The Unfinished Democratization *of* Europe

ERIK O. ERIKSEN

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For Andreas, Håkon, Henriette, and August

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Preface and Acknowledgements

This book has had a long journey. It started in 2002 when we initiated the project *Citizenship and Democratic Legitimacy in the European Union* (*CIDEL*) and was carried on with the instituting of the *RECON* project in 2007.[1] It is the result of several years of work to come to grips with the fact that a new political order has arisen in Europe, and one which has transformed the Westphalian order. For the first time in human history, we witness the development of a political order that is not based on a culturally homogenized people, or brought about by coercion and brute force. The nature of the European Union is a large and contentious issue, but nevertheless it is one which has brought to the fore the question of whether post-national democracy is possible. Are we now witnessing the third transformation of democracy—to a post-national form—succeeding the transformations to the city-state and to the nation state? Alas, the resources for such a move are shallow at the European level and it is the member states that hold the means of legitimate violence in reserve. The European Union (EU) is a polity that does not itself have direct control of a given territory; it lacks a collective identity; truly hierarchical principles of law and powerful enforcement means.

In order to know what is to be democratized one needs a grip on *the nature of the beast*. But what does it entail to talk of democracy at the European level? Does it imply establishing democratic institutions like the ones of the nation state? Does it presuppose a European people, a nation or something less? Can there be constitutions without a state and can there be democracy without it? The question is, in other words, whether democracy really can be disassociated from its hierarchical, nation-state foundation. To clarify such questions requires the joint effort of many disciplines, as normative, legal, and socio-political aspects are interwoven.

Fortunately this has been much of a collaborative work and I have benefited greatly from discussions, collaboration, and co-writing. I am grateful for all that I have learnt from my colleagues at ARENA over the years and the networks I have been taking part in. In particular, I am indebted to John Erik Fossum, with whom I have cooperated for years, and who generously allowed me to reprint a co-authored article (Chapter 4). I am grateful to Agustín José Menéndez who urged me to take European law seriously, and to Helene Sjursen who made me aware of the importance of the EU's external dimension.

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[1] On the CIDEL project, see <http://www.arena.uio.no/cidel/index.html,> on *Reconstituting Democracy in Europe* (RECON), see <http://www.reconproject.eu> (both accessed 23 March 2009).

Chapter 4: 'Europe in Search of Legitimacy: Strategies of Legitimation Assessed', *International Political Science Review*, 25/4 (2004): 435–59.

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Parts of this book have been presented in seminars and conferences, in Oslo, Florence, London, Frankfurt, Chicago, Copenhagen, Stockholm, Madrid, Aalborg, Austin, Berlin, Montreal, and Riga. A number of people have commented on specific topics raised in this book, among them are Lars Blichner, James Bohman, Hauke Brunkhorst, Damian Chalmers, Nicole Deitelhoff, Rainer Forst, Harald Grimen, Daniel Gaus, Jürgen Habermas, Kerstin Jacobsson, Christian Joerges, Knud Erik Jørgensen, Marika Lerch, Anders Molander, Jürgen Neyer, Johan P. Olsen, Ulrich K. Preuss, Kolja Raube, Thomas Saretzki, Rainer Schmalz-Bruns, Philip Schlesinger, Anne Elizabeth Stie, Hans-Jörg Trenz, anonymous reviewers for Oxford University Press, and Philippe C. Schmitter and Christopher Lord, who commented critically on the penultimate version of the manuscript. The comments I have received are immensely valuable although I am not sure to what degree I have managed to satisfy my critical interlocutors.

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List of Abbreviations

ASEAN	Association of South East Asian Nations
CAP	Common Agricultural Policy
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
COREPER	Committee of Permanent Representatives
COSAC	Conference of Community and European Affairs Committees of Parliaments of the European Union
CT	Constitutional Treaty
DiDeP	Direct Deliberative Polyarchy
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EP	European Parliament
EPC	European Political Cooperation
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EU	European Union
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICC	International Criminal Court
IGC	Intergovernmental Conference
IMF	International Monetary Fund
MEP	Member of the European Parliament
Mercosur	Southern Common Market
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
OECD	Organization for Economic Cooperation and Development
OMC	Open Method of Coordination
OSCE	Organization for Security and Cooperation in Europe
SEA	Single European Act
TEC	Treaty establishing the European Community

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WP	White Paper
WTO	World Trade Organization

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Introduction: European Democracy in Transformation

The history of the European integration project is replete with conflict and rivalry. Deadlocks and stalemates have however been overcome and it has sustained a rapid growth and development, in particular throughout the 1990s. The European integration process is characterized by historians as *revolutionary*,[1] but is not universally embraced. Critique flourishes and support of the European Union (EU) has been declining in parts of Europe. Disagreement stems from different conceptions of the EU qua polity; different conceptions of the nature and direction of the integration process; and different conceptions of democratic legitimacy. Notwithstanding recent confusion and disagreement about its nature and telos, the EU has developed into a political union with extensive competencies and powers. A political order that is distinct from its constituent parts has arisen, one which has transformed the Westphalian truism of sovereignty. Classical international law guaranteed the equal status of sovereign states and the state's independence from outside intrusion. In Europe the nation-states have managed to domesticate international relations among themselves. By institutionalizing supranational dispute mechanisms, a pacific settlement of conflicts is enforced. Today war seems unthinkable among the large European states.

The European integration project was a reaction to a belligerent past. It originated in the ruins of the Second World War, aiming at ending nationalist aggression and inter-state war. From the very outset this was a normative project about the (self) containment of Germany, ending war in Europe, achieving stability and peaceful coexistence. This project has resulted in a new political order without historical precedent, and one which has committed itself to democracy. The European Union has embraced democratic principles, yet it falls short of fulfilling these principles itself; hence the *democratic deficit*. This problem is not confined to the institutional arrangement at the European level as the EU is a complex multi-level entity that impinges on the democratic character and performance of the member states and even on affiliated non-members. This means that we cannot establish the member states' democratic legitimacy without properly taking the effects of the EU into account.

This book deals with the puzzle that democracy, which hitherto has existed only on the nation-state level, now is expected of the EU to appear in a post-national

[1] See Hitchock 2003: 436. See also Judt 2005.

union. What does this mean in theoretical terms, can it be realized at all, and if so, how far has European integration proceeded along this developmental path? The book purports to contribute to democratic theory under conditions of globalization and intensive *interdependence* as well as to the understanding of the EU from a democratic point of view. The EU is the most advanced experiment in democracy beyond the nation-state, and one which challenges widely held assumptions about the preconditions for democracy.

The debate on supranational democracy in Europe hinges on the fact that there is something to legitimize, that is, that the EU is not merely an intergovernmental organization controlled by the nation-states. The EU at present consists of twenty-seven member states and influences states and citizens directly. The overall claim in this book is that the EU can no longer be understood as an international organization whose legitimacy derives solely from the member states but should be seen instead as *a polity in its own right* with direct links to the citizens. The topicality of the question as to whether there can be democracy beyond the nation-state is sharpened by the fact that Europeanization and globalization are frequently held to undermine national democracy. But can post-national democracy be realized at all?

It goes without saying that democracy is always unfinished. It is a contested concept and an ideal that can never be fully realized. We can therefore only talk about *democratization* of established power structures as a measure of democracy. Thus, the end product is not democracy *tout court* but a state of affairs that complies better with proper standards than the present state of affairs in Europe. By democratization we generally mean curtailing the level of domination in society and increasing the possibilities for collective self-determination. In line with the theory of deliberative democracy, democratization is here further specified to mean increasing the possibilities for offering the citizens justifications for the power structures they are subjected to.

In this introduction, I will start by spelling out some of the supranational aspects of the multi-level constellation that makes up the European Union, which distinguish it from an ordinary international organization. Then, I outline the presumption about democracy as the legitimation principle of power and discuss why constitutionalism rather than state sovereignty comes to the fore in a post-Westphalian order. Thereafter I revisit the debate on European democracy, which I group into three different positions. Lastly, I present an overview of the chapters making up the rest of the book.

BEYOND SIMPLE INTERGOVERNMENTALISM

The new political order was brought about in a cooperative and voluntary manner and through the means of enhanced economic collaboration. Starting with the Coal and Steel Community (ECSC) in 1952 between Germany, France, Italy, and the Benelux countries, it has emerged into a forceful political entity. This was the first time powers were delegated to a supranational organization—the High

Authority, which later became the powerful European Commission—that took hold over a policy area of vital interest to the nation-states. Coal and steel are what weapons are made from and should therefore be reciprocally controlled. Or as the Schuman declaration (1950) put it:

> By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.

European integration was brought about by bold initiatives from committed European leaders and supported by stakeholders in different countries. In one perspective it has been an elite-led project, and one confined to cooperation in areas of mutual interest. Conflicts with regard to the expansion of the Communities' competences were resolved through complex rounds of bargaining at Intergovernmental Conferences (IGCs). At late hours and in closed-doors settings deals were made and bargains struck on Treaty changes.

In another perspective, the focus is on Community-established institutions and procedures for identifying and solving common problems on their own. Autonomous cooperation freed from political bargains and political struggle for power has also been a conspicuous feature of the European integration process, creating a basis for increased understanding, more compromises and progress. Trust and faith in the integration process, which has been fostered through continuous contact and cooperation in more or less independent problem-solving sites, has prepared the way for new initiatives—for further deepening: from the Paris (1951) and Rome (1957) Treaties, through the Single European Act (SEA) (1986), Maastricht (1992) and Amsterdam (1997) to the Nice Treaty (2001), and further to the Laeken Declaration (2001), the rejected Treaty establishing a Constitution for Europe (2004) and the ensuing Lisbon Treaty (2007). Through these processes of steadily firmer and more institutionalized forms of cooperation, the European nation-states have been transformed. They have been 'Europeanized'. The nation-states have voluntarily circumscribed their sovereignty and reduced their autonomy. In many areas the nation-states have surrendered their veto powers.[2] As noted by the European Court of Justice (ECJ):

> By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sover eignty or a transfer of powers from the states to the Community, the Member States have limited their soverign rights and have thus created a body of law which binds both their nationals and themselves.[3]

[2] They have accepted restrictions on their sovereignty not only for the sake of cooperation with other states but also for the establishment of a 'legal system of peace and justice between nations' as it is stated in the Italian Constitution, Article 11. Other European states' constitutions contain similar paragraphs.

[3] Case 6/64, *Costa v Enel.*

The supranational character of the legal structure of the EU started with the acceptance of a constitutional reading of the founding treaties, already in the 1950s, and explicitly in the 1960s,[4] which transformed the European Economic Community (EEC) from an international regime into a quasi-federal legal system based on the precepts of higher-law constitutionalism. This was generated by the ECJ in the combined doctrines of *direct effect*, which affirms the full legal character, under certain conditions, of EC norms; and *supremacy of Union law*, stating that national norms must give way to Community ones when an irreducible conflict arises within the scope of application of the Treaties. This has been coupled with the growth of the number of EU provisions and Court rulings, where the Court acts as a trustee of the Treaty and not as an agent of the member states. The EU appears to have reached a stable political form based on a *material constitution* (Menéndez 2004).

The upshot is that European citizens are subjected to decisions that have not been decided unanimously among the states but by qualified majority vote in the Council. A state rights clause is non-existent in the Treaties. In its place there is a subsidiarity clause claiming that 'decisions are taken as closely as possible to the citizen', with little legal bite (Somek 2008). Slowly, the European Community emerged into a supranational organization with legal personality and a legal system based on the precepts of higher-law constitutionalism. It has materialized into *a polity in its own right* and one with a democratic vocation.

Democracy came to the fullest expression through the decision in 1976 to elect the representatives of the European Parliament (EP) by direct universal suffrage, making it the only genuinely supranational parliament in the world. Further, the Treaty of Maastricht established European Union citizenship, and this as well as other individual rights make up critical components of democracy as self-legislation. In the Amsterdam Treaty, the commitment to democracy was entrenched. The EU is more than an international organization forged on the basis of the mutual interests of the member states. It is also inadequate to see the process of conflict resolution *solely* as a result of threat-based bargaining, because how can unequally situated governments, each in pursuit of its own self-interest, bargain rationally with one another, and yet arrive at a system with some form of democratic imprint? The EU, unlike an international organization, carries out its affairs not through diplomacy and crude bargaining, but through a set of institutions and procedures. The European Treaties have the function of a constitution as they establish both a unitary European citizenry distinct from national ones and a set of autonomous European bodies: the European Commission, the European Council, the Council of the European Union, the European Court of Justice and the European Parliament, which make European-wide law and are devoted to the Union itself.

The system is endowed with an *authoritative dispute resolution mechanism*—the ECJ, which bases its rulings on recognition of the primacy of Union law. The

[4] See the leading cases: 26/62 *Van Gend en Loos* and 6/64 *Costa v Enel*. On the supranational character of EC law, see Weiler 1999a; Alter 2001; Stone Sweet 2004.

