unaccountability": a leader who has lost the confidence of his own party or constituency cannot be replaced by someone better able to deal with the situation, or more attractive to the persons who have lost confidence. In the same way, such a leader cannot be held to account – especially when he cannot be re-elected at the end of his term.[37] Another presumed advantage of a presidential system is that the voter knows the person he or she is voting for. However, that knowledge, and the voters' preference for one presidential candidate or another, may be very superficial as it will often be the result of "videopolitics,"

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[33] The term is from Arthur Schlesinger's work *The Imperial Presidency*, 1973, in which the author maintains that over time, mainly in matters of foreign policy, the power of the U.S President grew tremendously, an evolution which culminated with, and was exposed by, Richard Nixon and the Watergate Affair. See the excerpt from Schlesinger's book in *The Lanahan Readings in the American Polity*, third ed. (Ann G. Serow and Everett C. Ladd, eds.), at 221-228.

[34] See further, Linz, n. 28 above, 24-26; also 46-47.

[35] In such circumstances, a head of state may have the constitutional power to refuse the signing of a controversial act, as happened recently when the Italian President Carlo Azeglio Ciampi refused to sign into law a bill that he believed would reinforce the overwhelming dominance of PM Berlusconi's mighty media empire. See *The Economist*, January 17-23, 2004, at 41.

[36] The device was first applied in Germany in reaction to the short-lived governments under the Weimar Republic. On the instability of that Republic which lasted from 1918 to 1933, see C. Allen on Germany in Kesselman & Krieger, n. 3 above, at 251-253.

[37] Linz, n. 28 above, 9-10 and, on the implications of no re-election, 16-18.

(*i.e.* of good looks and sound bites).[38] Moreover, also in a parliamentary system, the voter will mostly know whom he is voting as, most of the time, it will be the leader of the party winning the election who will become the new prime minister. More importantly, in a parliamentary regime the voter may know the candidate less but will better know the political program for which he or she is voting, and leaves the choice as to who will implement the program to the party he or she has voted for.[39]

Summing up the discussion Stepan and Skach conclude that parliamentarism has a more supportive constitutional framework because of its "greater propensity for governments to have majorities to implement their programs, and its greater ability to rule in a multiparty setting," because of its "lower propensity for executives to rule at the edge of the constitution and its greater facility at removing a chief executive who does so, …", and because of its "greater tendency to provide long party or government careers, which add loyalty and experience to political society." [40] To be sure, the arguments against presidentialism may be based too much on broad distinctions to be true for all purposes, but they have not generally been refuted. [41] The question remains, however, of whether "pure" presidentialism, American style, cannot be improved by a "mixed" form of presidentialism, French style.[42]

The difference between pure and mixed (or semi-) presidentialism has been drawn by political scientist Giovanni Sartori who, in an article pointedly entitled "Neither Presidentialism nor Parliamentarism,"[43] defines "pure" presidentialism by three criteria: (i) a popularly-elected chief executive; (ii) who can only be discharged under very special

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[38] Thus Giovanni Sartori, "Neither Presidentialism nor Parliamentarism," in *The Failure of Presidential Democracy* (Linz and Venezuala, eds), Baltimore, John Hopkins University Press, 1994, 106-118.

[39] Linz, n. 28 above, 10-11. The difference has been characterized by Yale professor Bruce Ackerman in the following terms: " … the cult of presidential personality goes against the grain of republican self-government. It is downright embarrassing for a constitution to ask free and equal citizens to place so much trust in the personal integrity and ideals of a single human being. Far better for the constitution to encourage citizens to engage in a politics of principle – debating which of the existing political parties best expresses their collective ideals …": Bruce Ackerman in "The New Separation of Powers," 113 *Harvard Law Review*, 2000, 633, at 663.

[40] Stepan and Skach, n. 27 above, 132.

[41] See *Presidents, Parliaments and Policy* (Stephan Haggerd and Matthew D. McCubbins, eds.), Cambridge, Cambridge University Press, 2001, 319. For a staunch defender of American presidentialism, see Steven G. Calabresi, "An agenda for Constitutional reform" in *Constitutional Stupidities, Constitutional Tragedies* (William N. Eskridge, Jr & Sanford Levinson, eds.) 1998, quoted by Bruce Ackerman, n. 32 above, who strongly disagrees with what he calls "triumphalism" (at 633), and favours himself a form of "constrained parliamentarism."

[42] Along with France, Brazil and Russia are the three major countries having a semi-presidential system. For a thorough analysis of semi-presidential systems in Europe, see the book edited by Robert Elgie, *Semi-Presidentialism in Europe* (Robert Elgie, ed.), Oxford, Oxford University Press, 1999. The book does not aim to demonstrate which form of government is better, though, but is rather concerned with the need to reconsider the assumptions underlying the debate: at 282.

