Democracy, Legitimacy and Constitutionalism

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1   Introduction

The failure to ratify the Constitutional Treaty has prompted a renewed and in some ways refreshing debate on some basic assumptions regarding the democratic deficit of the European Union, ranging from the position that it is in fact *not* a problem to the view that it is a very serious problem indeed.[1] However, far from being novel, these challenges are confronting all political systems with varying degrees of intensity and have been integral to the debate on the future of Europe during the last decades.

The aim of the introduction is to give a brief background to some of the basic concepts used when analysing some of the systemic challenges facing the European Union. The concepts relevant for our present purposes are *constitutionalism*, *legitimacy* and *democratic deficit* which are addressed in more detail in the other contributions in this section. We seek to illuminate the following composite questions:

- Which are the different conceptions of the legitimacy and the democratic deficit and how are they related to each other and to constitutionalism in the EU context?
- Given different conceptions; what are the possible solutions?

There is no need to rehearse the Constitutionalisation process itself here but questions which preceded and succeeded the French and Dutch referenda are central in the following pages. The Laeken Declaration specified a number of challenges which were to guide the work of the Convention on the Future of Europe and even though the focus of the debate has shifted somewhat in the aftermath of the French and Dutch rejections the Declaration remains relevant. The original challenges were specified as [that]:

> The Union needs to become more democratic, more transparent and more efficient. It also has to resolve three basic challenges: how to bring citizens, primarily the young, closer to the European design and the European institutions, how to organise politics and the European political area in an enlarged Union and how to develop the Union into a stabilising factor and a model in the new, multipolar world.[2]

Some of these challenges have been addressed during the prolonged 'period of reflection'[3] but unsurprisingly they have thus far not been officially resolved. The Constitutional Treaty did however contain significant institutional reforms

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1   *See* for example Herzog, R. and Gerken, L. (2007) *Gastkommentar*. Die Welt, 13 January and Moravcsik, A. (2006) *Chastened Leaders need Concrete Policy Success*. Financial Times, 27 January, Special report on "The Future of Europe".

2   SN 300/1/01 REV 1, Laeken Declaration on the Future of the European Union, Annex I to the Presidency conclusions – Laeken, 14 and 15 December 2001.

3   *See* SN 117/05, Declaration by Heads of States or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, (European Council, 16 and 17 June 2005).

and reforms related to the external capacity of the Union – some measures were codifying practices already well under way while other proposed changes were new. 'Bringing the EU closer to the citizens' however rings like a worn out cliché and it is not entirely clear if the challenge now is perceived as a matter of miscommunication or if it meant to be tackled by some form of democratic reforms or new legitimising processes – a whole spectra of reform proposals are on the table and a few of them will be encountered in this introduction and in the contributions to this section. Below we will first try to bring some clarity to the meaning of key concepts and subsequently move on to the different reform strategies before concluding with some possible ways forward.

2   Constitutionalism

The contribution by Professor Shaw contains a condensed primer on constitutionalism in the context of the European Union focusing primarily on the vertical and horizontal relationships between different levels of law and we will only comment very briefly on the state of constitutionalism in the Union. Rather, we will focus on some basic features of constitutions, as such, and below on how they might be related to the democratic deficit and the issue of legitimacy.

   The principal aims of a constitution is normally to create stability in – and predictability of – the political system and to protect values of – or create spheres within – the political system that are not open to political competition through placing a limit on the use of public power. Put differently, the exercise of public power should not be arbitrary but should rest on upon principles. To these ends a constitution normally contains basic instruments of government regulating the functions and powers of central institutions, basic values and human rights.[4] Moreover, in federations and other forms of multilevel polities there are normally some kind of catalogue of competencies which lays down which level has the authority to decide what and who should be the arbiter – or which principle or formula that should be used – in case of conflict.

   Looked at this way, it is hardly controversial claiming that the EU already has a form of constitution and has had one for a long time. What makes the case of the EU special is that neither the rules nor the space it applies to is stable, which of course means that the goal of long-term predictability is hampered by the frequent Treaty revisions and that one of the purposes behind the Constitutional Treaty was to write a text that were to stand the test of time.

   What then is the relevance of constitutions when the real issues at stake are legitimacy and democracy? After all, constitutions entail a practical limitation on democracy (or the reach of majoritarian decision-making), i.e., "limited as opposed to absolute government"[5] – but limited government is also the hallmark of liberal democracies. First, a fundamental part of any democratic system is accountability, i.e., to hold those actors which exercise public power responsible

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4   For an introduction *See* for example Gavison, R. (2002) *What belongs in a Constitution?* Constitutional Political Economy, Vol. 13, No. 1, pp. 89-105.

5   Smith, G. (1989) *Politics in Western Europe*, 5th edition, Aldershot: Gower, p. 125.

for their use of power. At the central level of government this is done either directly by the voters through elections, indirectly by the parliament or through other checks such as judicial review, the latter being frequently used in the European Union. The central link between accountability and constitutionalism is the latter's task to make the location of responsibility transparent and to lay down procedures and structures that ensure that power is - in the words of Føllesdal referring to democracy in general - responsive to the best interest of citizens over time. Just how this is achieved is however a matter of contention to put it mildly, but variables which are often elaborated upon in this context concern *inter alia* the electoral system and separation of powers.