EU is, thus, an entity with competences and capabilities of its own. Moreover, it has in recent years undertaken steps to reduce its democratic deficit. All legal persons, and not only states, have judicially enforceable rights, and legitimacy established through domestic channels, through national democracy, has been supplemented with direct channels of influence. The European Parliament has obtained more power and majority vote has replaced unanimity as the means of arriving at decisions in the Council in most policy fields. Moreover, the Charter of Fundamental Rights of the European Union (2000), as *consolidation* of existing law, applies to all citizens of Europe and strengthens the protection of the citizens at the supranational level. Hence, the EU is a Union both of *states* and of *citizens*.

The European Union is a novel type of entity whose principled and constitutional status is ambiguous and incomplete and whose underlying telos is not clear. It is burdened with legitimacy deficits with regard to structure, process and project. *Structural* problems refer to the EU's weakly developed legislative structures, including the lack of European political parties, a proper public sphere, a cumbersome and executive-driven policy process, and an 'incomplete' constitutional arrangement imbued with an inadequate separation of branches of powers. The *process* of integration is widely criticized, although the critics often do not agree, nor do they emphasize the same problems. For instance, some critics are concerned with costs and efficiency, others with technocracy and lack of popular participation and due process, and yet others with the absence of a sense of community and identity. Also as a *project* the EU is criticized. Is it a good idea, what are its merits and whose interests does it serve? Some denounce the EU for its lack of ambition, others for its overly strong ambition. In the member states, many are sceptical concerning the Union's policies. This distrust is manifest not only in the low turnout in the elections to the European Parliament, but also in the loudly voiced opposition of anti-modernization and anti-globalization groups. Such scepticism was revealed in the popular rejections of the Constitutional Treaty (CT) in France and the Netherlands in 2005 and of the ensuing Lisbon Treaty in Ireland in 2008. With the treaty-reform process coming to a halt, many commentators have been prompt to assert that the European Union is in crisis. This stands in stark contrast to the euphoria with regard to the 2004 enlargement of the Union to ten new countries from the East and the South and with regard to the Constitutional Treaty signing ceremony in Rome later the same year.

IN SEARCH OF JUSTIFICATION

The problem of the legitimacy deficit of the EU raises the question of *the nature of the entity*, which values it promotes and how it can be justified. In this book, I start from the premise that the EU exists as a powerful entity; it is a system that makes authoritatively binding decisions and exerts influence over its subjects. Such an order of dominance is in need of justification. In particular, it requires a set of procedural norms through which legitimacy can be claimed and contested.

I am not concerned with why the EU is, or whether it should be, in place. Rather, given the fact that it has been brought into existence and affects the interests and identities of European citizens and states in a profound manner, the question is whether it can achieve legitimacy, and on what grounds. A European basic structure exists—with economic, political, legal, and cultural institutions involving citizens in comprehensive schemes of social cooperation, the effects of which are far-reaching and for the most part unchosen by the people.

The point of departure is that the EU is a *large-scale experiment* searching for binding constitutional principles and institutional arrangements beyond the mode of rule entrenched in the nation-state. State power is being domesticated by supranational law, and the only possible legitimacy basis for this law, I contend, comes from the constitutional developments in Europe that emerged in the wake of the French Revolution, and which for more than 200 years now have contributed massively to both the creation and stabilization of nation-states. It was in *The French Declaration of the Rights of Man and Citizen* (1789) that for the first time the members of a European polity were conceived of as *social and political equals*. In the republican tradition constitutions are arrangements for respecting the equality and the freedom of the individual in the realization of the idea of popular self-government; or as it is stated in §6 of the same declaration:

> Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives, in its formation; it must be the same for all, whether it protects or punishes.

The argument in this book is that it is this notion of a democratic sovereign—a self-governing polity—that animates the criticism of the integration process, the accusation of an elitist and technocratic driven process, as well as many of the reforms undertaken to meet the criticism. In democratic states there is a presumed link between the normative validity of a political order and the social acceptance of this order. One therefore can expect that when integration has reached a point where the supranational institutions wield influence over the citizens and the states—when the EU is not merely an international organization—there is a requirement of democracy because this is the only justifiable standard of political legitimation available in Europe.

I make two claims. First, that democracy (however understood) is the only morally sound principle for the legitimation of political domination. The EU needs legitimation and such can be accomplished only through institutionalizing democratic rights and procedures through which the addressees of the laws can exert influence and put decision-makers to account. At a minimum these entail equal political rights, civil liberties, freedom of expression, and principles for accountability. Second, that the reform processes of the Union testify to the emergence of a post-national union with democratic features. The latter is a contentious claim that needs further empirical investigation to be corroborated. My argument is that the political system of domination already in place at the European level requires and aspires to direct legitimation—from the citizens

themselves; and not only indirect—derived from the member states. This can be achieved only by making the EU into a democratic polity.

In particular since the establishment of a directly elected European Parliament in 1979, and after the hard-won referenda over the Maastricht Treaty in the early 1990s, we have witnessed a reform process oriented towards repairing the democratic deficit of the Union. Two conspicuous traits stand out. First, the Charter of Fundamental Rights of the European Union, proclaimed at the Nice IGC in December 2000. The Charter, which made up Part II of the Constitutional Treaty, is in the Lisbon Treaty replaced by a cross reference, which makes the Charter binding and gives it the same legal value as the Treaties.[5] The Charter of Fundamental Rights lends credence to the notion of the EU as an organization of legal consociates rather than a market. Second, the decision to establish the Convention on the Future of Europe at the Laeken Summit (European Council 2001a), later dubbed the *Constitutional Convention*, which drafted the Constitutional Treaty (ratified in eighteen member states[6] but rejected in the two popular referenda in France and the Netherlands).[7] The ensuing Lisbon Treaty is at the time of writing in limbo after being rejected in an Irish referendum in 2008, but expected to come into force in 2010. These two developments are the most important signs that the EU is involved in democratic constitution-making.

One may however ask whether democracy is at all possible beyond the nation-state. Are the resources in the form of *a uniformity of interests* that Tocqueville (1835–40) required; the *mutual sympathy among the populations* that John Stuart Mill (1861) saw as a condition; the '*reflexive homogeneity*' that Claus Offe (2003a) holds to be intrinsically linked to democracy, available at the European level? Or are they at all necessary for post-national democracy? To this date, democracy has relied on criteria that are derived from the nation-state. As there are global and post-national forms of governance, there may be a need for a conception of democracy that is decoupled from the nation-state model.

THE MYTH OF WESTPHALIA

International organizations occupy an uneasy place in democratic theory. Can such entities develop into democratic organizations, or will they affect established political institutions and identities adversely? The process of European integration

[5] Article 6.1 Treaty on European Union (TEU), as amended by the Lisbon Treaty (Official Journal C 115 of 9 May 2008). A Protocol introduces specific measures for the UK and Poland seeking to establish national exceptions to the justiciability of the Charter: 'Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom'. See further Chapters 4 and 5 on this.

[6] In order of ratification date: Lithuania, Hungary, Slovenia, Italy, Greece, Slovak Republic, Spain, Austria, Germany, Latvia, Cyprus, Malta, Luxembourg, Belgium, Estonia, Finland, Bulgaria, and Romania.

[7] In the French referendum, held on 31 May 2005, 55 per cent of the voters said 'no' to ratifying the Constitutional Treaty. In the Netherlands, a consultative referendum was held on 1 June 2005, in which it was rejected by 61.5 per cent of the Dutch voters.

is spurred by intense *mutual interdependence*, and is linked to processes of globalization and denationalization that pose problems for national democracy. Economic globalization implies that decisions are increasingly made in contexts well beyond national control, and the range of policy options available to national decision-makers is greatly narrowed. In a globalized context, the scope of social organization no longer appears to coincide with national territorial boundaries. Trans-border problems such as capital flight, tax evasion, volatile global financial markets, large-scale population movements, pollution and the like are beyond the reach of nation-state capability. Increasingly, political bodies beyond the nation-state are required to cope with this new problem scenario as well as to curtail arbitrary power. The present delegation of powers to external organizations and the law production in international bodies leads to *juridification, technocratic governance, and executive dominance.* These problems are generally associated not only with globalization but with the European integration process as well, which, however, can also be seen as an effort to catch up with them politically.

Is there any possibility for bringing the common will of the peoples of Europe to bear upon EU decision-makers? Under the established conditions of interdependence, cooperation and institutional responsibility it is difficult to meet the democratic claim that decisions should be either made through a process inclusive of all those who are affected by them, or acceptable to all those who are affected. It is hard to achieve *full political equality* in an international context.

On the other hand, if political communities are no longer only national, the idea of self-government needs to be rethought. Today, the process of globalization is helping to bring forth the emergence of a transnational community and new forms of governance above (as well as below) the state. It is of interest to explore what notions of legitimacy and capability such forms are based on, and whether they do contribute to democracy beyond the nation-state.

European integration is a process in motion, and the EU is an unsettled order. Jacques Delors once called it *un objet politique non-identifié.* The EU provides us with an *experimentarium* for testing alternative ideas of legitimate rule beyond the nation-state. In Europe the political community is no longer merely statal or national, the sovereignty of the states no longer (if it ever was) absolute and undivided. The EU has pooled sovereignty within a territory that it does not fully control. These developments have come to reflect a multi-dimensional and disaggregated conception of sovereignty and a move beyond the Westphalian order, that is an order in which states are held to be sovereign with fixed territorial boundaries and entitled to conduct their internal and external affairs autonomously, without any possibilities for external actors to control the protection of human rights.[8]

[8] Sovereignty may take different forms, but the classical doctrine states that 'first, no one can be the subject of more than one sovereign, second, only one sovereign power can prevail within a territory, third, all citizens possess the same status and rights, and fourth, the bond between citizen and sovereign excludes the alien' (Linklater 1996: 95).

In this order the international society is in a state of anarchy in the sense that there is no higher authority to appeal to. Anarchy is limited and *organized*, as it is a legally sanctioned attribute of the states system. A further presumption is however that sovereignty is not simply a legal status; it is also a description of state power: states control the main levers of power and have the capacity to exercise territorial control within the legal, economic, and cultural realms. In this sense 'anarchy is what states make of it' (Wendt 1992). Deals will be struck that reflect the asymmetrical power relations in the international sphere of states, hence the prevalence of threat-based bargaining with the accompanying characteristics of side-payments, horse-trading and package deals. Within the European setting, where state power varies considerably, no single state is strong enough to enforce its will. Systematic change has occurred in the political order of Europe, moving beyond Westphalia (Ruggie 1993). One should, however, realize, as already Hegel (1821) and Carl Schmitt (2003: 167) did, that state sovereignty was never absolute, not even in its most Hobbesian moments; it rests on shared political norms and *mutual recognition* and on institutionalized procedures for conflict resolution between the states. From this perspective constitutionalism, rather than state sovereignty comes to the fore.

This is more so as legal developments over the last half-century have been remarkable, and one of their main thrusts has been to protect human rights, moving classical international law in the direction of cosmopolitan law. The development of the United Nations (UN) (and regional entities such as the European Convention on Human Rights), whose global entrenchment has been re-enforced through multilateral arrangements for regulating economic international affairs (such as the World Bank Group, GATT, IMF, and the WTO), and their accompanying set of institutions, first delimited, and later redefined, the principle of state sovereignty. Aggressors can now in principle be tried for crimes against humanity, and offensive wars are criminalized. Thus, international law may have changed so that state sovereignty has become *conditional* upon citizens' sovereignty. *Staatsräson* is no longer the sole priority, as the individual has become the state's *raison d'être*. On this background, advocates of cosmopolitan democracy challenge the notion of sovereignty and, drawing on the work of Hans Kelsen (1920, 1944) and others, have argued to replace the concept of sovereignty at all levels with *constitutionalism*.

The mentioned remarkable legal developments have been hard to account for and the implications have to a large degree gone unnoticed. The myth of the Westphalian order prevails,[9] and not only in the (much taken for granted) template of international relations (Osiander 2001), but also in the *methodological nationalism* of the social sciences in general (Beck 2003).There is need for theoretical innovation in order to grasp and account for the underlying normative order of the 'system of states' as well as the developmental path towards *cosmopolitization*. By this is meant not only trends towards a constitutionalized world order but also the inclusion of universal categories—human rights clauses—in national constitutions.

[9] See Kelsen 1920. For another take on the myth of state orders, as symbolic orders, see Cassirer 1946.

First of all there is a need for reassessing sovereignty. Nominally, it depicts the legal capacity to act on common action norms independently and 'the right to issue orders backed by threats which are generally obeyed' (Hart 1997: 25). It is a principle stating that an order is free if it is not dominated by others, but it does not any longer depict the status of territorially limited absolute powers. It is an ordering principle of international affairs, as well as a status and a set of rights and privileges (Morgan 2005: 139). However, increasingly it has been legally circumscribed and embedded in a normative structure of mutual recognition. A state does not cease to be sovereign even if it has delegated certain of its rights, powers and privileges to a supranational order whose decisions it cannot veto; but a state can reach a point wherein it has delegated so much that other states no longer regard it as a sovereign state. In Europe, borders are not absolute barriers, state sovereignty is pooled and delegated, constrained and transformed (Jackson 2000: 346), and the dividing line between domestic and foreign politics is blurred.