[43] Giovanni Sartori, n. 38 above.

circumstances; and (iii) who is both head of government and head of state. The first two criteria apply to a mixed form of presidentialism, but the last criterion does not. Thus, under the French system, the President who is head of the Republic, is popularly elected and cannot be removed from office, except for reasons of high treason.[44] However, the President is not head of government as well, the top executive being the Prime Minister who is designated by the President with the approval of one of the houses of Parliament, the National Assembly.[45] Depending on the circumstances, the French system can be more or less presidential. In circumstances of "non-cohabitation," that is when the President and the Prime Minister are supported by the same political majority, the President dominates the political scene, and the system is therefore more presidential. By contrast, the system is less presidential in case of "co-habitation", *i.e.* when the President and the Prime Minister are supported by disparate political majorities. In such a situation, the Prime Minister can rely on a majority in Parliament which supports him or her, but which does not support the President. In this situation the system has more in common with a parliamentary system.[46]

It follows from this description that a semi-presidential system has the same drawbacks as a presidential system. Those are: dual legitimacy, independence of the presidency from the elected legislature and rigidity in the sense that there are no deadlock-breaking devices when dual legitimacy leads to a lasting conflict between the presidency and parliament – with one notable exception though, which is stipulated in favour of the President, that is that, once a year, the president can dissolve parliament and call new parliamentary elections. Precisely because of this exception, the President will in the French system be seen also, as in a pure presidential system, as a partisan head of State.[47]

B. Assessing pure and mixed parliamentarism.

[44] Favoreu et al., n. 14 above, 562-563.
[45] Id. , at 564.
[46] See further Ezra N. Suleiman, "Presidentialism and Political Stability in France," in *The Failure of Presidential Democracy*, n. 18 above, 136-163.
[47] In addition to these drawbacks which the French system shares with pure presidential systems, there are other reasons for the French system not to be emulated. Those are that the system consists of a series of overlapping relationships: not only between the president, the prime minister and the parliamentary majority, but also between the executive and wider state structures, such as the judiciary and independent administrative regulatory agencies, between the political elite and the people, and between France and Europe. Robert Elgie, "France" in the work cited in n. 42 above.

Parliamentarism in its *purest* form is a system that lost its appeal with the French Third (1870-1940) and Fourth (1946-1958) Republics and with the German Weimar Republic (1918-1933).[48] It refers to a so-called "assembly-driven" system in which parliament wants or tries to make important decisions itself and is unwilling or incapable to give political backing to the executive, thus preventing the latter from running the country. As such, the system is totally inept to govern a modern state.[49] To be sure, most often the situation does not arise because parliament insists on using its sovereign power but because it is too much divided as a result of extreme party-proliferation. In such a situation, political parties are too small and too weak to give lasting support to a "coalition government," with the result that the executive, if it does not wish to resign at any occasion, is forced to ask the head of state to dissolve parliament and to call new elections. If these elections are inconclusive, this may lead to even more instability, as happened in the last months of the Weimar Republic during which no fewer than six elections were held, all resulting in minority governments.[50]

In recent times, pure parliamentarism has therefore been replaced by one or another form of "mixed" parliamentarism. In that respect, Giovanni Sartori makes a distinction between three different kinds of parliamentarism hinging on the strength of the position of the head of government, Prime Minister or Chancellor. These are: (i) a "first above unequals" head of government; (ii) a "first among unequals" head of government;" and (iii) a "first among equals" head of government. In the case of a "first above unequals", like the Prime Minister in the U.K., the head of government is also the party leader of a one-party government. In such a situation, he or she has a free hand in picking and firing subordinate ministers and, as party leader, cannot him- or herself be easily removed by a parliament that is dominated by the party he or she leads. At the other extreme, in the case of a "first among equals," like the Belgian Prime Minister before 1993, the head of government is not the leader of the ruling political party which makes him or her, when governmental crises occur, along, and on a par, with the other cabinet ministers, dependent on compromises worked out by party secretaries and faction leaders; when no compromise is found, these party leaders agree to oust government and call new

[48] Between 1879 and 1914, French governments had to step down about fifteen times: Favoreu, n. 14 above, at 473), between 1946 and 1958 governments lasted approximately six months on average: id., at 476. On the Weimar Republic (1918-1933), see C. Allen on Germany in Kesselman & Krieger, n. 3 above, 251-253..

[49] Sartori, n. 38 above, 110.

[50] C. Allen on Germany in Kesselman & Krieger, n. 3 above, notes at 252, that the last several months of the Republic (1932-1933) witnessed no fewer than six elections, all resulting in minority governments.

elections.[51] In between these two situations, there is the case of a "first among unequals," like the German Chancellor, that is of a head of government who cannot be unseated by a mere no-confidence parliamentary vote, but can unseat fellow ministers without being expected to leave office him or herself.[52]

III. A system of accountable government for the Union with an executive answerable to an elected parliament.

I will now examine, in light of the foregoing analysis, which governmental structure the European Union should adopt. The answer is neither a pure nor a semi-presidential system, but a strong - though not majoritarian but consensus - parliamentary system, that is, a system in which the executive is fully answerable to the elected parliament.

It will be clear, from the outset, that the Union's decision-making process is unlikely to result in a presidential system for the Union, and that there is no reason why it should. There are two reasons supporting the first part of that proposition: (i) among the twenty-five 25 Member States, only Cyprus has a pure presidential system while only France has a truly semi-presidential system; and (ii) the present political system of the Union already has more parliamentary features than presidential ones, and the draft Constitution would add some more. As for the second part of the proposition, i.e. that the Union should not adopt a presidential system, the foregoing discussion has not shown that a presidential system is superior to a parliamentary system. I will briefly deal with each of these elements.