Second, a good constitution can be seen as containing, or more narrowly defined *being*, a form "that structure and discipline the state's decision-making processes" through incentives.[6] Consequentialists could argue that constitutions should facilitate efficiency in delivering desired results. Constitutional design for an efficient tyranny is quite easy to envision, therefore the interesting constitutional trade-off in democratic systems is between state decisiveness and responsiveness to general interests. One central constitutional variable which affects the decisiveness is the number of veto points in the political system[7] and we will return to the tension between input and output of the political system in the section on legitimacy below.

Thirdly, constitutions can promote certain *values* seen as integral to the political system. Even though there is no consensus on the exact array of democratic core values at least two seem to be indispensable; popular sovereignty and political equality.[8] Democratic systems may also promote other types of values such as distributive justice and positive freedom[9] but these are normally not enshrined constitutionally but rather desired (or contested) results from the political process. The European Union is interesting in this context since values which are enshrined in the Treaties concern *inter alia* the protection of markets and competition policy which leads some researchers to reject the notion that the Treaties or the proposed constitution are truly of constitutional status.[10] Related is the feature of some constitutions which contain a *credo* defining the purpose of the polity, for example 'an ever closer union'.

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6   Sartori, G. (1994) *Comparative Constitutional Engineering*, Basingstoke: Macmillan, p. 202.

7   For a discussion *See* Cox, G. W. and McCubbins, M. D. (1997) *Political Structure and economic Policy: The Institutional Determinants of Policy Outcomes*, Department of Political Science, UCSD.

8   Gilljam, M. and Hermansson, J. (2003) *Demokratins ideal möter verkligheten* in Gilljam, M. and Hermansson, J. (eds.), Demokratins mekanismer, Malmö: Liber, p. 14.

9   *See* Young, I. M. (1996) *Political Theory: An Overview* in Goodin, R. E. and Klingemann, H.-D. (eds.), A New Handbook of Political Science, Oxford: OUP, pp. 484ff.

10 Bartolini, S. (2005) *Restructuring Europe: Centre Formation, System Building and Political Structuring between the Nation State and the European Union*, Oxford: OUP, pp. 164-165.

3   Legitimacy

> 'Legitimacy' is one of the most frequently used and misused concepts in political science. It ranks up there with 'power' in terms of how much it is needed, how difficult it is to define and how impossible it is to measure.[11]

In a European context, legitimacy was for a long time not an issue and the integration process was characterised by a 'permissive consensus' meaning that the process was passively approved by public opinion or at least not actively disapproved.[12] The years following the Maastricht referenda saw a decline in public support for the Union and in the turn-out to the elections to the European Parliament; trends that have continued during the first decade of the new millennium triggering fresh concerns about the legitimacy of the EU.[13]

Essentially 'legitimacy' concerns the property of a political system whereby the procedures for law-making and implementation are seen as *acceptable*, i.e., appropriate and binding, by the citizens or more encompassing; legitimacy as a belief that the "existing political institutions are the most appropriate ones for the society" – a definition which stresses the evaluative quality of the concept.[14]

A composite view of legitimacy is found in the analytical framework developed by Fritz Scharpf. First, input legitimacy concerns "government *by the people*" and is closely related to traditional notions of representative democracy.[15] However, he sees a 'thick' collective identity as a precondition for input-oriented legitimation. Shared history, culture and language makes redistribution and (enforced) solidarity acceptable, while Føllesdal in his contribution argues that 'contingent compliance' can be promoted through institutions and institutional design.[16] The concept contingent compliers in this context means that citizens will follow the rules as long as they consider them fair and as long as they believe that others also will follow the rules.[17] In Scharpf's view, input-oriented legitimation is not possible within the European Union but he takes a more positive view on the possibilities for output-oriented

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11   Schmitter, P. C.(2001) *What is there to legitimize in the European Union … and how might this be accomplished?* in Joerges, C. et. al. (eds.), Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, Jean Monnet Working Paper No. 6/01, NYU School of Law.

12   Lindberg, L. and Scheingold, S. (1970) *Europe's Would-be Polity*, Englewood Cliff: Prentice-Hall

13   *See* Norris, P. (1997) *Representation and the democratic deficit.* European Journal of Political Research, vol. 32, no. 2, p. 276f & Hix, S. (2006) *Why the EU needs (Left-Right) Politics? Policy Reform and Accountability are Impossible without it*, Notre Europe, Policy Paper no. 19.

14   Lipset, S. M. (1963) *Political Man. Social Bases of Politics*, New York: Anchor Books, p. 64.

15   Scharpf, F. (1999) *Governing in Europe. Effective and Democratic?*, Oxford: OUP, p. 6.

16   *ibid.*, p. 8f .