Secondly, there is a need for theoretical innovation with regard to accounting for these processes in empirical terms. What notions of agency, of rationality and legitimacy, are required? Max Weber (1946: 280) stated that interests can only be realized as far as they are connected to justificatory ideas, and ideas can only be realized as far as they are connected to existing interests. We need to know what kind of competence and skills, and what social, moral, and cultural resources made the European development possible. A European identity, which could make up the common value base required for effective collective decision-making of a post-national sovereign, is feeble. Is democracy then possible at the European level? Can it be disassociated from its putative nation-state foundation? Is it true that without the 'enabling condition of sovereignty'—with 'some form of law, with the centralized authority to determine the rules and a centralized monopoly of power of enforcement'—there can be no justice (Nagel 2005: 116)?

EUROPEAN DEMOCRACY REVISITED

There are different solutions as to how Europe could handle interdependence among the states and the putative democratic deficit of the emerging order.[10] Three positions that cut across ideologies and academic disciplines can be discerned.[11] The first, most dominant, takes as its key premise that *the nation-state is the container of democracy.* The challenge facing proponents of national democracy is that in today's

[10] On this debate see also Majone 1998 and Moravcsik 2002, who contend there is no deficit. According to Moravcsik (2002: 605), 'Constitutional checks and balances, indirect democratic control via national governments, and the increasing control of the European Parliament are sufficient to ensure that EU policy making is, in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens.' For a rejoinder, see Bellamy 2006; Culpepper and Fung 2007; Føllesdal and Hix 2006; Kaina and Karolewski 2007; Schäfer 2006. See also Schmitter 2000.

[11] This section draws on Eriksen and Fossum 2008.

Europe, a range of processes generally labelled under the heading of globalization are seen to *undermine* the salience of the nation-state as the embodiment of democratic government. Conservative Eurosceptics see European political integration as synonymous with the factors that drain out the essence of nationhood.[12] Social democrats and communitarians claim that the European integration process sustains a neo-liberal supranational order, an order that undercuts both the systems of risk regulation and the measures of solidarity that were such characteristic traits of the European welfare state.[13] Taken together, these factors are seen to sustain a system of multi-tiered democratic deficits. Many students of democracy go further and argue that the democratic deficit is not merely a contingent matter relating to the effects of globalization, but refers to a lack of core civic democratic components such as a common European public sphere (Grimm 2004). Some underline the structural character of the problem: it highlights built-in limitations in the *scale* of representative democracy. Robert A. Dahl (1999), for instance, has argued that, beyond a certain scale representative democracy cannot work; thus, extending representative democracy to the European level lengthens the democratic chain of legitimation and *heightens citizens' alienation*. The most obvious solution is to roll back integration. But can the rolling back of European integration *rescue* national democracy under conditions of interdependence and globalization? The merit of this solution is disputed by other analysts who argue that the main challenge to national democracy does not emanate from European integration, but instead from *decisional exclusion* as a result of denationalization and globalization. Dahl's argument about a 'reasonable threshold' of size can also be countered:

- the right size of the republic is not clear as the American federalists already recognized;
- the current interdependent international affairs subject the individuals to foreign decision-making;
- with the deprivation of any form of direct international representation 'the relative weight of each individual's vote should be even more severely discounted' (Marchetti 2006: 302); and
- public deliberation and the mediation of participation through various public spheres may outweigh the loss of direct influence (Bohman 2005: 33).

Many of the decisions affecting national citizens are made elsewhere; or the necessary collective decisions are not made at all. Indeed, these processes reveal decreasing steering capacities on the part of the nation-state.[14] When framed in

[12] For a selection of Eurosceptical writings, see M. Holmes 1996. See also the special issues of *European Union Politics* on 'What Drives Euroskepticism?' (Hooghe 2007) and of *Acta Politica* on 'Understanding Euroscepticism' (Hooghe and Marks 2007).

[13] See Greven 2000; Miller 1995; Offe 2000, 2003a; Scharpf 1999; Streek 2000. Siedentop (2000) gives this argument a special twist. Whilst supporting a European federal state, he argues that the present integration process is an unhappy marriage of French *étatisme* and neo liberal economism. This mixture threatens to undercut the prospect for democracy in Europe.

[14] See Nielsen 2004. Bartolini (2004) sees this in the weakened power of centres' ability to control peripheries. Against this view we find analysts who argue that European integration *strengthens* the state. See, notably, Moravcsik 1994; Milward 1992.

this light, analysts such as Jürgen Habermas (2001a, 2004) see European integration not as the nemesis of democracy, but as a means of *uploading* democracy to the European level. Many representatives of both positions take the nation-state as their frame of reference and discuss the prospects for democracy in these terms. Proponents of a European federal state (e.g. Mancini 1998; Morgan 2005) would for instance argue that instituting democracy at the supranational level is the best assurance for sustaining democracy also at the member-state level. Within such a configuration, the member states could no longer be sovereign nation-states. But will they relinquish national identity, and can a European federation develop an acceptable and viable European identity? The answer hinges, at least in part, on how central to democracy is the claim to the effect that without a collective identity, there can be no democracy.

The second position is made up of transnationalists and multi-level governance scholars who argue that the challenge facing Europe is neither to rescue the nation-state nor to upload state-based democracy to the EU level. The EU is seen as a *sui generis entity*, a possible alternative to the nation-state model.[15] Further, some analysts hold the EU up as a type of polity that has prospects for developing democracy *beyond* the nation-state.[16] Ruggie (1993) sees the EU as a case of unbundling of state authority and with this a change in the constitutive principle of territorial sovereignty. Transnationalists and multi-level governance scholars portray the EU as made up of a host of *new governance structures* that combine to make up an alternative to a government above the nation-state. To them, sovereignty resides with the problem-solving units themselves.[17] A variety of supranational organizations, transnational 'private global authorities' and governance networks engage in rule-making and regulation beyond the state. They are based upon the private law framework of legal institutions but claim legitimacy, serving the public interest. Dense transnational networks and administrative systems of coordination have been intrinsic to the legitimacy of the EU, and some see these as amounting to a form of *transnational constitutionalism* (Fischer-Lescano and Teubner 2006; Joerges et al. 2004). This debate focuses on the conditions under which decision-making in such issue areas can be deemed to be legitimate. If the self-governing collectivity is part of several communities—national, international, and global—the locus-focus of democracy becomes a puzzling matter (Held 1995: 225).

The crucial question that this debate brings forth is whether the state form and a collective identity are necessary preconditions for democracy to prevail, or whether a leaner structure made up of legal procedures and criss-crossing public discourse can ensure democratic legitimation. In short, can democracy prevail without state and nation?

[15] Hooghe and Marks (2003) outline two models of multi level governance, among which 'MLG II' is the one closest to the non state approach to governance.

[16] See notably Schmitter 1996, 2000. See also Hoskyns and Newman 2000; Preuss 1996; Weiler 1999a, 2001a; Zürn 1998.

[17] See for example Bohman 2007a; Cohen and Sabel 1997, 2003; Dryzek 2006; Gerstenberg 2002.

The third 'cosmopolitan' position in the debate focuses on Europe as a particularly relevant site, for the emergence of *cosmopolitanism* (Archibugi 1998; Beck and Grande 2004; Delanty and Rumford 2005). Scholars from different disciplines draw variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU's global transformative potential through acting as a 'normative power' or 'civilian power' (Manners 2002; Sjursen 2007a). Even though cosmopolitanism 'is not part of the self-identity of the EU' (Rumford 2005: 5), scholars nevertheless recognize the EU as a part of, and as a vanguard for, an emerging democratic world order. It is seen to connect to the changed parameters of power politics through which sovereignty has turned conditional upon respecting democracy and human rights. It can be posited as one of several emerging regional-cosmopolitan entities that intermediate between the nation-state and the (reformed) UN, and which become recognized as a legitimate independent source of law.

Some, notably Cohen and Sabel (2003, 2006), and Bohman (2007a), opt for a 'cosmopolitanism restrained', which blends elements of cosmopolitanism with regional transnational governance. They argue for the normative validity of a polycentric system of *directly deliberative polyarchy* modelled on the European system of governance. This entails a model of direct participation and public deliberation in structures of governance wherein the decision-makers—through 'soft law', benchmarking, shaming, blaming, and so forth—are connected to larger strata of civil society. The EU is seen as a multi-level, large-scale and multi-perspectival polity based on the notions of a disaggregated democratic subject and of diverse and dispersed democratic authority.

The debate on European democracy makes clear that the core issue is to establish *what democracy can mean* when the nation-state cannot be taken for granted as the foundation. The EU is an unprecedented, complex, and multi-faceted entity whose identity, legitimacy, and democratic quality are contested. I examine the nature of the Euro-polity by taking stock of recent developments and reform processes within the Union. What kind of political order is it and what type of legitimacy does such an order require? Is it a challenge to the international order or is it adapting to it? Through analysing the compound nature of the multi-level constellation that makes up the EU, I endeavour to shed light on these fundamental questions with regard to democracy beyond the nation-state. More specifically, on the basis of some stylized, and some not so stylized, facts about the reform processes and the present state of affairs of the Union, I seek to clarify the putative values and dilemmas involved in the developments from the point of view of deliberative democracy.

REALIZING EUROPEAN DEMOCRACY

Part I of this book is devoted to developing a theoretical perspective on democracy beyond the nation-state as well as the normative principle of democratic

legitimacy. In Chapter 2, I address the claim to legitimacy and what it means to justify political orders under modern conditions of pluralism and equality. Citizens must be offered justification for the exercise of political power with acceptable reasons. This points us in the direction of *deliberative democracy*, which posits that it is the public use of reason and democratic procedures that confer legitimacy upon laws and policies, and not substantive values or utilities and functional results. Such results are themselves in need of justification. I distinguish between democracy as a *legitimation principle* and an *organizational principle*. What democracy entails in institutional terms cannot be settled properly through scientific analysis or philosophical construction as it entails normative-practical knowledge: it requires the involvement of affected parties. Thus there can only be a quest for *democratization* and not for a particular institutional form of democracy. But according to which concept can democratic legitimacy at the European level be pursued?

This question is addressed in the ensuing Chapter 3, which starts with a conceptual decoupling of democracy and nation. I elaborate the assessment standard for political legitimacy espoused by the discourse theoretical variant of deliberative democracy and question rational consensus as a criterion of legitimacy. Deliberation cannot ensure correct decisions—it cannot ensure full political equality—because the demanding conditions for rational consensus cannot be achieved. Is deliberation then rather needed for ensuring that all voices are heard—the participation of all? I develop two notions of deliberative democracy based on whether deliberation can make clear what is just or 'equally good for all', or whether it must be seen rather as a requirement that makes participation possible. The principle of democracy in this second reading does not assert that the laws meet with the rational assent of all, but rather that they are legitimate when they are the outcome of an open, fair, legally institutionalized process and can be defended against criticism and accepted with reasonable reasons. In line with this I replace the criterion of consensus with a less demanding one, that of a *working agreement*. This concept is subsequently used to assess the legitimacy of the Constitutional Treaty, as well as to conceptualize the justifiability of the multi-level constellation that makes up the EU in Chapter 9.

In Part II, I address the components of democratization that can be identified in the EU, starting by assessing three strategies as possible solutions to the Union's legitimacy problems. In Chapter 4, I distinguish between legitimation through *utility*, *values* and *rights*, which relate to different notions of the EU. The instrumental logic designates the EU as an organization whose special purpose is to solve the perceived problems facing the nation-states and which asserts that legitimacy depends on the ability to solve problems effectively and the capacity to deliver the goods that people demand. In a value-based perspective Europe is more of a community in which the different national modes of allegiance and identification are to be harmonized. The success of the EU depends upon developing a *shared identity* and a value basis for integrating different conceptions of the good life, and a diverse range of societal interests. These two modes of legitimation figure strongly in the debate on, and in aspects of, the EU, but both

have become problematic. A third possibility is to conceive of the EU as a *rights-based polity*; a polity that is in need of *direct legitimation*. In this view, the integration process hinges on the ability to establish a fair system of cooperation founded on basic rights and democratic procedures for deliberation and decision-making. Taking stock of the ongoing constitution-making process, the task is to assess how robust and salient such an alternative is, as opposed to the two other strategies.

In Chapter 5, I discuss the Charter of Fundamental Rights. I see it as needed for securing the interests and the diverse values of the citizens of Europe. The Charter denotes the EU as a union of citizens and not merely as a common market. It has been argued that rights are detrimental to social integration as granting individuals legal rights has *atomistic*—disintegrative—*consequences*. However, human rights are not merely abstract principles which, when positivated, secure negative freedom. When they are constitutionalized and turned into fundamental rights they contain a guarantee for equal freedom of all citizens. A charter of fundamental rights is a means to enhance the legal certainty of the citizens, reduce arbitrariness, and to institutionalize the right to justification. However, as the principle of popular sovereignty points to a particular society, and human rights point to an ideal republic, only with a cosmopolitan order—democracy at a supranational level—can human rights be properly institutionalized.