A. Rejecting (pure and semi-) Presidentialism for the Union.

(i) Of the fifteen old EU members, ten States have no president or only a parliamentary president who is not popularly elected, two States have a popularly elected president who functions however as a parliamentary president, two have a semi-presidential system, and one has had a semi-presidential system for a few years, but has changed it into a parliamentary presidency.[53] Among the ten new EU members, six have a system without a

[51] See Stephen Hellman describing the Italian system, in Kesselman & Krieger, n. 3 above, 401.
[52] See Sartori's article, n.38 above, 109-110.
[53] Belgium, Denmark, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom are monarchies whereas Germany, Greece and Italy have a parliamentarily elected president. Austria and

popularly elected President, three have a semi-presidential system, and (as mentioned) one has a pure presidential system.[54]

(ii) The present political system of the Union is more parliamentary than presidential. The European Commission is currently the Union's executive under the first pillar, and is accountable towards the European Parliament, which has the power to make it resign using a motion of censure taken by a special majority. [55] The Commission works under the political guidance of its President, who allocates responsibilities between the members of the Commission and can ask a member to resign.[56] The Commission President and Members who are proposed by the Member States and nominated by the Council, are approved "as a body" by Parliament, before being definitively appointed by the Council acting by a qualified majority.[57] All of those elements point in the direction of a parliamentary regime. Moreover, if the draft Constitution were to be adopted in its present form, the Commission President shall be proposed to Parliament by the European Council, "taking into account the elections to the European Parliament" - which points even more in the direction of a parliamentary regime - and shall then be approved by the Parliament, and appointed by the European Council.[58] To be sure, the European Council, consisting of the Member States' heads of State and government, would be chaired by a President elected by the Council for two and a half years (renewable once).[59] However, because the European Council would not be authorized to exercise legislative functions, but only to act as a political driving force,[60] its president would not have legislative (or executive)

Ireland have a popularly elected president but function as a parliamentary system. Finland and France are semi-presidential systems; however, after President Kekkonen's resignation in 1981, Finland has evolved into a more parliamentary system: see David Arter's country report in Robert Elgie (ed.), n. - above, 48-66. Portugal was a semi-presidential system until 1982 when the constitutional powers of the president were reduced to little more than those of a parliamentary president. See Sartori, *Engineering*, n. - above, 125-131. For a description of the semi-presidential systems in Austria, Finland, France, and Ireland, see Robert Elgie (ed.), n.42 above.

[54] Cyprus has a genuine presidential system, Lithuania, Poland and Slovenia have a semi-presidential system. Czechia, Estonia, Hungary, Latvia, Malta, and Slovakia have a parliamentary system. Of the three semi-presidential systems mentioned, Slovenia has a figurehead presidency like Austria and Ireland, Lithuania and Poland have a presidency that is still in a flux, sometimes being more presidential sometimes more parliamentary depending on the personality of the incumbent president. See the country reports in Robert Elgie (ed.) n. 42 above.

[55] See Article 201 EC Treaty.

[56] Article 217 EC Treaty.

[57] Article 214 EC Treaty.

[58] Article I-26 (1) and (2) of the initial draft Constitution, as amended by the June 2004 IGC.

[59] See Article I-21 (1) of the initial draft, now Article I-22 (1) of the final draft.

[60] See Article I-20 (1) of the initial draft, now Article I-21(1).

functions either, and would therefore resemble more a presidential head of state in a parliamentary system, than a president, American style (see below).

(iii) I will not repeat the reasons why a parliamentary system is preferable to a presidential system, as I have examined the question in the preceding chapter. Let me only add that, if a pure presidential system were chosen as a form of government for the Union, it would require a fundamental reshuffling of the present institutional balance. Currently, that institutional balance is characterized by a complex and delicate system of *power-sharing* between the three political institutions, Parliament, Council and Commission, and between the Union and the Member States, and not at all by a neat separation of power. If the Union were to have a universally elected president, that should be the president of the Commission who would then designate the other commissioners as members of a cabinet that is only responsible to him and not towards parliament. Parliament should then be composed of two houses, one elected by the people, like the European Parliament now, and one consisting of members appointed by the Member States, like the Council of Ministers currently. None of these houses would have the power to unseat the president of the Commission. Clearly, such adjustments to the Union, would be too drastic, especially given that the system would still have to prove its value in surroundings that are completely different from those prevailing in the United States. Though the presidential system certainly works well in the United States, it is a system that is difficult to define, let alone to imitate,[61] certainly in a Union which has not the cohesion and the allegiance from its peoples as the United States do enjoy after more than two centuries of existence. Moreover, the election of a president by popular vote, would seem to be operational only in a bipartisan system where the elected president can, to maintain his popularity while in office, rely on a (quasi-) majority of voters. In a multi-party system as the one prevailing in the Union the president's popularity would depend on a consensus between political parties that represent only a fraction of the population.

[61] See for example Richard Neustadt's book *Presidential Power and the Modern Presidents*, 1990, in which it is argued that the President's real power comes not from the Constitution nor from formal authority, but rather from the authority to persuade others; and the book of Arthur Schlesinger, *The Imperial Presidency*, 1973, who argues that the power of the presidency has grown tremendously over the years, and that Americans must remain on guard in the future, even although the "imperial presidency" was exposed with Richard Nixon. For excerpts, see *American Polity* (Ann G. Serow & Everett C. Ladd, eds.), third ed., Lanahan Publishers, Inc., Baltimore, at 217-228.

The Union should also not adopt a semi-presidential system modelled on the French example. As pointed out previously, the popularly-elected French President shares the executive power with a Prime Minister, who is designated by the President but approved by Parliament.[62] If such a system were transposed to the European Union, it would imply that the President of the European Council would be deeply involved in both the Union's executive powers and its legislative powers - which is not what the draft Constitution would provide (see above). If that were the case, the Commission President, as the head of the European executive, would exercise his or her powers in the shadow of a directly-elected President who would have his or her own, far stronger legitimacy. It would also imply a serious curtailment in the powers of the European Parliament and, therefore, increase the Union's "democratic deficit." Both these features make the French system unsuitable to a system like that of the European Union, which needs a strong executive to effectuate its integration project, and a strong parliament to enhance its democratic legitimacy.