17   This notion is related to Rawls' conception of duty of justice, *See* Føllesdal, A. (2006) *EU Legitimacy and Normative Political Theory* in Cini, M. & Bourne, A. (eds.) Palgrave Advances in European Union Studies, Houndmills: Palgrave, p. 161ff.

legitimation, which does not necessitate a collective identity – only common interests,[18] where results not procedures the decisive point, i.e., a political order is legitimate because the citizens accept the *results* of public decisions and the effectiveness of the system (government *for the people*).[19] The primary challenges for output-oriented legitimacy are effective problem solving on the one hand and the hindering of abuse of power on the other. In particular the effective problem-solving – delivering the desired results – is at the heart of Moravcsik's argument and is also the strategy of legitimation that Scharpf gives some possibility of overcoming problems of legitimacy in a European context. To add to the analytical complexity, one can also consider what has been labelled *throughput* legitimacy which concerns how decisions are made and where the deliberative quality of the decision-making process is seen as enhancing legitimacy.[20] These are three different, but of course not mutually exclusive, conceptions of legitimacy. Applied to existing political systems they yield equally different prescriptions if one wishes to address a lack of legitimacy. To summarise, these forms of legitimacy can be seen as focusing on who is a stakeholder; and how and to what effect the decision-making system is functioning.

The complexity does not stop here since it is also possible to analytically divide the principles of legitimation as for example *indirect*, *parliamentary*, *technocratic* and *procedural* legitimacy[21] and in a number of other different ways such as policy legitimacy and democratic legitimacy or to use Føllesdal's sub-categorisation of social, legal and normative legitimacy. This proliferation of analytical schemes is not necessarily conducive to cumulative knowledge but understandable given the complexity of the empirical phenomena it tries to capture.[22] This brief account serves to illustrate the complexity of not only the content of concept but also existence of multiple forms of legitimacy which are not necessarily mutually reinforcing.

Finally, having introduced 'legitimacy' and 'legitimation' we should also try to make sense of the notion of a deficit. Such a deficit could either be identified through comparison with an ideal state or through empirical comparison with existing political systems. However, neither point of reference is necessarily appropriate for evaluating legitimacy in the European Union. Føllesdal lists four different symptoms commonly invoked when discussing the legitimacy deficit; falling popular support, noncompliant behaviour; challenges to the legality of European integration; and shortcomings from a normative perspective.

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18 Scharpf, F. (1999) *op. cit*., p. 11.

19 Zürn, M. (2000) *Democratic Governance Beyond the Nation-State: The EU and Other International Institutions*. European Journal of International Relations, vol. 6, no. 2, p. 184.

20 Zürn, M. (1998) *Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance*. Frankfurt am Main: Suhrkamp, p. 233ff. *See* also Risse, T. and Kleine, M. (2007) *Assessing the Legitimacy of the EU's Treaty Revision Methods*. Journal of Common Market Studies, Vol. 45, No. 1, p. 72ff.

21 Lord, C. and Magnette, P. (2004) *E Pluribus Unum? Creative Disagreement about Legitimacy in the EU*. Journal of Common Market Studies, Vol. 42, No. 1, p. 185ff.

22 But *See* also *ibid*.

Moravcsik in his works uses some of these measures, in particular support and trust, when addressing, in his view, the misconception of a legitimacy deficit in the Union.[23]

Unsurprisingly, this brief discussion leaves us without a consensus regarding legitimacy and how is to be measured. Without any intention of solving this gargantuan challenge we will only refer the reader to some suggested operationalisations of legitimacy. Support, trust, loyalty and acceptance are all integral to the concept of legitimacy and one can follow Easton in emphasising the importance of diffuse systemic support, which is indeed possible to measure.[24] Seen this way, the question of legitimacy of the European Union is an empirical rather than a normative question but there is also the important question of 'support for what, precisely'? Is it for democracy, institutions, constitutions or the political system?[25] Furthermore, as indicated above, there are a number of interesting measures outlined in the contributions.

4   The Democratic Deficit

Both the academic and public debate about the democratic deficit of the EU has intensified substantially over the last couple of decades. The expansion of community competences, the successive treaty revisions, the enlargement processes and the increased use of referenda to ratify treaty changes have all played parts in giving more salience to debates about the democratic credentials of the EU. Through the process of European integration government functions previously monopolized by national government authority have been transferred. While formal political boundaries may not have been substantially altered, the transfer of shared or exclusive competences to the EU seriously challenges the functional boundaries of the polity.

Numerous scholarly efforts have resulted in a multitude of definitions, diagnoses, remedies and prescriptions concerning the nature and of the EU and its political system. According to what is commonly used a *standard definition* of the democratic deficit[26] the central democratic problem is that control over the

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23   Moravcsik, A. (2002) *In Defence of the 'Democratic Deficit': Reassessing the Legitimacy of the European Union*, Jornal of Common Market Studies, Vol. 40, No. 4, pp. 603-634.