In Chapter 6, I continue this line of reasoning with regard to the external policies of the EU. The parameters of power politics have changed in Europe and the EU exports the rule of law, democracy, and human rights worldwide. The threat of *force* is needed to ensure equal rights for all but can find justification only when used to protect human rights. Hence the defining feature of a legitimate polity cannot be the absence of military force. The criterion for judging the polity's normative quality should rather be derived from cosmopolitanism, that is, whether it subjects its actions to the constraints of a higher-ranking law. I establish this criterion, its theoretical and institutional underpinnings, and provisionally assess whether the EU in fact complies with it.

The development of post-national democracy in Europe depends not merely on rights but also on the emergence of an overarching communicative space that functions as a public sphere. But can there be a public sphere when there is no collective identity? In Chapter 7, I deal with this problem. Despite the fact that the European Union is neither a state nor a nation, its development as a new kind of polity is closely connected to the formation of a common communicative space. European cooperation and problem-solving create public spaces but have not produced a single, non-exclusive, general European public sphere. Rather, what we find is a layered public sphere. There are transnational, *segmented publics* evolving around policy networks constituted by the common interest in certain policy fields, which are found wanting with regard to proper political justification. The EU also harbours many legally institutionalized discourses—*strong publics*—that are specialized on collective will formation close to the centre of the political system, and which have been promoters of democratic reforms. Selected institutional aspects of the EU pertaining to Comitology, the Court,

the European Parliament are analysed, as well as aspects of the process of constitution-making. What are their contributions to democratizing the EU? The lack of a truly European public sphere can be seen as the consequence of the democratic deficit, the deeper causes of which may be seen as a result of a weak European civic solidarity, of 'no-demos'.

Part III of this book is devoted to the analysis of what kind of post-national order is developing in Europe. The EU is theoretically challenging, as it constitutes a new type of political order, which does not fit into the traditional dichotomy of intergovernmental and nation-state entities. In Chapter 8, I address the prospects for *democratizing* transnational governance structures and ask whether democracy can be disassociated from *government*. Hierarchical government is supplanted by policy networks, epistemic communities and committees and other arrangements for common problem-solving. The European Union itself has, more recently, come to be seen as a *system of multi-level and multi-centric governance*. Legislation and implementation are diffused to networks, partnerships, and private actors in transnational structures. The exercise of authority is no longer exclusively statal as the generation of norms takes place transnationally via practices of governance in spontaneous coordination processes, in committees and networks. Governance by performance and evaluation is a method for dealing with political controversies on the basis of 'soft law'. The *White Paper on European Governance* suggests networking and partnership models of integration as a means to bring the EU closer to its citizens. Such measures may help in rationalizing policy-making and implementation but, I contend, do not contribute much to close the legitimacy gap. On the contrary their effects on democratic legitimacy may be perverse.

Is the EU a transnational governance system or a nascent system of government? The new governance approach is deeply critical of the nation-state, but is under-theorized both with regard to the relevant conception of the 'nature of the beast' and its putative normative credibility. I examine the strengths and weaknesses of transnational governance and reconceptualize *government* as opposed to both *governance* and *state-based perspectives* on post-national democracy.

The rights development of the European Union is an important step in the process of constitutionalizing a regional cosmopolitan order in which all European citizens are empowered to claim their right to legal action and protection. However, the process of Europeanization is tainted with juridification and executive dominance. The citizens have obtained rights but they have not been able to give these rights to themselves. *There is rule of law without self-legislation* (Brunkhorst 2008). The protracted constitution-making process of the EU testifies to a promising, but yet unaccomplished mission of democratization, and in Chapter 9, I ask what form of democracy is needed in the post-national configuration. Does it require a state-like government or something less? Further, can there be constitutions without a state and a sovereign people? The EU is not a state and its power is limited. Even though the member states hold the means of legitimate violence in reserve, the EU has achieved competences and capabilities similar to authoritative government. The point of government is democratic

institutions. A non-state entity can, I maintain, amount to government in so far as it performs the functions of *authorized* jurisdictions. In line with this, the Union can be considered as an emerging *state-less government*—a quasi federation—that finds part of its justification as a regional subset of a larger cosmopolitan order. The legitimacy requirement of such a governmental order must be different from that of a fully authorized power-wielding polity. Nevertheless, due to the democratic deficit of the Union, it is not possible to establish the conditions under which a process of public justification would be deemed legitimate.

In the last chapter, I address the puzzle as to why parliamentary democracy has become the legitimacy standard for the EU when there is no demos. We witness a development from a situation in which democracy served as a guiding norm for national systems only, to one where democracy has become an increasingly relevant standard also for evaluating the EU. But why has the reform process taken the form of support for a parliamentarian model of representative democracy when central conditions for it to work properly are not in place? The solution to the puzzle is sought in the normative thrust of the parliamentary principle as the main embodiment of popular rule. But the lingering question is whether there can be democracy based on an empowered parliament without a political community.

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Part I

The Democratic Challenge

The European integration process has not left the nation states untouched. The EU has contributed to transform them, directly through legally binding actions, as well as more indirectly, through unleashing processes of mutual learning and adaptation. It has affected the nation-state model of democracy to the degree that the question of nation-state democracy cannot be settled without taking the European level into account. What does democracy mean in the multi-level constellation that makes up the contemporary European political order?

The normative criteria that the EU subscribes to are the well-known principles of the democratic constitutional state. The European Commission, the EP, the ECJ as well as the European Council and the Council of the European Union have seconded the viewpoint that the EU should be a democratic order based on the rule of law and human rights. In the rhetoric and policy documents of EU decision-makers, there is a recognized claim for accountability, openness, and transparency, reflecting the modern principle that justifications of public institutions should themselves be 'public'.

With regard to EU democracy there is *a double conceptual ambiguity*. What needs to be democratized is unclear, as is what kind of political order the EU is. How Europe should be democratized is also indistinct because it is unclear which of the many models of democracy fits the EU (Beck and Grande 2004: 346).

2

The Quest for Democratization

INTRODUCTION

With the internal market and the monetary union more or less in place, the Common Market is exhausted as a resource for further integration. The possible enlargement to Turkey, the establishment of a common foreign and security policy and, not least, the question of social measures at the EU level, pose new kinds of problems for cooperation. The questions raised in these policy areas are difficult to handle within the established economic, free-trade frame of reference for the politics of the Union, as they affect the very basis for cooperation. They require a notion of the collective enterprise, that is, a conception of the entity's foundation, mission, or vision, beyond that of a free market. The questions do not only have to do with solving the perceived problems of the member states, but with the setting of borders and priorities, with burden sharing and with defining collective tasks. Thus, they require a conception of what the EU is or should be—of its *constitution and identity*. There is a need for the EU to clarify its normative basis. Hence, as I will return to in Chapter 5, a constitution that spells out the basic principles for the Union is required. But what is there to constitutionalize; what type of constitution can and should the EU subscribe to? The answer depends on the nature of the entity in question, what competences it has, what kind of power it wields; whether it is a system of domination that requires proper justification like that of full-blown political orders.

In this chapter I first briefly address the legitimation problems of the Union and the concept of legitimacy. What does it mean and what are the implications for the political theory of the Union? On the basis of the contention that citizens must be offered justification for the exercise of political power that has convincing force *in light of standards that are accessible to them*, I distinguish between democracy as a *legitimation principle* and as an *organizational principle*. The first gives rise to a deliberative concept of democracy, while the latter points us to some institutional prerequisites that constitute the yardstick for addressing the actual democratic deficits of the Union.

MODES OF JUSTIFICATIONS

In order to establish normative criteria for legitimacy, one needs first of all to know why justification is required.

Challenging the nation-state

The EU is a power-wielding system whose structure and policies affect the interests, identities, and preferences of both the citizens and the states of Europe. It affects the citizens in their capacities as customers, clients, and users of public and private services. The legal developments of the Union have also affected the identity of the member states, which have become exactly that: member states, and not merely nation-states. As I return to in Chapter 9, it is based on a special type of contract, whose purpose is to change the identity of the contracting parties. The EU was initiated by nation-states but with the aim of transforming them to 'member states'. The EU controls a significant amount of public funds, affects national policy-making and takes decisions of major economic and social importance. It commits the member states through international agreements with third countries and makes laws with *direct effect* on the member states and their nationals. The increase of decision-making power and scope, combined with the expansion of qualified majority voting at the European level, affects the long-established national institutions of citizenship, representation and accountability and disturbs the balance between the powers.

The EU interacts with national governments and favours executive power at the expense of legislative. It empowers the judiciary at the national level and privileges contact with interest groups and NGOs at the expense of parties. The Union is a powerful polity, which undermines the democratic legitimacy of the nation-states and takes decisions that have distributional costs. It is, as addressed in Chapter 8, simply not true that the European integration project is a win-win situation, nor is it merely about solving the perceived problems of the member states in line with the Pareto criterion, which states that only decisions that no one will find unprofitable, and that will make at least one party better off, will be produced, and which hence lends legitimacy to international negotiations (cf. Scharpf 1999; Moravcsik 1998).

Both European integration and supranational polity-building processes challenge nation-state democracy, and are in need of justification. The endeavours to justify such by invoking side effects that are unnoticed and unintended by the parties involved are deeply problematic. This is the rationale of the so-called Monnet method which is premised on a permissive but *tacit consensus* on the value of prosperity and common problem-solving, and which does not allow for any direct participation by the citizens. It is now held to be technocratic and no longer viable (see e.g. Eichenberg and Dalton 2007). One should, however, distinguish between the fact that the EU has weak support, and hence lacks legitimacy, and that it does not fulfil some normative criteria of legitimacy inferred from political theory. Setting out such criteria and assessing the EU according to them is the errand of this book.

The call for justification

The EU has been made through protracted processes of Treaty change without explicit debate among the citizens about the purpose and final aim of the

integration process. Political debates of today's Europe, to the extent that they exist, document lack of agreement. Pragmatic problem-solving and muddling-through processes of Treaty amendments—on overtime and at late hours—have characterized the political process to this date. Through this procedure, the European Community has managed to bring about a *material constitution*, that is, one that speaks to social practices that are actually regarded as the basic norms of a given society (Menéndez 2004: 115). The bigger, principled questions about aims and purpose, about *finalité* and proper constitutional identity have been left out. On what grounds can the EU be justified? Why is it needed and what is it good for?

In Chapter 4, I will address these questions by assessing three strategies of legitimation—through utility, through common values, and through rights. It should be noted at the outset that rights are both constraining and enabling. They are not merely protective instruments against an intrusive government but are also making participation and the realization of collective self-government possible. 'Right' is a legal entity, which presupposes *mutual recognition* and respect that every rights-holder is compelled to offer and essentially entitled to receive from other rights-holders according to principles of justice (cf. Honneth 1995: 108). Rights establish the lingua franca of democracy, as they are constitutive for the political game as such.

The EU is a contested entity and it is unclear what it should develop into. The nature of 'the beast' is not clarified. It is not a state—nor should it be, according to many analysts and contestants. Some claim that the EU is, and should continue to be, an international organization in the hands of the member states because post-national democracy is not possible as there is no European demos.[1] Already Ernst B. Haas noted the lack of loyalty among the mass public in Europe, and Giandomenico Majone (2005: 218) claimed that 'the federalist project was doomed from the start, because—absent a European demos—a European federation would lack the material and normative resources to provide the public goods people have come to expect from the state, whether unitary or federal'. Likewise, Raymond Aron (1974) argued that multi-national citizenship is impossible.

Others claim the EU already has taken on more state-like features and that it is as competent as the United States was at the beginning of the twentieth century. Hence, it can and should develop into a full-fledged federal state.[2] The task is to bring untamed political power, also at the national and sub-national level, under the rule of law by creating a sovereign constitutional authority. One should however not *replicate* at the supranational level what went wrong on the national level, and which created the need for international organizations and supranational bodies in the first place. Others therefore hold the EU to be an entity *sui generis* of which there is no blueprint or historical precedent. For them, the EU

[1] See, e.g., Bellamy 2006; Grimm 1995; Moravcsik 2002.
[2] See, e.g., Mancini 1998; Morgan 2005; Haseler 2004.

represents an interesting experiment in governance without a state. As mentioned, there are other positions as well, and, thus, an open-minded perspective with regard to polity outcome is required at this stage.

The claim to legitimacy

All systems of domination require justification because they affect the freedom, security and well-being of all the subjects—they benefit and threaten, reward and punish. However, every political order *claims to be legitimate*—to be right and just. It acts under the presupposition that it is legitimate and thus deserves to be obeyed. In this way it raises a claim that may be warranted or not. By legitimacy we then do not merely mean the bare acceptance or support for an order, but that there are good reasons to be given for why a political order deserves obedience. A political system always presupposes that it ought to be recognized because it preserves something valid and cherished. Legitimation serves to make sure that a polity is fit to make binding decisions on behalf of a demos: that the policies and decisions chosen protect the integrity of the society and realize its vital values and goals in a good manner, and that the citizens therefore have a duty to comply.[3] In a democratic *Rechtsstaat*—a *law-state*—it is the law that binds the legislators to the citizens.[4] This means that the legislators must find a way of justifying the laws in order to ensure support from the subjects, that is, those who are going to be affected by them. Thus, in democratic states there is a presumed link between the normative validity of a political order and the social acceptance of this order. In a modern state it is the citizens who are the only sovereign. Hence, democracy means citizens' self-government via the medium of politics and law.[5] Many students of modern politics today subscribe to the tenet that democracy is the sole remaining legitimation principle of political domination. Of the long-established authorities—religion, law, state and tradition—it is only democratically enacted law that has survived the corrosion process of modernity (Frankenberg 2003). Religion and tradition are exhausted forces as bases for political legitimacy in modern (Western) societies, that is, societies that have been through the democratic and the industrial

[3] Habermas 1979: 178ff; 2003: 262. See further Beetham 1991; A. Buchanan 2002; Peters 2005; Weber 1921.