B. How to construct a parliamentary system for the Union?

1. A consensus democracy.

Having reached the conclusion that the Union should have a parliamentary system, the question is, then, which form of parliamentarism the Union should adopt. Here also, the current state of the Union shows the way, the Union having already several distinctive characteristics of a *consensus* democracy. As pointed out by political scientist Arend Lijphart,[63] consensus is sought after at various levels (i) in the Union's executive, the Commission, which is comparable to a cabinet, where a broad inter-nation and inter-party coalition is based on consensus; (ii) with regard to the executive-legislative balance of power, the Commission is an equal partner in the relationship between the three EU institutions (Commission, Parliament and Council), rather than to be subordinate to the European Parliament, thus being an equal party in the inter-institutional dialogue; (iii) the Union has a multi-party system with a large number of political parties represented in Parliament and several parties represented in the Council of Ministers; thus depending on

[62] In the text accompanying n. 17ff.
[63] *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, Yale University Press, 1999, at 42-45.

the formation of a sufficient consensus and ; and (iv) the European legislature consists of two legislative bodies, Parliament and the Council, with the first representing the people and the second representing the states; thus not a union of states or of peoples but a union of states and peoples.

Defining the Union as a consensus democracy does not only correspond to the current state of the Union, it is also desirable that the Union be one, and remain one given the large cultural, linguistic, political and sociological differences that exist in a Union of twenty-five Member States. In such a Union, a consensus democracy based on an electoral system of proportional representation, is the only system that permits the involvement of large segments of the population in the Union's decision making process. Which is why the United Kingdom which for internal purposes applies a majoritarian system on the basis of a "winner-take-all" electoral system, has agreed to apply proportional representation in elections for the European parliament.

2. With a strong leadership

The fact that the Union takes the form of a consensus democracy should not prevent it from having a strong executive. Consensus democracies have not been proven to be less decisive policy makers than majoritarian democracies.[64] Moreover, the Union already has a strong government in the European Commission, at least under the first pillar. Under that pillar, the Commission takes part in each of the three basic functions of government: through its (quasi-) monopoly of legislative initiative, it participates in the Community's legislative process; it exercises much of the Community's executive power, autonomously or by delegation; and it exercises an important supervisory role through its power to institute proceedings in the European Court of Justice against any Member State that has failed its Community obligations. This polyvalent position has made of the Commission the driving force behind the Community's economic and social policies - a role which it has fulfilled for half a century with great skill and dedication. The draft Constitution maintains the Commission's stronghold.

[64] Ibid. chapters 15 and 16. See also, for further references, W. van Gerven, supra n. 1, at 330.

The Union has also, under the first pillar, a strong head of government in the Commission President, who, in Sartori's terms, is "first among unequals,"[65] rather than a mere "first among equals." Many elements prove this point: (i) members of the Commission cannot be appointed without the accord of the president; (ii) the president decides on the internal organisation of the Commission, allocates responsibilities among its members and, with the approval of his colleagues, appoints vice-presidents; (iii) the president gives political guidance to the work of the Commission and participates in the meetings of the European Council; and (iv) he may ask a member of the Commission to resign.[66] In the draft Constitution these prerogatives are confirmed, and extended to areas now belonging to the second or the third pillar.

3. With a democratic legitimacy rooted in citizen involvement through parliamentary elections.

To transform the European Union into a parliamentary regime in view of increasing of increasing the Union's democratic legitimacy and the involvement of citizens in the Union's public affairs, will require some institutional and political changes.[67] I will discuss these below in section C, D and E. First one general remark.

Of the three political institutions: Parliament, the Council of Ministers and the Commission, only Parliament possesses full democratic legitimacy for being directly elected by the peoples of Europe, for the first time in 1979. By contrast, the Council of Ministers which is the most prominent part of the EU Legislature, has no democratic legitimacy and, as a body, is not politically accountable to anyone at the supra-national level. Its individual members are indeed Member State ministers who are politically accountable to Member State parliaments, and to no one else. As for the Commission, it is composed of members who are appointed de facto by the Member State governments, and then screened and approved by the European Parliament. In contrast with members of Member State executives, they are independent officials who do not have a political affiliation with any of the political parties represented in the European or the national parliaments. They are nevertheless in some ways politically accountable as they are bound to explain their actions to the European Parliament and can, as a body, be censured by

[65] For the distinction, see supra n. 38.
[66] Articles 214 and 217 EC Treaty and Article 4 EU Treaty.
[67] See in that regard chapter 7 of my book "The European Union, a Polity of States and Peoples," supra n. 1.

Parliament.[68] At the level of the European Union, separation of power is a non-starter. The three institutions mentioned above, Parliament, Council and Commission, share the legislative power in a rather unorthodox way: the Council of Ministers has legislative power in all matters but exercises that power, under the first pillar, on a par with the European Parliament when the co-decision procedure of Article 251 EC Treaty applies (which it is the case in a growing number of instances). Moreover, under the first pillar, the Council or Parliament cannot pass legislation if the Commission has not made a legislative proposal.

C. Enhancing the EU Commission's political accountability and recasting the role of Euro-parties.

From a perspective of political accountability, the current system would seem to have three major deficiencies: the Commission is composed of members who have been nominated by Member State governments without any citizen involvement directly or indirectly, i.e. through political parties; the Council of Ministers and its individual members are not politically accountable to anyone at the European level; the European Council of Heads of State or Government plays a politically important but, from a viewpoint of political accountability, fully undefined and inexistent role. Hereinafter, I will deal with the first of these deficiencies in the present section (C) and say a few words on the second and the third in the next two sections (D and E).