24   Easton, D. (1965) *A Systems Analysis of Political Life*, New York: Wiley and Easton David, (1975), *A Re-Assessment of the Concept of Political Support*. British Journal of Political Science, Vol. 5, No. 4, pp. 435-457. *See* also Chierici, C. (2005) *Public support for the European Union. From theoretical concept to empirical measurement*, CEC Working Paper 2/05, University of Twente, for an overview and conceptualisation of diffuse support.

25   For empirical research on support *See* Norris, P. (ed.) (1999) *Critical Citizens. Global Support for Democratic Governance*, Oxford: OUP and Torcal, M. and Brusattin, L. (2005) *A Four-factor Model of Political Support*, Policy Paper Series Democratic Values, No.18.

26   Weiler, J.H.H with Haltern, U.R & F.C. Mayer (1995) *European Democracy and Its Critique*. West European Politics, Vol. 18, No. 3, pp. 4-39. Føllesdal and Hix argue that the debate around the democratic deficit has become even more diverse and contribute with an upgraded version of the democratic deficit that involves five claims: 1) European integration means an increase in executive power, 2) the European parliament is too weak, 3) there are no 'European' elections, 4) the EU is too distant from voters, 5) European integration

political agenda as well as decisions and political outputs has shifted from being under parliamentary control (through the national, parliamentary chains of delegation) to a executive-dominated system at the European level. According to this view, the supranational Commission and the representatives of national governments in the Council of Ministers are the key actors while the parliamentary control exercised by both national and European parliament is deemed inefficient. The central institutional problem is therefore associated with an asymmetry of power and accountability. While national democracies remain intact, the expansion of the degree of decision-making beyond the control of national parliaments has grown substantially and, thus, brings more salience to issues concerned with the democratisation of the EU.

The assessment of the democratic deficit often depends on some basic conceptual differences among which the definition of democracy and how the EU is perceived in terms of the logic of integration and the limitations of the cooperation are central. A common reference in relation the definition of democracy is Robert Dahl arguing that minimally a political system is democratic if a) all citizens are guaranteed the same political rights and b) the political process is structured as a competitive system that foresees and permits government change through general elections.[27] Although many other alternative ways of channelling popular preferences exist we most commonly refer to systems of representative democracy. The EU meets the first criteria at the supranational level through equal voting rights in European parliament elections.[28] The second criteria is more difficult to meet since there is not one electoral arena but each of the national electorates vote for different lists and there is no connection between results in European parliament elections and 'government formation' at the European level. Moreover, neither the elections for national parliaments nor to the European parliament offer the electorates any real choice over European political outcomes, that is, the elections do not concentrate on those issues[29] and voting behaviour is only most indirectly related to future political outcomes. One could argue that European policy trade-offs should be the theme of elections to the only directly elected assembly at the European level, but it has also been advanced that since most of the legislative powers within the EU system and decisions about for instance treaty revisions lay in the hands of national governments and parliaments, national elections should focus on long-term aspects of European integration.[30]

However, this is naturally not the full story of the democratic credentials of the EU's political system. Schmitter argues that the EU lacks many

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produces a 'policy drift' from voters' ideal preferences. Føllesdal, A. and Hix, S. (2006) *Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik.* Journal of Common Market Studies, Vol. 44, No. 3, pp. 533-62.

27 Dahl, R.A. (1989) *Democracy and its Critics*, New Haven, Yale University Press.

28 However, votes are weighted differently depending on the size of the country.

29 Mair, P. (2005) *Popular democracy and the European Union polity*. European Governance Papers (EUROGOV) No. C-05-03,2005.

30 Mair, P. (2000) *The Limited Impact of Europe on National Party Systems*. West European Politics, Vol. 23, No. 4, pp. 27-51.

preconditions necessary to the creation of a democratic system in the traditional meaning that it needs to look for alternative avenues. There is a lack of democratic infrastructure in that the EU lack a clearly defined superior authority, a defined centre and territory, a common identity and common elections and party system.[31] Furthermore, many observers argue, as we saw above, that some sort of common identity is necessary for making majority-decisions acceptable for the minority. It has also been argued that there is a lack of a common European public space.[32]

Due to the hybrid between supranational and intergovernmental modes of integration, there are also different interpretations of which chain of delegation between citizens and public decision-making that matters the most. From an intergovernmental perspective the legitimacy of European level decision-making derives from the national parliamentary chains of delegation. According to this view, the ministers in the Council of Ministers are held accountable in their parliament back home and voters are making judgements on the government's European policies in national elections. From such perspective the lack of citizen control at the European level is of limited concern. However, with the expansion of majority voting in the Council the control of national parliaments is challenged. The theory of liberal intergovernmentalism argues that the integration process proceeds as a result of consensual outcomes between national government representatives.[33] Those representatives are elected nationally (where elections and representation function more efficiently than in European parliament elections) and have good information about voter preferences (so they can pursue policies close to these) and can exert control over supranational agents.