[4] On 'law state' as translation of *Rechtsstaat*, a 'state under law', see MacCormick 2007:3.

[5] Self government may mean two different things: it may (in the liberal tradition from Locke and Kant) mean that the 'members of the community subordinate themselves to a superior power that they jointly constitute' (Hindess 1992: 99), or, as in the republican tradition, the active exercise of citizenship 'with final control over the agenda' (Dahl 1982: 6). Discourse theory purports to bridge the gap by conceiving of the democratic procedure as one that sets the conditions for justifying the laws, a procedure, whose constitutive rules need to be subjected to citizens' scrutiny in turn. I return to this in the next chapter.

revolutions. Religion and tradition are spent resources. Procedural forms of legitimation have replaced substantive, theocentric forms.

Modern societies that have undergone democratic revolutions can thus be seen to have reached *a new level of integration*—they have institutionalized a new mode of conflict resolution. The modern idea of the state as an impersonal and privileged legal order with the power to command descends from the ancient worlds of Greece and Rome, and took shape in the Western world in the sixteenth century. Through processes of secularization and democratization, through the democratic revolutions the legally circumscribed political order loosened its ties with property rights and religion, and took the form of an autonomous institution based on self-legitimation. It became autonomous, and separated from civil society, because of the automatic regulations of relations with the environment through taxing capacity, on the one hand, and through citizens' influence based on universal suffrage, on the other hand. The latter made further *democratization* of the constitutional order possible as it turned the subjects of the prince into active citizens. The modern concept of democratic rule is closely tied to the Western idea of individual freedom, perceiving the individual as equipped with inalienable and inviolable rights that every authority is bound to respect. This notion embodies the idea of a private sphere, of personal intimate relations, and of the dignity and sacredness of human beings. It descends from a concept of freedom that is barely older than the Renaissance and the Reformation, but upon which our whole civilization hinges, according to Isaiah Berlin (1969: 129).

Intrinsic to this development are *communicative freedoms*, which in Europe took root in the public spheres that emerged in English coffee-houses from 1680 to 1730, as well as in drawing rooms and clubs in France, and which were at first literary, then political, public spheres.[6] The term 'public sphere' signifies that equal citizens assemble into a public and set their own agenda through open communication. The modern idea of a public sphere broke with the notion of a society based on harmonized forms of life and hegemonic values. The ideal of a conflict-free order was replaced by the ideal that conflicts should be resolved through debate and further that the holders of power—the princes—should be accountable to the citizenry through public discourse (Lefort 1988: 39). It was, thus, in Europe that the idea unfolded that the legitimacy of systems of domination depends upon the reasons and motivations of the ones subjected to them.

A reflexive mode of justification

The upshot is, according to Habermas (1979), the institutionalization of new moral and legal principles as well as mechanisms for conflict resolution aiming at

[6] At the beginning of the eighteenth century, London had approximately 3,000 coffee houses, and towards the end of the century, Germany had 270 literary societies (Habermas 1989). See further Chapter 7.

securing peaceful coexistence within pluralistic societies. This institutionalization testifies to the fact that modern societies have *learned* and that they have based the justifications of their political systems on the protection of the rights and interests of the citizens. This learning process is reflective of the waning of cosmologies and comprehensive worldviews as the legitimating instances of political power. We witness the transformation to a *reflexive mode of justification* in that the reasons and motivations become the legitimating source: beliefs and reasons are subjected to a critical test through institutionalized opposition and public review. We have witnessed the transition from conventional, traditional, or charismatic forms of justification in which the grounds for conflict over legitimation in typical cases stem from prophetic and messianic movements that challenge the official religious doctrine, to modern constitutional democracies in which legitimation stems from the trust in procedures, and hence conflict over legitimation from questioning the claimed impartiality of procedures. Bernhard Peters makes an illustrative typology that draws on Max Weber's famous types of *non-rational* legitimacy beliefs:

- Traditionalist legitimacy is based on unconditional loyalty to a particular tradition, on beliefs in the sacredness or the superior value of that particular tradition, which is presented in myths, narratives, rituals, and other symbolisms.
- Religious legitimacy is based on unconditional belief in sacred, 'revealed' truths (*Offenbarungsglauben*).
- Charismatic legitimacy denotes all kinds of allegiance to political leaders, institutions, or collectivities that are based on affective attitudes of a certain kind: unconditional, unreflective identification with powerful individuals or collectives, a mixture of submission and self-aggrandizement through such identifications, and elated feelings of belonging and unconditional loyalty. (Peters 2005: 98)

These are legitimacy beliefs based on non-rational reasons. They cannot be publicly articulated and supported by cogent arguments, hence be reciprocally justified. They are based on convictions and attitudes that are beyond reason—and reflect essentially unquestioned and unquestionable loyalty to the respective political order. While legitimation in religiously integrated societies is reflective of material principles premised on religious cosmologies and fixed worldviews—of ultimate grounds shared and trusted by believers—the modern principle of legitimation is based on the formal conditions for justification and rational agreement.

This should not be understood in such a way that legitimation is accomplished through the purely formal aspects of procedures, that is, that political decisions are correct not because of their content, but because they have been made by authorized institutions. The often-made point that normative questions could not be solved rationally, and that political decisions therefore are legitimate solely because they are positivized or decided—*decisionism*—has been the champion of behavioural political science as well as of legal realism. It characterizes the legal

rational form of domination according to Max Weber (and Carl Schmitt), a viewpoint that also Robert A. Dahl[7] and Niklas Luhmann (1969) come close to. Many students of political theory oppose this de jure conception of legitimacy. It is not merely the formal and technical aspects of the democratic procedures that distinguish the modern form of legitimation, but rather that the procedures and presuppositions for reasonable agreement themselves have been turned into a principle: 'The procedures and presuppositions of justification are themselves now the legitimating grounds on which the validity of legitimation is based' (Habermas 1979: 185).

A system of power is not legitimate only because actors *believe in* its legitimacy as Weber claimed,[8] but because it can be justified in terms of their beliefs. Legitimacy is a function of decision-makers' compliance with norms—or fair procedures—as this would be able to generate the rationally motivated approval from the subjects. It is the quality of pre-established procedures that generate legitimacy as they make actors comply even when political decisions or laws are in conflict with their preferences or interests. Legitimacy stems from citizens' reasons for holding these beliefs—basically from the actual ability of the system to protect and further the community's integrity, its values and interests. In order to clarify the relevant dimensions of legitimacy employed in this book, we must distinguish between *de facto legitimacy*, when decisions as a matter of fact are accepted by decision-takers, *de jure legitimacy*, when acceptance stems from compliance with legally binding law, and just or *normative legitimacy* wherever such acceptance would be expected from a rational person or from a rational process of deliberation among affected parties.

The modern democratic state testifies to the transition from material principles based on substantive common values to the procedures and presuppositions of unconstrained agreement as the legitimating force. Legitimation has become proceduralized: the outcome is correct when it has been decided through correct procedures. Different political theories testify to the fact that the procedural conditions of justification become the legitimation force in itself. In the tradition from Thomas Hobbes and David Hume to David Gauthier (1986) and James Buchanan (1975), scholars have tried to base the basic presuppositions of political orders on the rational self-interest of the members—as the condition under which agreement will be ensured. In the contract-theoretical tradition from John Locke to John Rawls, the fiction of *a state of nature* or of an *original position* specifies the conditions under which a rational agreement will appear. Rawls's (1971) well-known theory of justice as fairness rests on the thought experiment of an original position in which parties make individual choices about moral principles under radical uncertainty. Actors who are placed behind *a veil of*

[7] 'The opportunity to disagree about specific choices is the very reason for valuing the arrange ments that make this opportunity possible' (Dahl 1989: 307).

[8] 'But for sociological purposes, as distinguished from legal, it is only the probability of orientation to the subjective belief in the validity of an order which constitutes the valid order itself' (Weber 1921: 33).

ignorance—with no knowledge of their social situation, personal resources, and future position in society—are supposed to reach an agreement about what is just.

Legitimacy should be distinguished from *justice*, as institutions may be legitimate without being just. 'Legitimacy sets a ground-level criterion for basic structures, whose institutions are always backed by coercive powers of enforcement' (Wenar 2002: 60). Justice is a stronger criterion and one that is relevant for a host of forms of human activities in which coercion plays no vital part (Miller 2007: 277). However, in so far as coercion is involved, *democracy is a claim of justice*. Republicans claim that coercive powers are legitimate in so far as they actually are acceptable for those who are coerced. Citizens' participation is decisive for deciding what is just. In the tradition from Jean-Jacques Rousseau, Immanuel Kant and John Dewey to Karl-Otto Apel and Jürgen Habermas—and Rawls (1993)—we witness the attempt to ground political authority on the rational will of the united citizenry—on the reasons that free and equal citizens can reasonably or rationally accept.

What is common to these theories is that they subscribe to *the reflexive principle of justification* in which the reasons and motives for acceptance are decisive. There are several lessons to be drawn from this, among them that justification has been transposed to an ideal procedural principle, which means that popular sovereignty has become desubstantialized and proceduralized. It is no longer enshrined in a people—in a collective identity or in concrete bodies, such as a parliament—but has retreated into the very procedures for legitimate law-making. This points us in the direction of deliberative democracy as it is the democratic procedures—for public deliberation, participation, and decision-making—that make laws and policies legitimate and not substantive values. These procedures subject assertions—arguments in favour of certain goals, action plans, political programmes—to a critical test. Another lesson, which I return to later in this chapter, is that we should distinguish between the legitimating reasons and the forms of institutionalization, that is, between *democracy as a legitimation principle* and as *an organizational principle*. The justification of political orders is founded on the public freedom of the citizens. But within the deliberative camp there is disagreement with regard to what 'public use of reason' entails.

Reciprocal justification

Publicity is the test of the legitimacy and fairness of politics. 'All actions relating to the rights of others are wrong if their maxim is incompatible with publicity' (Kant 1795: 347). The appeal to the public constitutes the basis for the higher principles of the democratic constitutional state. However, there are different ways of redeeming this claim.

Rawls understands *public reason* as an expression of the reason employed by citizens with the same political rights in democratic states. His liberal principle of legitimacy in *Political Liberalism* reads:

> Our exercise of political power is fully proper only when exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of the principles and ideals acceptable to their common human reason. (Rawls 1993: 137)

Public reason characterizes a situation in which equal citizens in concert exercise political power over one another in the making of statutes and in amending the constitution. Public reasoning is assumed to be governed by a *reciprocity norm*: one appeals to reasons that are convincing enough to satisfy reasonable people—reasons that are mutually acceptable for persons who are prepared to live with others on fair terms of cooperation, and who recognize that there will be disagreements on many issues because of the burdens of 'judgement'. Because of cognitive and normative obstacles to rational agreement—even rational actors may not reach consensus—reasonable people are forced to accept *the fact of pluralism*.

Public reason is limited to political questions, and more specifically to such that are of a constitutional nature and concern the fairness of the basic structure of society. Public reason is about the common good as it is embedded in a society's concept of political justice. This does not from the outset refer to a substantial conception of what is public and what is private, respectively, but to the ideas and principles of practical reason. What these principles consist of will become clear when one reflects upon what justice means in a pluralistic society; and on such a reflection one will discover issues and conceptions of the common good, which are not compatible with the basis for peaceful cooperation. Those that are not mutually acceptable should be removed from the public debate. Public reason, when properly applied, excludes controversial, comprehensive ethical principles; hence *the method of avoidance*: 'Faced with the fact of reasonable pluralism, a liberal view removes from the political agenda the most divisive issues, serious contention about which must undermine the bases of social cooperation (Rawls 1993: 157).

The principle of *reciprocal justification* is an intrinsic part of public reason, as it is designed to rule out political and moral arguments that reflect values or worldviews that there are good reasons not to accept. The moral claims that citizens make must be justifiable with reference to principles and reasons that are mutually acceptable (Gutmann and Thompson 1996: 55). There are, however, several problems with this position, among them that the public debate becomes constrained. The principle of liberal legitimacy does not require consensus on a conception of justice—which in *A Theory of Justice* (Rawls 1971) is derived from the choices of actors under the 'veil of ignorance' in the original positions—but only on 'constitutional essentials'. It is constitutional, principled deliberation as conducted by judges that is the prime model of public reasoning. It is modelled on a legal discourse for the interpretation, rather than for the generation of norms (Forst 1994; Habermas 1998a). Even though this is a feasible standard of justification that scholars may provisionally make use of in assessing arguments for institutions, structures and policies, it does not exhaust the principle of public

reason. Existing basic laws may be biased or wrongly institutionalized and *impartiality may be false*. As the principle of popular sovereignty reaches beyond constitutionalism, the citizens of modern states are granted a more radical form of freedom.