1. Involving political parties in the appointment of the Commission.

To confer democratic legitimacy upon the EU's executive, that is the Commission, citizens will have to be involved in the selection of the president and members of the Commission. The traditional way to achieve that in a parliamentary regime is to make political parties, represented in parliament, participate in the formation of executive government.[69]

[68] Articles 197 and 201 EC Treaty.
[69] The role of political parties can hardly be overestimated, even though it is rarely constitutionally recognized - with a few exceptions, most notably the Federal Republic of Germany: see Article 21 of the Basic Law.

The most crucial function of political parties is to recruit party members and party representatives to stand as a candidate in one of many local, regional, national or European public elections, and to take part in the formation of governments at each of these levels (with the exception, so far, of the European level). More specifically, at the national level, party leaders will *de facto* select the Prime Minister, approve his or her choice of cabinet ministers, and maintain his/her position, and that of the cabinet, in office. This is so, because it is normally the leader of the political party that prevailed in the last parliamentary election, who will be asked by the head of state to form a new government, and who will often become the head of government, if he or she succeeds in forming a team.[70] Because in a multi-party political system (as most European countries are) not even the largest political party will normally have enough seats to secure a majority in parliament, the party leader asked to form the government will want to have the support of other political parties. Getting that support sometimes requires difficult negotiations with the leaders of these other parties, each of them ensuring that the political platform of his or her party is sufficiently taken into account in the drafting of the new government's political program. That program is to become the new government's road map. Once it is agreed on, discussions between the party leaders will start on the allocation of portfolio's between the "coalition parties," and on the names of the persons which each party proposes as cabinet ministers. When the government is formed, it will be submitted to the approval of parliament and, if approved, be appointed by the head of state.

To enhance the Union's democratic legitimacy, the involvement of Parliament in the appointment of a European government and - through the political parties represented in Parliament - the involvement of citizens should be increased in order to make both involvements comparable to those of national parliaments and citizens in the appointment of Member State governments. That would mean that, after the elections to the European Parliament, the President of the European Council[71] would first invite the leader of the largest political party that came out of the elections, to initiate negotiations with other

[70] The role of political parties in the formation of a new government is rarely described. For some indications, see Kesselman & Krieger, n. 3, at 85-86 (UK), 187 (France) and 290-291 (Germany).

[71] I am using the terms "European Council" (of Heads of State or Government) and "President" in the meaning attached thereto in Articles I-21 and I-22 of the draft Constitution. For the moment the European Council is not mentioned as an institution in Article 7 (1) EC, but its role and composition are defined in Article 4 EU. On this awkward position, see K. Lenaerts and P. Van Nuffel, (R. Bray, ed.), *Constitutional Law of the European Union*, London, Thompson, second edition, 2005, at pp. 384ff.

party leaders to form a Commission. If that leader does not find enough support to secure a majority of votes in Parliament, the President of the European Council would ask another party leader to try a second time. Once a majority has been found, and agreement has been reached between the political parties involved on policies which the coalition will pursue, the leaders of the "coalition" are to agree on the allocation of portfolios, and on which persons will be appointed Commission president (often the political leader who has made the coalition possible) and Commission members. For reasons of democratic legitimacy, those persons should preferably be politicians who have been elected in European *or* Member State parliamentary elections. They could also be 'non-parliamentarians' if they have the support of a majority in Parliament. Moreover, the Commission should be composed in a way that it reflects "satisfactorily the demographic and geographical range of all Member States of the Union."[72] Any newly-formed Commission would be submitted for approval by Parliament, and would then be appointed by the European Council, as it is currently.

The involvement of Euro-party leaders in the formation of a new Commission, in accordance with the Member States' parliamentary traditions, would be a substantial change. Commissioners would be approved by Parliament on the proposal of political parties represented in Parliament, rather than on the proposal made by Member State governments. There is no reason to believe that the new procedure would be less capable, than the current procedure, of selecting competent and independent persons as required by Article 213 (1) EC. To the contrary, with the involvement of political parties representing civil society, the procedure would at least be more transparent than the current procedure, under which Member State governments nominate the members of the Commission on the basis of personal preferences. Of course, the current practice of advance screening of

[72] Thus Article I-25 (3) (b) of the initial draft Constitution, now in a different context in Article I-25 (6) of the final draft. It has been suggested that, following the example of the situation in Switzerland - where the seven seats in the Federal Council of the confederation are allocated to the political parties in accordance, roughly, with their share in the vote - the Commission would be composed in a similar way. Moreover, in the Swiss Federal Council the taking of votes is avoided and decision making is based on compromises when a majority agreement is possible. See for a brief guide on the Swiss system: http://www.adm.ch/ch/index.en.html. It is doubtful whether the large variety of peoples, political parties and traditions in the 25 Member States would allow such a "magic formula" (as the Swiss solution is called) even when the number of Commissioners would be reduced from the current 25 seats to a lower number as provided in Article I- 26 (6) of the final version of the European Constitution.

candidate Commissioners by multi-partisan parliamentary committees in the European Parliament, should be maintained.[73]