European cooperation also affects the balance of power between national institutions. Proponents of the intergovernmental perspective of integration also note that executives have gained influence and act as legislators at the European arena. The loss of sovereignty of national parliaments to governments leads to an 'executive empowerment'. The mechanism of parliamentary control is easily maintained in areas where unanimity still applies since national parliaments can hold their governments accountable for political action and legislation at the European level. When moving to qualified majority voting, this mechanism of control becomes more difficult since the respective ministers cannot control political outcomes. [34]

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31   Schmitter, P. C. (1997) *Is it Really Possible to Democratize the Euro-Polity?* in Føllesdal, A. and Koslowski, P. (eds.) Democracy and the European Union, Berlin: Springer.

32   Habermas, J. (2001) *Why Europe Needs a Constitution*. New Left Review, No. 11, pp. 5-26

33   *See* Moravcsik, A. (1998) *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht,* Ithaca: Cornell University Press.

34   Bartolini has a different view on these issues. He argues that since decisions are not collectivised issues of legitimacy becomes irrelevant "To the extent that the EU is based on the voluntary agreement of all member states to participate, it leaves a constant option to exit open for all members, it allows partial exits, opt outs, variable geometries and the like, it resorts on many issues to unanimity voting and /or to mechanism of disproportionate weights, so legitimacy is immaterial within the EU and there is little need to discuss it. The

5   Democratisation and Legitimacy

As argued above, the perception of the integration process, as such, has bearing on how the democratic credentials of the EU are evaluated. If one understands the EU mainly as an intergovernmental organisation to which sovereign states have delegated some authority that can be re-nationalised if necessary, the democratic deficit becomes less problematic than if the EU is assigned state-like properties. In the former understanding the expansion of EU-level decision making is legitimised through the national chains of delegation and mechanisms of accountability remain with the national political systems. This mainly intergovernmental perspective can be criticised for having a too static and formalistic view on integration. Even though the national channels of representation may be central to the overall legitimacy of the system and even if expansion of community action is advanced by national leaders, the drift of competence to the European level leads to increasing asymmetries between power and accountability, according to the critics. One key element is associated with the issue of *kompetenz-kompetenz.* The main question is whether or not the EU can expand its own competences and therefore touches upon the issue of which level of the system that has *final control over the agenda.* The link between sovereignty and what construes the demos in a democracy is addressed by this criterion. No other level or agent within the system should have the capacity to overrule the demos in what issues should be on the agenda and not.[35] Still, in an abstract sense, the demos can delegate authority to agents taking actions outside the direct influence of the demos. However, the crucial criterion is that the demos can retrieve any delegation. If it can do so it qualifies as *delegation* and when this mechanism of restoration does not function we are dealing with *alienation.*[36] Alienation in this sense means a delegation of powers that cannot be brought back to the adequate original political arena.

Regardless of which approach one takes to the process of European integration, there is no denying that both the scope and depth of the Union's competencies has increased considerably during the last decades, in particular in the area of joint decision-making. How much of the annual bulk of legislation emanates from the European level is however a matter of contention and estimates vary between 15 and above 80 percent.[37] One study of Swedish laws

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EU does not lack legitimacy; it is not insufficiently legitimate. It is simply *aligitimate* in the sense that the problem is irrelevant to it decision-making." Bartolini 2005, p. 166.

35   Dahl, R.A. (1989) *Democracy and Its Critics,* New Haven: Yale University Press, p. 113.

36   Karlsson, C. (2001), *Democracy, Legitimacy and the European Union,* Uppsala: Statsvetenskapliga föreningen, p. 46ff.

37   This type of estimates are naturally riddled with definitional problems which makes comparison between different studies difficult, but *See* for example Johannesson, C. (2005) *EU:s inflytande över lagstiftning i Sveriges riksdag.* Statsvetenskaplig Tidskrift, Vol. 107, No. 1, pp. 70-84, Hegeland, H. (2005) *EG-rättens genomslag i svenska lagar och förordningar.* Europarättslig tidskrift, Vol 8, No. 2, pp. 398-399. *See* also Nugent, N. (2006) *The Government and Politics of the European Union*, 6th edition, Basingstoke: Palgrave Macmillan, p. 388 and McKay, D. (2001) *Designing Europe: Comparative Lessons from the federalist Experience*, Oxford: OUP, p. 12.

and regulations between 1995 and 2004 found that only six percent were implementing or complementing directives or regulations stemming from the European level. Naturally, such variation in perceptions of reality results in vastly different diagnoses of – and prescriptions for – the constitutional and democratic reforms of the Union. That is to say, if the policy-making on the European level is best characterized as 'marginal' and confined to technocratic regulation, rather than encompassing, political and re-distributional, then the case for comprehensive legitimizing reforms is not as strong as if the 'true' state of affairs is the other way round. As we will see in the contributions, apart from normative differences, this characterization of reality shapes the conclusions of the authors.

6   Reform Strategies

In this section we will highlight some recent contributions in the debate concerning reform strategies aiming at coming to grip with some of the weaknesses of the political system of the EU. The proposals and perspectives highlighted in this section only cover some views from the current debate. The purpose of this limited exercise is merely to indicate some of the various strands in reasoning about the democratic deficit and related issues.