First, the freedom rights of the constitutional state grant the citizens a fundamental place in the legitimation of the modern state. The modern legal system observes the principle that everything that is not prohibited is permitted. Kant pointed out that citizens who recognize each other as free and equal must give each other the same and the greatest possible degree of freedom, if they want to regulate their coexistence through law. This implies that the citizens must be free to consider the validity of the law and must therefore be free not only to choose whether they wish to comply with the law, but also whether they would want to make up their minds about it at all. They can neither be forced to approve nor to participate if the law is to claim legitimacy. There must be the possibility of undomesticated debate. The citizens' private autonomy, which is ensured by liberty rights, means that the citizens need not be accountable for their action plans, let alone give publicly acceptable justifications for their choices. Their private autonomy is secured by a set of judicially specified and guaranteed rights, which authorizes actors to make their own free choices.[9]

Secondly, democracy should at least be placed on the same footing as the constitution, as the rights that make up the basic structure of society must themselves be conceived of as democratically enacted. Individual rights are both a result of, and a prerequisite for, democratic legislation. When the *pouvoir constituant* rests with the people, rights are the outcome of a process in which the affected parties participate either directly or through their representatives. The principle of reciprocal justification does not require *actual participation* of affected parties. Hence, scholars making use of this principle as a theoretical device for assessing actual discourses and legitimations may come to play the role of *moral experts*. They can be accused of being *philosopher kings* who deduce what is not acceptable from theory. Who can possibly know what should be excluded without being subjected to a test in a free and all-inclusive public debate? We should therefore opt for a more unrestricted version of the publicity principle. I would like to expand it to all reasons that pass:

a) *The discursivity test*—that is, reasons that can be expressed and understood by competent individuals; and
b) *The universalization test*—that is, reasons are subject to the principle of the approval of all affected when it comes to validation of constitutional essentials.

[9] Habermas 1996a: 121. Consequently, there is a right to non participation, and thus a right to be in opposition to even rationally grounded opinions. Negative individual rights relieve the individuals from the moral requirement of justification. The individual has achieved *a right not to be rational* (Wellmer 1993: 15ff).

All claims are permitted and a proper public discourse—among affected and critical interlocutors—tests which claims deserve public recognition and which do not. In such a discourse there is no limitation of topics or claims, no 'a priori' removal of issues from the public agenda. A public discourse, when subjected to demanding procedural constraints, will enable a critical test of which claims or interests are justifiable, and which are not. A public debate itself is able to sort out what is acceptable, and what is not, when the participants are subjected to the exacting conditions of rational discourses. In contrast to the contractarian notion of a hypothetical consent as the justification principle, involvement and actual consent of the citizens are required by discourse theory; hence the importance of deliberation.

Deliberation has epistemic value as it leads to improvements in information and judgement: it is a cognitive process for the assessment of reasons in order to reach just decisions and conceptions of the common good. By implication it also increases the likelihood that losers comply with majoritarian decisions. In addition, deliberation carries a moral weight as a political system which guarantees conditions for autonomous public deliberation, gives us better reason to believe that its decisions are morally correct. A kind of *political autonomy* is constituted when actors have to seek justification in relation to what others can approve of, that is, everyone who is subject to collective decision-making must be able to find an acceptable basis for such decisions. The obligation to justify the use of political power to those affected by it is an expression of equal membership for everyone in the sovereign body that is responsible for authorizing the use of power. The problem that we will approach from different angles is how political equality can be realized by involving everybody in a deliberative process.

DEMOCRATIZATION AS PROCESS

The quest for democratization can legitimately only take the shape of a process that is under-institutionalized, but when justifications have to refer to standards that people agree with, we get to an institutional minimum.

Democracy as form and principle

Actual institutional arrangements can only approximate the ideal procedural aspect of democracy. Real democracy has never been realized.[10] We should therefore distinguish between the justifying reasons and the forms of institutionalization, and hence between democracy as an *organizational form* and *legitimation principle*.

[10] This was already known to Rosseau, and Luhmann (2000) holds it as a plain illusion, and Dahl (1971) chose the term polyarchy for modern democracy.

Only by adhering to democratic procedures can power-holders justify their decisions and the citizens subject them to a critical test; only by employing these procedures can collective goals be achieved legitimately; only through these can laws be sanctioned, changed, and enacted correctly. In other words, democracy is not identical with a particular organizational form, but is rather a principle, which specifies what it means to get political results right. The democratic principle is selectively institutionalized in modern states but nevertheless is operative as a *critical standard*. Even though the institutions of modern governments do not in any exact way mirror this standard, the norm of government by the people preserves its critical status as the principle through which proponents and opponents can come to understand each other's claims. It is this standard that informs criticisms of dominance and power relations, as well as reform strategies and social movements. In this way, democracy works as *the eternal actualization of possibilities*; as delegitimation of undemocratic structures and as the reordering of political orders that are found wanting or deficient.[11] Seeing democracy as a legitimation principle more than identical with a particular organizational form makes us aware of the many possible forms of institutionalization of the democratic principle, and why it has, historically, come in many different forms and shapes.

Organizational manifestations of the principle refer to forms such as direct or participatory democracy, and to indirect, representative forms such as parliamentary and presidential democracy. These organizational forms reflect the particular nexus of institutions, rights, procedures, decision-making competences, that make up an authoritative governmental structure for making demos-wide and collectively binding decisions. To decide what organizational form of democracy is appropriate for a particular society is, however, not merely a theoretic endeavour. A great deal of factual information about the actual constellation of interests and conflicts, material resources, power relations, normative structures, and so on, is required. Moreover, such facts are infused with values, as are the practical implications. They are charged with normative perceptions, power, and historical legacy. The institutional nexus that makes up democracy as an organizational principle is thus likely to be much contested. The organizational question must therefore be settled not by scholars or 'philosopher kings', but by the affected participants themselves. Substantial arguments, negotiated compromises—established conceptions of what is true, correct, fair, or valuable or normative blueprints—justify decisions only when subjected to procedural constraints: it is the *process* that makes the decisions legitimate. Legitimacy, as mentioned, is a question of what can be *justified* in a process rather than what is right or fair according to some theoretical standard. The citizens' moral judgements are decisive, not those of the political philosophers.

[11] The destiny of democracy then is that it is condemned to the eternal actualization of its potentialities, e.g. by identifying its own shortcomings and by criticizing society for not being democratic enough (Eder and Trenz 2007: 179). Democracy operates through de legitimation. It exists only as an attempt to constantly democratize (Luhmann 2000: 96f).

This has the implication that *democratization* cannot mean the preference for one or the other organizational form. Democratization may be defined as 'the robust realization of human rights sufficient for non-domination [. . . and] political inclusion in the specific sense of the development of powers, statuses, and the freedoms of citizens' (Bohman 2007a: 51). Democracy as a legitimation principle points to the justificatory process itself for a substantive assessment of empirical conditions. Deliberative democracy is therefore necessarily *under-institutionalized*. This need not be a weakness as, for example, Heidrun Abromeit (2002) and Robert E. Goodin (2005) contend, but rather a cautious reflection of the proper non-technocratic role of philosophers and social scientists in designing political institutions. The idea of democracy as a system of self-governing citizens implies that institutional blueprints must be sparse and that there can only be a quest for democratization and not for a particular institutional form of democracy. *The liberation of the people must be their own work*—it cannot be left to scholars and experts. The institutional form must be an open-ended project and not foreclosed by scientific venture.

However, what could such substantive reasons common to all European citizens possibly be as regards legitimacy-conferring institutions? What kind of reasons could be mutually acceptable for Europeans with regard to the institutional forms of democracy if not the ones referring to equality, freedom, citizenship, popular sovereignty, and the like? These are deeply entrenched principles fundamental to the legitimation of contemporary states. They are universal in vocation but stem from the enlightenment period of modernity and became first institutionalized in Europe and North America. Hence, when contending that binding decisions must be justified with reciprocally acceptable public reasons according to standards citizens agree upon, I take these standards to reflect *the institutional minimum* of the common European political arrangement—the principles of the democratic law-state, or the democratic *Rechtsstaat*. This is so because European integration takes place within a context of democratic nation-states, and it is only by invoking such notions of legitimate rule that critics can make their voices heard and through such that power-holders can meet the criticism of the system in place. Democracy is the legitimation mode of European politics and is not one on a par with other substantive values such as prosperity, welfare, security, peace, or Christianity and European humanism. These refer to *value consensuses* which, as we will see in Chapter 9, may or may not exist in pluralistic societies. Nor do the outputs of a political system justify as they themselves are in need of legitimation. Functional results require justification with regard to the interests, norms and values they count in favour of. The democratic minimum runs deeper than values and outputs, as it lays down the procedure for how to find out what is right by justifying institutional arrangements, policies and results to the ones affected.

Common denominators

A law-based democracy is held to require coercive power—a state—to sanction non-compliance and realize collective goals. Power is a condition for legitimacy,

as well as for justice, as sanctions are needed for the law to prevail. Can the EU then be democratic when it is a polity that does not itself have direct control over a given territory; when it lacks a collective identity, truly hierarchical principles of law and coercive power? Are we witnessing a polity without a state and an emerging democracy without a demos? It is the member states that implement EU regulations and hold the means of legitimate violence in reserve. A political theory of the Union must therefore be a theory of the multi-level constellation that makes up the EU. In this constellation the member states are formally in charge of the coercive means, but the exercise is heavily constrained by the supranational legal and political order.

The institutional common denominator of this organizational form first and foremost stems from the idea of popular sovereignty which emerged in western European societies from the late Middle Ages and was bolstered by universal franchise and the idea of an equalitarian society in the eighteenth century. For a long period of time, Europe was shaped by the so-called Westphalian state order that merged with the legacy of the French Revolution to give birth to the nineteenth- and twentieth-century nation-state. Far from providing a unitary model, and in spite of its different profiles and historical-cultural paths of institutionalization, the real career of the European nation started only after the Second World War, when it became the world template of legitimate political order based on internal inclusion and external delimitation, popular sovereignty, and the controlled exercise of power (Meyer et al. 1997). The nation-states' capacities for accommodating diversity are held to rely on the following components:

- a fixed, contiguous and clearly delimited territory;
- a single rightful power and entrenched hierarchical principles of law;
- a collective identity derived from a common history, tradition, or fate;
- a cultural substrate associated with the nation;
- a public sphere that performs catalytic functions for identity formation.

The problem with such a model of democratic rule is well known: the nation-state is accused of warmongering, of homogenization of diverse populations, of exclusion and the suppression of minorities, and also for making democracy into a 'community of fate' that autonomously governs itself self-regardingly without much concern for others' legitimate interests. The nation-state produces externalities for others that it is not held responsible for. Hence the pertinent normative question as to why this model should be replicated at the supranational level.

The democratic minimum

The bare bones concept of democracy employed in this book is stripped of essentialist elements and refers to an institutional arrangement—a legally constituted polity—through which members of a community make collective decisions. It builds on two fundamental principles:

1. The principle of *political equality*: citizens should have equal opportunity to participate in the law-making process as is reflected in the formula of 'one man one vote'.
2. The principle of *popular sovereignty*: the laws should be made by those who are subjected to them.

The institutional design consists of (a) the *rule-of-law principle*, which guarantees the equal protection of individuals; (b) *rights to political participation*; and (c) *state-free spaces* in the civil society constituted by communication and association rights. It is meant to ensure both the liberal principle of liberty and the republican principle of popular sovereignty, which respectively warrant the private and the public autonomy of citizens.

From a democratic perspective, the public sphere located in civil society holds a unique position, because this is where everyone has the opportunity to participate in the discussion about how common affairs should be governed. However, political deliberation takes place within a system of constitutional rights. Constitutions containing bills of inalienable rights and competence clauses for delimiting the powers of the various branches of government, assign rights and duties, establish rules and procedures for deliberation and decision-making, give prerogatives and protect minorities from the tyranny of the majority. They contain formal rules for representation and decision-making, for how laws can be made and changed, for judicial review through an independent court system to protect the rights of the individual. The purpose of several regulations within modern law is to increase political equality, balance or neutralize power, limit factionalism and self-interest politics, and secure the conditions for deliberation and rational decision-making. The ways the legislators relate to their constituents have developed in the direction of meeting deliberative criteria of democratic accountability. Since the eighteenth century, we have seen the introduction of the following principles for representation:

1. Those who govern are appointed by election at regular intervals.
2. The decision-making of those who govern retains a degree of independence from the wishes of the electorate.
3. Those who are governed may give expressions to their opinions and political wishes without these being subject to the control of those who govern.
4. Public decisions undergo the trial of debate. (Manin 1997: 6)

Consequently, the shared institutional nexus of modern democracies shows that the deliberative reading of the democratic constitutional state is not far-fetched. It is partly institutionalized, as the many arrangements aiming at the hearing and inclusion of affected parties, and at substantial political equality and public reasoning, testify to. The basic principles with regard to which political orders can claim legitimacy are those of *autonomy* and *accountability*. By autonomy is meant the basic democratic principle that those affected by laws should also be authorized to make them. Intrinsic to this criterion is the possibility of the authorized bodies of decision-making to react adequately on public support to

determine the development of the political community in such a way that the citizens can be seen to act upon themselves. Accountability designates a relationship wherein obligatory questions are posed and qualified answers required. It speaks to a justificatory process that rests on a reason-giving practice, wherein the decision-makers can be held responsible to the citizenry, and by which, in the last resort, it is possible to dismiss incompetent rulers.[12] In institutional terms then, democracy, at a minimum, requires both a *polity* and a *forum* which refer to:

- authoritative institutions equipped with an organized capacity to make binding decisions and allocate resources; and
- a common communicative space located in civil society, where the citizens can jointly form opinions and put the power-holders to account.