2. Recasting Euro-parties.

The new procedure of appointing Commissioners - in combination with the existing procedure of censuring Commissioners - can only work adequately if the political parties operating at the European level (so-called 'Euro-parties') are differently organized. In that respect, it is not enough for Article 191 EC to provide that "[p]olitical parties at European level are important as a factor for the integration within the Union." Existing parties must also organize themselves, and change their own attitudes, in view of playing a decisive role in forming the Union's executive government, and supporting it while it is in office.[74]

Currently, the parliamentary Euro-party groups play a role mainly within the European Parliament in the preparation of Community legislation. Except for screening candidates proposed by the Member States, they are not constitutionally involved in the political process leading to the formation of a European government – although they may be involved de facto, by raising objections against an individual candidate parliament has screened, - nor are they involved in the formulation of citizen goals to be pursued by that government. Moreover, while in office, the President and the other members of the Commission are not allowed to proclaim an affiliation with any political party, nor may they consider themselves to be bound by a specific political program. This implies that, conceptually, they have no political ties with any of the political groups in the European or Member State parliaments. That would change if Euro-parties and their leaders were to become involved in the formation of a European government and the formulation of a European program. It would imply that Euro-parties would fulfil the tasks which political parties fulfil in parliamentary democracies. These tasks consist primarily of explaining the impact of political decision-making on the citizens' personal life and well-being, offering citizens alternative programs and attractive candidates for elected office, and championing

[73] That practice could even be extended by requiring multi-partisan parliamentary committees in the Member States' *national* parliaments to screen the candidates on the 'three-persons' lists which the Member State governments would propose.

[74] On European parties, see Stephen Day and Jo Shaw, "The evolution of Europe's Transnational Political Parties in the Era of European Citizenship," in *The State of the European Union*, ed. Tanja Börzel and Rachel A. Cichowski, Oxford, Oxford University Press, 2003, 149-169.

popular issues and proposals. Most importantly, it would require political parties, or coalitions of political parties, to campaign in the name of their candidate for the top positions in European government. The way to achieve that would be for the Euro-parties to present partly trans-national lists in the Member State constituencies, on which candidate MEPs are presented whom the European public knows for their achievement on the European or international scene, along with candidates known for their achievements on the national scene.[75]

Furthermore, Euro-parties could greatly enhance the democratic legitimacy of this electoral process by organising advance-primaries among their registered voters to designate the "trans-national" candidates on their lists. On the basis of the outcome of these primaries, they could then announce the names of the candidates, whom they would propose for the presidency and membership of the European Commission if, after the elections, they were to become involved in negotiations on the formation of the Commission.[76] Obviously, the actual number of votes which these "pan-European" candidates would have assembled behind their name in the national constituencies, would have an impact on the party's final decision as to whom they will put forward as a candidate for the Commission presidency and membership.

All that is not enough though: in order to be attractive for citizens, it will be necessary for the Euro-parties to associate themselves with clear issue dimensions that reflect major citizen preferences. Currently, the Euro-parties act mainly as conglomerates of national parties with insufficient party-identity and little party-autonomy. In order to involve citizens, they will need to identify themselves with distinctive, and divisive, issues around which large citizen groups can be assembled. The most prominent issues which may assemble citizens at the European level, are: the "socio-economic" dimension, the "integration versus inter-governmental" dimension, the "cultural-ethnic/linguistic" dimension, and the "pro-environment and basic citizen participation" dimension. At the level of the Member States, these dimensions are responsible for the emergence of larger or smaller political parties.

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[75] See also in the same sense: Day and Shaw, n. 77 above, 167.

[76] On the idea of breathing life into European elections by organizing primaries, see Tom Spencer in *European Voice*, 22-28 April 2004, at 9. The idea would certainly help to encourage the media to pay more attention to the European elections.

There is no reason why these issues would not lead also to the emergence of strong and cohesive political parties at Union level. They could lead for example to two large parties, one centre/left and one centre/right party, both committed to (moderate) European integration but each with a different emphasis (not a split) on social versus market-orientation, *and* to a number of smaller parties, such as a conservative party strongly committed to the nation state and to cultural (including religious) identity, a leftist party committed to anti-globalism, and a green party committed to broad environmental issues with a strong emphasis on citizen participation. On the basis of the current composition of the European Parliament, both the centre/left and the centre/right parties would be able to form coalitions, if not with each other, than - the former - with the leftist party and/or (presumably) the green party, or - the latter - with the conservative and/or (possibly) the green party.

D. Constructing political accountability in the Council of Ministers - and in committees of Member State officials and regulators operating at the European level.

1. Improving the EU Council's political accountability and enhancing the role of Member State parliaments.

The most delicate issue is how to enhance the political accountability of the Council of Ministers. Political accountability of the Council is controversial in the sense that, as a prominent part (under the first pillar) of the Union's legislative branch, the Council should normally be capable of founding its legitimacy on some kind of direct popular support - but that is not the case taking account of the Council's composition out of Member State representatives at ministerial level (Article 203 EC), each of them therefore being only, individually, politically accountable towards a Member State parliament. There are two possibilities: either by making the Council, as a body, politically accountable towards an institution at Union level - but which one?; or by making it, as a body, politically accountable to a gathering of national parliaments. A great deal depends on how the Council of Ministers will be regarded in the future, more particularly, whether it is seen to become, in the (very) long run, one of two houses of parliament in a bicameral system.