6.1   Politicisation

A recent strand in reform strategies of the EU is to propose an increased politicisation of the European level political system.[38] The politicisation-thesis makes reference to the democratic breakthrough in the nation-state and argues that political conflicts are essential for the introduction of a representative democracy with real electoral choices. Research on party behaviour in the European parliament has shown that party groups are increasingly cohesive and that there is an embryonic European level party system. Conflicts within this party system nowadays resemble those of most national party system and are concentrated around the traditional left-right axis. This provides a good basis for making politics more contested within the polity and to provide a real electoral offer in EP-elections. The argument is based on a competitive model of representative democracy in which the mechanism of accountability functions primarily because there is a choice between altering elites aspiring at controlling the executive.[39] From this perspective, making a European executive accountable before a directly elected parliament would transform the EU-level political system into a more democratic one. The European level executive should by its composition reflect the electoral outcomes in EP-elections. These proposals put emphasis on the importance of political conflicts and alternatives that may foster political awareness and attachment of citizens. Research has often described EU-level policy-making style as consensual. The decision-

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38   Hix, S. (2006), *op. cit.*

39   Schumpeter, J. (1943), *Capitalism, Socialism and Democracy,* London: Unwin.

making rules are organised in such way that political outcomes often are the result of compromises. This leads to mainstream political outcomes that are acceptable to all (or most) actors. Those who favour more politicisation argue that the choices for the EU now are more concerned with issues that are market-making or market-correcting and that this division could provide the basis for alternative visions of future integration.[40]

6.2   Deliberation

Contrary to those arguing that more political conflict followed by a stronger role for political parties and representation would help, a recent strand in democratic theory as well as normative contributions about the EU's democratic deficit emphasise the role of communication and deliberation.[41] Rather than establishing efficient mechanisms of accountability and a stronger role for political parties, some argue that consultation and participation by civil society in the decision-making process at the European level may be a more adequate way of strengthening the democratic credentials of the EU. By gathering representatives of civil society, interest organisations and citizens and deliberate the links between public decision-making and concerned interests should be improved and, thus, rendering more legitimacy to political outcomes.[42]

6.3   Participatory Democracy /Referendum

Treaty revisions as well as issues of membership have increasingly been decided by modes of direct democracy through the use of referenda. While some member states have constitutional provisions stipulating that the people has to be consulted when signing international agreements, most cases of popular consultation have been initiated on a non-required basis by national parliaments or executives. The expected effect is that the legitimacy of those decisions, for instance delegation of more powers to the EU, will increase. While most referendum-outcomes have been affirming, the cases of no-votes have given more resonance (Denmark 1992, Ireland 2001, France 2005 and the Netherlands 2005). The troubles in ratifying the Maastricht Treaty urged some analysts to proclaim the end of the so-called 'permissive consensus'[43]. The logic behind the 'permissive consensus' was that national leaders were entrusted by citizens to pursue policies at the European level despite the asymmetry between power and accountability at the European level.

Experiences of nationally held referenda over European integration have not always been positively perceived. It has been argued that the campaign has focussed on domestic features and that the outcomes may create deadlocks. Still,

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40   Hix, S. *op. cit.*, p. 23

41   Eriksen, E.O and Fossum, J.E. (2002) *Europe in Search of its Legitimacy: Assessing strategies of legitimation,* ARENA Working papers, p. 38.

42   This strategy can be found in the Commission's White Paper on European Governance, COM(2001) 428 final.

43   Franklin, M., March, M. and L. McLaren (1994) *Uncorking the bottle: popular opposition to European Unification in the wake of Maastricht.* Journal of Common Market Studies, Vol. 32, No. 4, pp. 455-472. Lindberg, L. and S. Scheingold (1970), *op. cit.*

the trend of an increased use of modes of direct democracy is highly visible. Furthermore, proposals to hold European-wide referenda have been introduced.[44] The argument for holding European-wide referenda often make reference to the lack of democratic infrastructure and a functioning electoral arena in European politics.[45] It is claimed that by letting all European citizens vote on single issues, truly European preferences that are not distorted by domestic features will come to the fore. This, in turn, is to lead to pan-European debates that will foster awareness that may lead to a strengthening of a European identity.

6.4   Decentralisation

As we saw above, one component of the democratic deficit, conventionally defined, was a general executive empowerment on behalf of national parliaments in EU decision-making. To counter such a drift of powers it has been frequently argued that national parliaments need to become more active in European policy-making in general and vis-à-vis their own executives in particular when it comes to European affairs. As a strategy for democratisation, increased national parliamentary control is more a national than European solution and more partial rather than comprehensive as long as the policy-making is not purely intergovernmental. The underlying condition which makes it so is that parliamentary-executive relationship is a pre-eminently national competence which cannot be regulated or standardised on a European wide basis. Apart from the legal obstacles to a more uniform and effective national parliamentary control, the different parliamentary systems, their histories and idiosyncrasies make general and common rules highly impracticable. Nonetheless, the role of national parliaments was given some considerable thought during the Convention in general and in the area which did not concern domestic structures and procedures the proposed constitution contained improvements in the right to information and time limits to allow for effective scrutiny before decisions are made.[46]

More parliamentary control – or influence – may help to alleviate some aspects of the Union's legitimacy problems, through stimulating public debate, through putting European affairs at the heart of the domestic political arena and through strengthening the representative element in European decision-making.[47] National parliaments are in this context seen as 'better' representatives

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44 *See* for instance the think-tank Initiative and Referendum Institute Europe, "www.iri-europe.org".