It is in the light of these standards that the critique of the EU's *democratic deficit* gains credibility. Such critique is made exactly with reference to insufficient institutionalization of the main manifestations of constitutional democracy, namely inadequate entrenchment of citizens' rights, lack of a European public sphere and of European political parties, and weak representation and representativeness of the system. European citizens are not in the position to choose another government if they so wanted. The EU does not meet the criteria of autonomy and accountability in institutional terms as it is in breach of the constitutional principle of a clear division of legislative, executive, and judiciary power: legislative power is shared between the Commission, the Council, and the Parliament; executive power between the Commission, the Council, and the member states; and judiciary power between the European Court of Justice, the Court of First Instance (CFI), and member-state courts. Its legislative and executive powers are mixed up, something that amounts to the modern concept of *despotism*, that is, the rulers' self-programming. Before addressing the EU's development with regard to democratization, we need, however, to explore the relationship between deliberation and democratic legitimacy. Can deliberation alone bear the burden of legitimation?

[12] On the debate on these criteria see Held 1995: 16, 224; and further Bovens 2007; Harlow 2002; Zürn 1998; Offe and Preuss 2007.

3

Democratic Legitimacy Through Deliberation?

INTRODUCTION

The EU has sustained a rapid expansion of political regulation in Europe and has over a period of fifty years transformed the political landscape in a profound manner. The unbridled sovereigns authorized by the Westphalian order are brought under the rule of a supranational polity with an authoritative dispute resolution mechanism in place. Now this is a puzzling development for conventional political science as it has taken place within a system that has neither major physical threats nor a distinct identity at its disposal to ensure compliance. How can states come to curtail their own power and pass over some of their sovereignty to a supranational Union?

The deliberative approach presents itself as a very apt tool for addressing such processes. Integration has to do with the building of communities and with the widening of the boundaries of trust and solidarity—with the transformation of a collection of actors into a group with a common mission. It is a process where actors shift their loyalties towards a new centre with the authoritative right to regulate interests and allocate resources. In order to understand the European integration process, the voluntary and communicative logic and normative quality of it need to be brought to the fore. When a collective identity is lacking, when the bargaining chips are few, the actors become dependent on the fragile resources of human language and law to sort out their differences. The language of power has to be replaced by the power of language. The deliberative perspective underlines the fact that the transformation of attitudes and identities hinges on collective learning and trust-building communicative processes.

In this chapter I enquire into what model of deliberative democracy can account for post-national legitimacy. The problem has to do with the relationship between an epistemic account of democratic legitimacy revolving on a rational consensus and a participatory variant that turns on substantive morality and institutional practices. The question is whether it is the quality of the debate and the rationality and fairness of the outcome that bear the burden of legitimation, or if it is the political process based on equal rights including universal suffrage, elections, majority vote, representation, and the like, that is the main container of democratic legitimacy. I contend that legitimacy requires institutions and that government or state is an enabling condition for justice. Furthermore, can the

discourse principle based on an epistemic account of democratic procedures hold sway as an operational conception of political legitimacy, or do we have to lower the ambitions in order to be able to make it empirically applicable, and can this be done in a manner that preserves its critical bite?

I start by introducing the discourse-theoretical approach to democratic legitimacy in modern states, and then spell out two versions of this approach—the *participatory* and the *rationalistic* models. Next, I make the case for the former one and a weaker form of consensus as the criterion of democratic legitimacy. By this move I endeavour to open a conceptual space between a communicatively achieved consensus and a strategically bargained compromise to fill in the lacuna left open by the established discourse-theoretical typology.

DEMOCRATIC LEGITIMACY

The problem of popular allegiance and approval is acute in every modern state and particularly pressing in a complex multi-national and poly-ethnic entity such as the EU. There are different theoretical approaches to this problem.

Political integration

Discourse theory posits that the reason why modern multicultural societies hang together may be explained, not by recourse to shared cultural values but by means of a more complex model of how allegiances are formed. It is necessary to distinguish between two kinds of social integration—*cultural and political.* The former denotes the kind of integration that is needed for individuals and groups who seek to find out who they are and would like to be. By this we think of the values and affiliations, language and history that form the glue of society—cohesion in general and trust and solidarity in particular—and which transform a collection of people into a group with a distinct *identity*, that is, the cultural substrate of the nation resting on a *civic* kind of solidarity.

A distinction is required between the cultural or *value basis* of a political order, which is dependent upon a particular identity that prevails in the groups and nations of which people are members, and the *constitutional order* of such a society. The latter does not rest upon a particular set of civic values but on transcultural norms and universal principles on which it is possible to reach agreement across cultures. The constitutional order claims to be binding on all subjects and to be approved by the various groups within society, each with its particular and distinctive identity and values. Modern nation-states are not merely 'nation-states'; as a rule they consist of many groups—social, ethnic, religious, and so forth—with different identities, values, and loyalties. They are multicultural societies and as such require a second level of integration—*political integration*—which makes it possible to cope with difference and collective

decision-making, without lapsing into 'ethnocentric politics'. The basic structure of constitutional democracies, then, does not only express certain values or conceptions of 'the good society', but in addition a conception of society based on democracy, rights, the rule of law, and solidarity. Different groups continue to live together and resolve conflicts peacefully because they agree on the basic rules and procedures that claim to secure fair treatment of the parties. It is only law that legitimately can secure *solidarity with strangers* in modern pluralistic societies (Habermas 1996b).

This perspective differs from that of John Rawls, who on the basis of the idea of an overlapping consensus requires the citizens to be able to distinguish between political/non-political attitudes. In *The Law of Peoples* (1999) Rawls distinguishes between liberal societies and well-ordered hierarchical societies. The latter are non-liberal societies but they comply with principles that liberals would regard as minimal requirements of political decency (peaceful, legitimate vis-à-vis the people, respecting basic human rights). *The Law of Peoples* thus applies to liberal, democratic as well as non-liberal (non-democratic, religious) societies. One may however ask why citizens should be required to distinguish political and non-political attitudes; and why should we ask of those committed to basic liberal democratic principles to surrender these in order to reach agreement with those who do not share them?[1] From the discourse-theoretical perspective citizens are not asked to forfeit their own belief in order to reach agreement, but to involve the others in a debate of what principles should apply. From this perspective a more far-reaching version of 'a rights-based theory of justice' appears and one in which 'all subglobal political systems would themselves have to become rights-based', that is based on individual liberties and democracy (McCarthy 2002: 260–61).

The explanation for such a possibility is to be found in the way in which freedom, democracy, autonomy, and equality—in short, due process and equal respect for all—have obtained a deontological standing in modern democratic societies. They are *principles* or *moral norms*, which it is a *duty* to comply with even though they could interfere with the values of the majority, particular conceptions of the good, roles, identities or interests. That is why constitutional rights can function like *trumps* in collective decision-making (Dworkin 1984). Some norms claim categorical validity because they are derived from the inherent dignity of the person—they are 'equal and inalienable rights of all the members of the human family'.[2] There is, then, not a necessary, conceptual link between ethnos and democracy, although there may be an empirical one.

A constitution protects the *private autonomy* of the citizens. It is a necessary precondition for the formation of authentic personal opinions. Modern constitutions not only enable, but also require and warrant, popular participation in the political process. That is, they enable *government by the people*. The democratic principle entrenched in modern constitutions refers to the manner in which citizens are

[1] See McCarthy 1997: 209 and Pogge 1994a for a critique.

[2] The Preamble of the United Nations International Covenant on Civil and Political Rights 1966.

involved in public deliberations, collective decision-making, and law-making through a set of rights and procedures, that range from freedom of speech and assembly to eligibility and voting rights. These political rights, and their attendant institutions and procedures, may be seen as a way to secure the *public autonomy* of the individual. They ensure that the addressees of the law can also participate in the making of the law. Moreover, modern states are large and pluralistic, and their complex institutional structure, to function, presupposes representation and delegation of power as essential principles of government. Therefore, the fundamental democratic requirement cannot be everybody's participation in actual decision-making processes in large and complex societies, but the right of all to participate in public deliberation on common affairs (Manin 1987).

Democratic legitimacy requires that the decisions that are taken can be seen as the outcomes of people's deliberation under free and equal conditions. Democratic collective will formation does not presuppose a set of shared values and opinions from the outset, but rather that viewpoints are integrated and all opinions are taken into consideration before a decision is reached. The presupposition that a set of non-majoritarian resources, such as shared identity or common heritage and tradition, are required for integration to come about, is then not really necessary for democracy to prevail.

Deliberative justification

Europe is far too diverse for integration to be based on primordial ties and attachments. Rather it has to be closely linked to the notion of *post-national identity*, a political identity founded on the recognition of democratic norms and human rights, as these are embedded in a particular constitutional tradition. Citizens should be seen as bound to each other not by those traditional pre-political ties that nation-states have appealed to but by subscription to democratic procedures and human rights. Rights, laws, and institutions associated with modernity are important in the shaping and fostering of *civilized identities* (Elias 1982). This type of identity is conducive to the respect for and accommodation of difference and plurality and a form of solidarity that is founded on mutual respect. It is the constitution and the continuing voluntary recognition of the constitution that hold people together, in other words, *constitutional patriotism* (Habermas 1996a: 465f; A. Ingram 1996). Justification may, as we have seen, take different forms; the notion of communicative rationality conceives of it in light of speech acts, through which actors attempt to achieve mutual understanding and coordinate action. Parties try to talk themselves into agreement by mutually respecting prevailing norms and validity claims (Habermas 1981: 392). By *arguing* in relation to inter-subjective validity standards of truth, rightness, or justice, participants can reach agreement and an independent base for judging the reasonableness of choices. Arguing is the procedure for redeeming validity claims.

Democratic institutions establish procedures for common problem-solving and conflict resolution, through which wills are also formed, conducive to

collective identity formation and civic solidarity. This grounds the assumption of post-national identification and democracy beyond the nation-state. In this perspective the democratic quality of decision-making is not measured with reference to the fit with the pre-established preferences of the citizens but rather with reference to the quality of the process. Has it been all-inclusive and allowed for the free and critical contestation of all opinions?

The theoretical basis for this principle is founded on the insight that the human language has a rationality potential also when it comes to creating and justifying norms.[3] Morally sane, communicative- and action-competent subjects can agree on theoretical as well as practical issues when they comply with the requirements of rational coherent communication. In this perspective, rationality does not solely designate consistency or preference-driven action based on a calculus of success—*instrumental rationality*—nor mere norm conformity or accordance with entrenched standards of appropriateness—*contextual rationality*—but rather reason-giving: when criticized, plans of action can be justified by explicating the relevant situation in a legitimate manner (cf. Habermas 1981: 15). Communicative rationality designates that actors coordinate their action plans on the basis of an achieved consensus and that they solve conflicts with reference to norms, which on their part can be tested in a *rational discourse* with regard to their impartiality.

Thus the motivation for rational communication is not the existence of common virtues or shared values, but its imperative presuppositions. When citizens are included in non-coercive communicative relations, and idealizing presuppositions of identical understanding of concepts and meaning, of free and equal participation, apply, every person is compelled to take the others' roles, and a '*we*' *perspective* comes into being from which we can jointly judge the validity of norms: can we all want this norm to apply when everyone's interests and values have been considered? The universalization principle is deduced from a set of logical presuppositions for all communication which concern redeeming reciprocity claims: Whoever engages in argumentation must presuppose that when normative claims are made—that is, claims about alternative orderings for the satisfaction of interests—the participants must, 'on pain of performative contradiction', admit that universalization is the only rule under which norms will be taken to be legitimate by all (Habermas 1990: 53ff). In principle, it would then be possible to reach a rational consensus about deontological norms and constitutional principles. Actor-neutral reasons are needed to justify a norm. Reasons based on self-interest do not fulfil the requirement of impartiality—morality entails upholding norms for the simple reason that they are right, and that violating them is wrong. It follows from this that some disputes cannot be settled simply with reference to mutual advantage. Simply establishing an equilibrium outcome does not make the outcome right.

[3] 'Ideas enter into social reality via the idealizing presuppositions innate in everyday practices and inconspicuously acquire the quality of stubborn social facts' (Habermas 2006a: 413).

Rational consensus among affected parties constitutes the criterion of democratic legitimacy in discourse theory. However, should a deliberation process not end up with an agreement, but with a vote, the deliberationists are facing a paradox. Why has no agreement been reached if the process has been a good one? On the other hand, one can ask why majority decisions are accepted. How can decisions be perceived as legitimate when some are opposed to them? How can the citizen accept a political decision, 'which involves him thinking that B ought to be enacted when, as we already know, he is of the declared opinion, that A ought to be enacted' (Wollheim 1962: 78).[4] The democratic process must be evaluated by means of standards that are independent of the deliberative process.