In that respect, a comparison with the German situation may be instructive, because of the federal structure of the German Republic in which, like in the Union (supra -), there is a

place to be allocated to both the People of the Republic and the component parts, the Länder, of the Republic. Accordingly, in a federal state, *bicameralism* belongs to the essence of the state. It implies, moreover, that, as a rule, the house elected by the people - which has therefore more democratic legitimacy than the other - is the most prominent part of the legislature, and that, indeed, is the case of the *Bundestag* in the Federal Republic of Germany. This is in sharp with the Union where the Council of Ministers, *i.e.* the institution with a lesser amount of democratic legitimacy, is currently the most prominent part of the legislature – demonstrating clearly that the Union is not (yet?) a true federation but only a confederation of states. However, if that were to change, that is, if - with the years - the elected parliament would become the most prominent part of the legislature, even then there is, in my view, no reason yet to make the Council, as a body, politically accountable at *Union* level to another Union institution in the fullest sense of the word, that is being answerable to such an institution for past conduct, even up to the point that the latter can make the former resign as a body. Justification for that proposition can be found in the German federal structure. In that structure the house in which the component states are represented, the so-called *Bundesrat*, *does* participate, in a not unsubstantial manner, in the legislative process of the federation. But, that does not prevent the representatives of these states in the *Bundesrat* from representing there the autonomous interests of the Länder, without any further ado.[77]

Fleshing this out in a more specific way, the members of the *Bundesrat* "shall consist of members of the Land governments which appoint and recall them."[78] Each *Land* in the *Bundesrat* has between three and six votes, depending on the size of its population. Each land may delegate as many members as it has votes, but the Basic Law prescribes that the votes of each *Land* "may be cast only as a block vote."[79] In exercising their rights to participate, take the floor and put questions forward, the members have the duty to act on behalf of their Land and its government, and to undertake action on its behalf.[80] On each of these points, the *Bundesrat* bears a striking resemblance to the Council of Ministers when it legislates under the first pillar of the EU. Moreover also the functioning of the *Bundesrat* and the Council of Ministers is very similar which is most obvious in the participation of both bodies in the legislative process of the federation and the Union,

[77] See Articles 50 and 51 of the German Basic Law. For comment, see Hartmut Maurer, n. - above, at 509 ff.
[78] Article 50 Basic Law.
[79] Article 51 (2) and (3) Basic Law.
[80] Maurer, n. – above, at 515.

respectively, on behalf of the component states.[81] Furthermore, neither the *Bundesrat* nor the Council of Ministers has the power to unseat the executive which, under both systems, is a prerogative that belongs only to the house that represents the people.

Turning back to the Union, all this does not mean that devices must not be put in place to enhance the Council's political accountability, in the sense of being accountable to other institutions for action to be undertaken in the future, or explaining action undertaken in the past. Obviously, one of these devices is to insist on full transparency of Council procedures by making access to Council documents as broad as possible, and requiring the Council to meet in public whenever it acts "in its legislative capacity."[82] A second is to foster the mutual accountability of the two legislative branches by increasing the instances in which they must consult and report to one another, so as to give each branch proper insight in what the other intends to do, and actually does. A third device is to draft a code of ethics that outlines the individual ministers' duties and responsibilities as members of a Union institution.[83] A fourth and most far reaching device would be to increase the involvement of national parliaments – and thus at the national level - in the supervision of the Council of Ministers' work which could be achieved by entrusting the existing Conference of European Affairs Committees (COSAC) with the monitoring of the performance of national ministers when they act in their capacity as Council members. It is uncertain however whether that committee is functioning well and, moreover, it is unclear which sanction the committee could apply when it judged some behaviour of the Council to be inappropriate.[84] An even more far reaching, controversial and surely unrealistic device (that, by some, will be deemed to be insolent) would be to reduce the number of MEPs by half (that is, from maximum 732 currently to 366[85]) and to establish, with the infrastructure and the financial and human resources thus becoming available, a second house of representatives composed of *delegates* from the Member State national and regional parliaments (thus remaining a member of their own national and regional parliament) whose task it would be to monitor the activities of the Council as a body, and to fulfil other assignments such as screening the application of the subsidiarity principle.

[81] See further W. van Gerven, supra n. 23, at 335-336.
[82] See Article I-50 (2) of the draft Constitution; compare with Article 207 (3) EC.
[83] See further W. van Gerven, supra n. -, at 365.
[84] On the committee in a broad context of the involvement of national parliaments in the monitoring of EU institutions, see C. Harlow, *Accountability in the European Union*, Oxford, Oxford University Press, 2002, 101-107.
[85] In the draft Constitution the number of MEPs was raised from 736 to 750.to

Such a parliamentary assembly should not become a Union institution but remain a platform where Member State delegates cooperate in streamlining European integration. That would mean that the Council of Ministers could remain what it is – not ever becoming a second parliamentary house, itself, a change that, most probably, would alienate the Member States and their citizens instead of enhancing the political accountability of the Union as whole.

2. Political accountability of European committees and networks of Member State officials and regulators.

The EU Council (of Ministers) is not the only body of Member State officials which plays an autonomous role at the European Union level - without being answerable, as a body, for past action to an elected assembly at Union or Member State level. For indeed, under the Council, there are many committees and working groups composed of Member State diplomats and civil servants, which find themselves in that same position - most prominently, amongst them, the committee of Permanent Representatives of the Member States (COREPER), provided for in Article 207, § 1, EC and made "responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council".[86] To be sure, individually those committees' members may be politically responsible in their Member State but, even then, they will, I assume, hardly be interrogated there as to whether and how they have performed their work in the interest of the European Union as a whole; rather, they will be asked how they served, at the European level, the interest of the Member State they represent.