45 Grande, E. (2000) *Post-National Democracy in Europe* in Greven, M. and Pauly, L. (eds.) Democracy beyond the State? The European Dilemma and the Emerging Global Order, Boulder: Rowman & Littlefield, 115–38.

46 *See* for example Langdal, F. (2003) *Nationella parlament och beslutsfattande på europeisk nivå*, Sieps 2003:12 and Raunio, T. (2005) *Much Ado About Nothing? National Legislatures in the EU Constitutional Treaty*. European Integration Online Papers, Vol. 9, No. 9.

47 For empirical research on national parliaments and European affairs *See* for example Smith, G. (ed.) (1996) *National Parliaments as Cornerstones of European Integration*, The Hague: Kluwer and Bergman, T. and Damgaard, E. (eds.) (2000) *Delegation and Accountability in*

of the national constituencies (holding preferences closer to the voters) and are seen as the appropriate institutions to control the delegated powers. The *constitutional* rationale underlying the idea of national parliaments as a solution to the democratic deficit is to ensure that parliamentary control capacity is as efficient when dealing with European affairs as with purely domestic legislation. This applies in particular to intergovernmental decision-making but is for the reasons given above never going to be able to fully counteract the actual transfer of resources to the executive, or to other EU institutions. If such tight control were to be implemented across the Member States it would most likely paralyse the decision-making of the Union through substantially increasing the number of veto players. However, while there are a number of benefits from active parliamentary involvement from a democratic perspective it cannot on its own solve the democratic deficiencies of the Union.

Subsidiarity is another important piece in the constitutional jigsaw whose legitimising potential still waits to be fully realised. The difficulties with subsidiarity are partly conceptual and partly practical. For example, is it a principle for the exercise of competencies or for their allocation and is the decisive criterion economic, political or legal?[48] Regardless, it is often advanced as a solution to avoid competence creep and centralisation through bringing decision-making closer to the citizens, through the implementation of policies on the lowest *efficient* level of government, which is not to say that this necessarily is a correct understanding of a principle which may also function in a centralising direction. Exactly how is the subsidiarity principle thought to help alleviate the legitimacy gap in the Union? The general argument seems to be along the following lines; given that the European Union consists of a number of demoi holding diverse preferences on different policy trade-offs coinciding with territoriality, a lower (closer, smaller) decision-making level is to be preferred to a higher (more distant, larger) everything else held equal. If it is true that EU

European Integration: The Nordic Parliamentary Democracies and the European Union, London: Frank Cass.

48 On implementation or allocation *See* for example Bungeberg, M. (2000) *Dynamische Integration, Art. 308 und die Forderung nach dem Kompetenzkatalog*. Europarecht, No. 6, p. 891 and Arbeitsgruppe Europäische Integration, Friedrich-Ebert-Stiftung (2001) *Kompetenzausübung, nicht Kompetenzverteilung ist das eigentliche europäische Kompetenzproblem*, Working paper no. 10, September and Føllesdal, A. (2000) S*ubsidiarity and Democratic Deliberation* in Eriksen, E. O. and Fossum, J. E (eds.) Democracy in the European Union: Integration through Deliberation? London: Routledge. For different scholarly perspectives on subsidiarity compare the arguments of for example Begg, D. *et. al*. (1993) *Making Sense of Subsidiarity: How Much Centralization for Europe?* Monitoring European Integration 4, Centre for Economic Policy Research, p. 35ff and Feld, L. & Kirchgässner, G. (1996) *Omne Agens Agendo Perficitur. The Economic Meaning of Subsidiarity* in Holzmann, Robert (ed.) Maastricht: Monetary Constitution without Fiscal Constitution?, Baden-Baden: Nomos pp. 195-226 which both draws on economic theory with the more (Catholic) cultural understanding of Elazar, D. (2001) *The United States and the European Union: Models for Their Epochs* in Nicolaidis, K. & Howse, R. (eds.) The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union, Oxford: OUP, pp. 42ff and the procedural perspective argued by Bermann, G. A. (1994) *Taking Subsidiarity Seriously: Federalism in the European Community and the United States,* Columbia Law Journal, Vol. 94, No. 2, pp. 332-456.

membership centralises decision-making to the European level creating more uniformity (and efficiency) where diversity would be a preferred state of affairs, a consistent application of a redefined subsidiarity principle could help align policy outcomes closer to the preferences of the citizens, as could a catalogue of competencies with a decentralised bias.