In addition to these committees and working groups,[87] there is an increasing number of committees of national regulators set up by EC legislation to foster cooperation, in a specific area of Community policy, between Community and Member State authorities, or between Member State authorities (the Commission being present as an observer), *or* to implement or apply Community rules in the Member States. An example of the first is the network of competition authorities of the Member States set up, pursuant to Article 11 of Council Regulation 1/2003 on Competition, to organize a close cooperation between the

[86] On COREPER and the working groups and preparatory committees operating under the auspices of COREPER, see K. Lenaerts and P. Van Nuffel, (R. Bray, ed.), supra n. 71, pp. 422ff.

[87] To be distinguished from the committees working for, and under the political responsibility of, the EU Commission in accordance with Council Decision 1999/468/EC on "Comitology".

Commission's Competition Directorate General and the 25 Member State competition authorities. An example of the second is the Committee of European Securities Regulators (CESR) set up by a Commission Decision of 6 June 2001, pursuant to a resolution of the Stockholm European Council, to serve as an independent body for reflection, debate and advice for the Commission in the securities field. The committee is also to "contribute to the consistent and timely implementation of Community legislation in the member states by securing more effective cooperation between national supervisory authorities, carrying out peer reviews and promoting best practice." [88] Here also, these networks – especially those of the second kind – are not politically accountable towards an elected assembly, neither at the European level nor at the national level; they rather operate *de facto* in a grey zone, that is on the border line between European and Member State competences, a zone where political accountability is not only lacking but even the application of the rule of law may fail to apply. [89]

If a satisfactory solution were to be found for the involvement of Member States (national and regional) parliaments in controlling the Council of Ministers participation in the European decision making process, that solution might also be of assistance in controlling the action of these national officials and regulators in the implementation and application of Community law in and among Member States.

E. What role for the European Council of Heads of State or Government?

In the draft Constitution the European Council consisting of the Heads of State or Government of the Member States, together with its President and the President of the Commission, was to become a full fledged institution of the Union. According to Article I-21 (1) it "shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions."[90] The Council "shall elect its President, by qualified majority, for a

[88] Commission Decision of 6 June 2001 referred to in the text, recital 9 of the Preamble. See further - briefly but with some references and in a broad context of convergence of private law - my contribution on "Bringing (Private) Laws closer to each other at the European level", in *The Institutional framework of European Private Law* (F. Cafaggi, ed.), OUP, 2006, p. 37ff, at pp. 72-73.

[89] For an excellent discussion, from a viewpoint of legal protection (and thus of the rule of law), with regard to the network of competition regulators, see D. Arts and K. Bourgeois, "Samenwerking tussen mededingingsautoriteiten en rechtsbescherming: enkele bedenkingen", 1 *Tijdschrift voor Belgische Mededinging*, 2006, pp. 26-47.

[90] Compare with Article 4 EU.

term of two and a half years, renewable once" (Article I- 22 (1)). The Council Presidency would basically have the power to drive the work of the European Council forward, to facilitate cohesion and consensus within the Council, and to ensure the external representation of the Union on issues concerning the Union's common foreign and security policy – all powers which the Chair, currently rotating between the Member State Heads of State or Government, has bestowed upon itself in the course of a long series of regular and prestigious summit meetings, beginning in 1974.

All in all, the powers which the draft Constitution has in mind for the Presidency of the European Council are rather modest compared with two other proposals which the framers of the draft Constitution rejected: the creation of a popularly elected president of the European Union, *or* making the president of the Commission the president of the European Council as well. None of these proposals was to be recommended. The first would have transformed the Union's institutional system into a semi-presidential system, French style, in which a Commission President who derives his legitimacy from the Member State governments would exercise his authority in the shadow of a universally elected Council President whilst the second would have turned the Commission president not only into "a first among equals" within the Commission but also among the Member State Heads of State or Government. Such a concentration of powers would have lead necessarily to the conclusion that the Commission President must be elected by the people - which would have transformed the Union into a presidential system, American style. None of these solutions would have been, or is, consistent with the choice of a parliamentary system as advocated hereinbefore.

The solution to be retained therefore, in line with the current situation, is to have a Council President elected by his peers with the power to drive the Union forward but without legislative or executive competences, therefore having more than purely ceremonial powers but having, instead, the prestige and moral authority to facilitate cohesion and arbitrate differences, and to represent the Union in its international relations.

To Conclude.

The answer to the question raised at the outset which was to know what governmental structure the European should adopt in the future, is that neither a pure nor a semi-presidential

system is to be recommended but rather a strong parliamentary system with an executive, the European Commission, whose democratic legitimacy is rooted in citizen involvement through parliamentary elections organized on the basis of political platforms presented by Euro-parties centred around well defined divisive issues. That would make the executive fully answerable towards the universally elected Parliament. As long as the European Parliament shares its legislative competence with the Council of Ministers (it being understood that the Commission retains its (quasi-) monopoly to table legislative proposals) and as long as the Council remains the most prominent part of the Union legislature (as it probably will and should remain for many years to come), the accountability of the Council at the European level should be strengthened through devices such as transparency, mutual accountability between the Council and Parliament, and codes of ethics outlining the duties and responsibilities of individual Council members. The involvement of Member State parliaments in controlling the Council as a Community institution, and controlling the numerous committees and networks of Member State officials and regulators participating in the implementation and application of Community laws and policies, is a commendable solution. The European Council of Heads of State or Government, and its President elected by his peers for a period of two years and half, once renewable, should not be allowed to take over legislative or executive responsibilities but should continue to fulfil their role of driving the Union forward, of facilitating cohesion and arbitrating differences and representing the Union in its international relations.