There are obvious parallels in the logic of the arguments regarding national parliaments and subsidiarity as legitimising mechanisms for the EU in that decentralisation of control and policy-making is seen as closer to the best interest of the citizens than in the case of centralisation. This is not least shown by the proposal that the national parliaments were to control the application of the subsidiarity principle in relation to proposed legislation according to the Constitutional Treaty. However, as mentioned above, these are both partial legitimising strategies which may actually co-exist with centralisation and supranational decision-making.

6.5   *Don't Rock the Boat*

Despite the many proposals urging for an increase of democratic structures, accountability and participation in the EU, some scholars argue the opposite. For Majone, the EU should be a regulatory state that does not engage in redistributive politics.[49] In this understanding the main problem is not how to successfully achieve mechanisms of accountability but rather to find institutional solutions that can help guarantee policy-choices that are Pareto-efficient. In order to reach mechanisms of accountability Majone proposes ex-post review by accountants and ombudsmen rather than through electoral delegation and representation The EU does not suffer from a democratic deficit but lacks credibility or legitimacy.[50] This legitimacy may be reached through goal-attaining by maximizing deliverable results. Those results can be accepted –as well as the far-reaching delegation to independent agencies – thanks to their superior results.

7   Conclusion

In our view the main problems with the current constitutional framework are the fused character of the system and complex and unpredictable policy-making – problems that would have become somewhat alleviated, but not solved, by the proposed Constitutional Treaty. Establishing clear lines of accountability and representation, simplifying decision-making procedures and sharper definitions of the competencies for different levels of government and institutions should be in the interest of the citizens of the Union if one is concerned about the democratic deficit of the Union. If these are desirable democratic ends there are a number of different approaches to reform that may be considered as we have

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49   Majone, G. (1996) *Regulating Europe,* London: Routledge.

50   Majone, G. (2000) *The Credibility Crisis of Community Regulation*. Journal of Common Market Studies, Vol. 38, No. 2, pp. 273-302.

seen above and we would like to highlight at least two approaches which we deem worth serious consideration.

First, the expanding scope and blurred boundaries of EU competence is as we have indicated above a cause for concern from a democratic perspective considering the adverse effects on primarily accountability but also on diversity. During the first 50 years decision-makers in the European integration process has prioritised efficiency and flexibility at the expense of diversity and accountability and the question is if the time has come to shift the balance in this trade-off. To address this problem we propose that two counter-majoritarian mechanisms should be further considered separately or jointly. First, a catalogue of competencies with a federalization of the Union where not only the exclusive competencies of the Union are specified but also the exclusive competencies of the Member States is the radical approach. Such a solution would help curbing centralization while at the same time making accountability easier to exercise on each level of government separately. However, since it is a very radical approach which would imply that sovereignty does not rest with the member states by default it is not likely to be realisable unless a systemic crisis provokes a refoundation of the Union. Secondly, we agree with Føllesdal that the formulation and the implementation of the subsidiarity principle is worth exploring more fully, bearing in mind that it has been part of the policy-making process since 1993. While a strict subsidiarity principle may stop or hinder competence creep its impact on clarifying responsibility is not as efficient as a catalogue of competencies and some continued blurring of responsibility could be expected to continue to exist if we were to go down that road. It may be worth noting that these reform strategies may be seen as being clearly at odds with past successful modes of integration. If one is concerned with efficiency and the Unions adaptability, reforms that involve introducing more veto-points in the system may decrease the capacity of the Union to effectively address issues that are salient at a given point in time and thus adversely affect the Union's output legitimacy.

The second related area we would like to highlight is the lack of political contestation which is becoming an increasingly serious problem as the powers of the Union has expanded. The main concern here is the lack of efficient mechanisms of representation. The proposals above dealt with the management and constitutionalisation of vertical divisions but constitutionalisation of *political* divisions is not in accordance with basic democratic principles. There are basically two proposals which in our view are worth considering further. First, a politicisation of the European arena, where patterns of conflict familiar from the nation state are reproduced on the European level and where citizens through political participation are offered a real voice in policy choices. The main drawback with this approach is that there are still no structures for conflict management on the European level and that the nature of the EU polity risks creating permanent minorities which undoubtedly will undermine the legitimacy of the Union. The second and probably less disruptive approach is national and would entail giving European politics a more prominent standing in national politics and where national politicians would have to explain and propagate their European agendas much like they do with their national agendas. Such a normalisation of "national European politics" may bring several benefits in

terms of accountability, preferred outcomes and legitimacy. However, it should be noted that this idea has been repeatedly proposed and has mostly materialised in terms of divisions over constitutional matters (a national vs. European cleavage) rather than a left – right cleavage on European issues recognisable from the domestic political settings.

Finally, it is worth keeping the current impasse in the process of constitutional reform in mind. Some, if not all, of the reform strategies outlined in this introduction are not possible without Treaty revisions while some may possibly be implemented without changing the Treaties. Whichever turn the constitutional process will take in the coming years it is imperative that the decision-makers keep the problems outlined in this introduction in mind and addresses them. Ignoring problems of democracy and legitimacy in the European Union may in the long run prove a very costly for the European political system(s).

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