DELIBERATION OR PARTICIPATION?

The very idea of democratic self-government rests on the assumption that it is possible to find more or less adequate answers to normative queries. The question is whether this must take the form of a wholly epistemic account of the deliberative procedure.

Deliberation and democratic legitimacy

Discourse theory calls attention to democracy as a legitimation principle because only the political process, governed by certain procedures, can lend legitimacy to outcomes. In the proceduralized and decentred version of popular sovereignty, legitimacy is seen to depend on the manner in which political decisions can be vindicated and justified in a public debate due to their *epistemic quality*. Deliberation contributes to the rationality of decision-making by the pooling of information and by argumentatively testing the reasons presented. The legitimating force of the democratic procedure is not merely to be found in participation and preference aggregation but in the access to processes that are of such quality that rationally acceptable decisions presumably can be reached (Habermas 2001a: 110). Hence, the epistemic thrust of deliberative democracy is to be found in the fact that a free and open discourse brings forth qualitatively better decisions.[5] The main moral argument for deliberative democracy is that the decisions are justified towards the affected parties. The laws are legitimate when they can be

[4] This is Wollheim's paradox: 'How can you vote for ø, but then immediately accept the majority's verdict of not ø, when voting for ø is seen as asserting "ø is true" and acceding to the majority verdict is seen as accepting "not ø is true"?' (Goodin 2005: 122).

[5] The whole institutional arrangement for deliberation and rights assuring decision making of constitutional democracies would not make much sense unless this was also the belief of the participants. Why would people vote or engage politically on other terms unless they believed they made a difference and that the political machinery was, at least in principle, capable of making correct decisions?

seen as the outcomes of people's deliberation under free and equal conditions and can discursively meet with the assent of all.[6]

But if it is the procedure itself that legitimates results, what, then, justifies the procedure? There is a problem with a pure procedural conception of deliberative democracy (Lafont 2003; cf. Christiano 1997: 265). Independent standards may be required in order to evaluate the process or the outcome. But how can they then be justified? From the point of view of democracy the question is how deep the deliberative commitment should run, whether it can bear the whole burden of legitimation or whether non-procedural, substantial elements are needed.

The problem is, moreover, that deliberation does not by itself determine the necessary scope of participation in the deliberative process. Democracy cannot decide its own borders.[7] The borders and boundaries of a polity rest upon contingent factors. All states have the borders and the population they have for accidental reasons and historical causes such as war, power, tradition, heritage, ethnicity and so on. A sovereign state is no voluntary association or cooperative enterprise, as the 'societal rules' are coercively imposed. Deliberation itself cannot establish the unit upon which democracy is brought to bear. Moreover, only with an enforcement capacity in place, can the laws of the citizenry be implemented and upheld efficiently and legitimately. A certain hierarchical or non-procedural element is necessarily presupposed in the deliberative reconstruction of democracy. If deliberation cannot do without independent standards, another formulation of the legitimacy principle is required. Habermas (2007: 434) insists that the inclusion of affected parties is as important as enlightening deliberation.[8] The problem is how to square the circle between participation and rationality. In order to reconcile these two dimensions I would like to suggest two different versions of deliberative democracy's basic tenet that the laws should be justified to the ones bound by it.

> Version A, the 'rationalistic' reading, is premised on the *epistemic account of moral rightness*. Deliberation is held to lead to improvements in information and judgement conducive to a rational consensus and where the quality of the reasons makes for acceptability. Norms are only legitimate when they can be approved by all potentially affected in a rational debate.
>
> Version B, the 'participatory' reading, conceives of the democratic procedure as a set of basic rights that set the conditions for justifying the laws in processes of collective self determination. The equality of the participants constitutes the threshold for the legitimacy of a collective will formation process aimed at an outcome that all can agree to and regard as reasonable.

[6] 'Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses' (Habermas 1996a: 107).

[7] The 'citizenry of a democracy cannot decide on the issues the citizens are to decide on' (Offe 2000: 182).

[8] The democratic procedure entails 'two components first the equal political participation of all citizens, which guarantees that the addressees of the laws can also understand themselves as the authors of these laws; and second the epistemic dimension of a deliberation that grounds the presumption of rationally acceptable outcomes' (Habermas 2006b: 5).

In version B, the democratic rights not only enable but also constrain the will-formation process and hence establish criteria for its legitimacy. Deliberation has *moral merit* because an action or condition is not permissible unless the affected could consent.[9] Deliberation is oriented to collective self-determination: in the last instance, only the actors themselves can know what is in their best interest—and what is the common good (Tugendhat 1992: 309ff). The role of deliberation is here not to warrant correctness but a) to ensure the inclusion of everyone's viewpoints and contestation among them, and b) to clarify wants and beliefs, to correct errors and increase the knowledge base in order to improve the reason-giving process and hence the competence to decide what is equally good for all.

Habermas subscribes to version A based on the epistemic account of the moral value of democratic procedures as he sees 'rightness' as an epistemic notion based on redeeming knowledge claims: moral judgements and legal decisions have an epistemic status as they can be right or wrong. He offers a procedural account of justice and defines moral rightness as what rational agents could agree to under ideal conditions: 'An agreement about norms or actions that has been attained discursively under ideal conditions carries more than merely authorizing force: it warrants the rightness of moral judgements.'[10] The problem is how to link this in with democracy as an *organizational principle* comprising governmental structures. In particular, how do we justify *the state form* and the principle of majority vote, which are the practical *modi operandi* of modern democracy and which entail subjecting to laws that have not been consented to by all in a free debate.

The big jump

Discourse theory holds that a practical discourse is a way to improve judgement and reach correct—or just—decisions. Deliberation makes impartiality of judgement possible when the actors adhere to the principles of rational argumentation. In order to find out what is equally good for all and avoid the *pitfalls of false impartiality* it is requested that everyone has a say. Deliberation has cognitive value as it examines whether claims and norms can pass the impartiality test, hence it makes for a rational appraisal of reasons. This proposal is an invaluable contribution to moral and political philosophy but it seems difficult to derive practical-political arrangements on this basis. There is a big jump from such basic principles to the operational principles of modern democracy. Admittedly, there is a link between deliberation and the state form as there is no need for actors to comply with obligations unless others comply, and there is no way to know what is right unless there is a legal specification of obligations. This can only be

[9] In this variant consensus is not the criterion of correctness of norms. A condition is not legitimate because people consent to it, but because it is right (Tugendhat 1993: 174 5).

[10] And further, 'since the "validity" of a norm consists in that it would be accepted, that is, recognized as valid, under ideal conditions of justification, "rightness" is an epistemic concept' (Habermas 2003: 258).

accomplished by a system of authoritative norm interpretation, which also has the capability to sanction norm violations (Apel 1998: 754ff; Kelsen 1944). The state is the key organizer of politics as it controls most means of coercion and is the main agent capable of making and enforcing laws equally binding on all.

But these are merely functional arguments as are the ones given for justifying the legal form underpinning statehood based on the monopoly of coercion.[11] What is lacking is a normative link—or autonomous reasons—because the state has the authority to use its power to enforce legal norms without the consent of the free citizens and the majority principle asks some citizens to obey laws they disagree with. Contrary to this, the discourse principle guarantees the citizens autonomy in a very powerful manner. Those laws that the citizens cannot accept in a rational debate, are not legitimate! Unfortunately, this weakens the realism of the theory, as most laws do not satisfy such a criterion. I will return to this problem. For the moment, the question is whether practical discourses can ever generate correct answers in the sense that argumentation makes clear what is just or 'equally good for all' (version A), or whether argumentation rather must be seen as a requirement that makes participation a necessary part of collective self-determination (version B).[12] In the latter case, deliberation is needed for respecting and integrating the wants and beliefs of the citizens in collective decision-making.

Epistemic and moral justification

An epistemic interpretation of deliberative democracy asserts that deliberation is a cognitive process where arguments are assessed in order to find just solutions and form opinions about the common good. According to Habermas the standard for evaluating the quality of the outcomes is given independently of an actually performed deliberation process. It is constituted by an ideal procedure, which specifies the contra-factual conditions for a public discourse in which all limitations on time and resources have been suspended, and where the authority of the better argument prevails.[13] To Habermas the rational consensus is the standard by which the correct outcome can be defined. By observing the ideal conditions for argumentation—the demanding requirements of a rational discourse—one should be able to arrive at the just or correct decision—one that everyone can approve of. The ideal deliberative procedure is constitutive for correctness as long as certain conditions are met. But if correctness is seen as what the actors will support under ideal conditions, it will be difficult to prove

[11] 'The legal form is in no way a principle one could "justify", either epistemically or normatively' (Habermas 1996a: 112).

[12] See Habermas 1990: 68, 71f; Habermas 2003: 241; Tugendhat 1993: 170.

[13] 'All contents, no matter how fundamental the action norm involved may be, must be made to depend on real discourses (or advocacy discourses conducted as substitutes for them)' (Habermas 1990: 94; cf. Habermas 2003: 362).

the epistemic qualities, that is, that actual deliberation leads to better and fairer decisions. Under non-ideal conditions the problem with justifying the epistemic value of deliberation arises. Actual deliberations will not generally meet ideal requirements: they will be marked by, for example, ignorance, asymmetric information, power, and strategic action. One may therefore question whether the reasons that can be stated publicly are also good (convincing or correct) reasons (Estlund 1993; Gaus 1997).

In order to defend the epistemic qualities of deliberation, process-independent standards are needed. An epistemic justification of outcomes will in that case become independent of ideal deliberative conditions but dependent on what the deliberation leads to with regard to rational decisions—independently defined. We are therefore faced with the following paradox: if deliberative democracy defends its claims on moral qualities via an ideal process, it cannot justify its claims on epistemic value. On the other hand, if deliberative democracy claims to have epistemic qualities, it can be defended only by standards that not only are process-independent, but also independent of deliberation (Bohman 1998: 403; Bohman and Rehg 1997). How can public deliberation be both moral and epistemic, in the sense that features of the process can justify the outcome at the same time as it has good effects?

This poses a problem for discourse theory, which, as a consequence, cannot totally do away with substantial elements. Procedural-independent standards are needed for securing a fair process.[14] Substantive morality is reflected in the fact that we do not expect representatives of a minority that have lost their case in a fair process to use only procedural arguments when they complain about the outcome. Procedure-external standards are used when procedures are criticized, justified, or reformed.

Substantive morality must be brought in to explain that political decisions have a binding power also on those who disagree as well as to explain the deontic commitment that constitutes respect for the law. This commitment hinges on a foundational morality basic to the principle of *equal worth of persons* in modern states, and which forms the background constraints for what can be accepted as a reason within a process of deliberation.[15] According to Charles Larmore (1999: 608) *respect for persons* is basic to liberalism as it is 'what impels us to look for a common ground at all'. It is a higher-ranking principle, as the norm of respect does not have the same sort of validity as the constitutional principles we live by. This I take to be the normative basis for version B of deliberative democracy as it is on the basis of such a foundational substantive principle that one can account for private autonomy as well as for the argument that the reason or will of each participant shall count equally in the political process. The equal worth of

[14] The discourse principle is itself normatively charged it contains a certain normative content as it 'explicates the meaning of impartiality in practical judgments' (Habermas 1996a: 107). It builds on moral premises on premises of a moral person who possesses certain rights and competences.

[15] '. . . as one cannot accept a reason within that process that some are worth less than others' (J. Cohen 1997: 415).

persons constitutes the ultimate basis for the justification of force as well as the state form because the coerciveness of the law is intrinsically linked to equal liberties for all—it is in order to ensure compliance with the law that a polity can legitimately use force.

The constituent norm of respect prior to agreement is proceduralized by Rainer Forst (1999a, 1999b), who suggests that *the right to justification* is the most basic right of all. In his view this is not a substantive value—a natural right that needs no further justification—but an indication of what justification entails. It reflects the ideals of democracy and the language games that go with it, hence normative standards transcending actual legal procedures. The standard for justification that is at work here is not objective or independent but rather one that constitutes the legitimation principle of democracy. It refers to an idea of a justly organized process that is used in assessing every actual institutionalization of political deliberation and decision-making (Forst 2001: 373-4). This is an interesting approach to the foundational difficulty, but one that is stuck with the problem of overcoming the feasibility requirement—that is that solutions should also be applicable to the real world, according to 'the-ought-implies-can' formula. How can we come from the right to justification which implies the basic requirement of *reciprocal and equal justification*, to democratic institutions able to convert goals into practical results? Forst's as well as Habermas's democratic principle implies, as Gosepath (2001) remarks, that actors have a veto: when they do not agree, nothing will be done (cf. Christiano 1996: 37ff). Hence, there is a missing link between deliberation and decision-making.

In discourse theory we are faced with the problem of knowing the quality of reasons in non-ideal situations. If we cannot know whether norms really are in the equal interest of all because the demanding requirements of a rational discourse cannot be approximated—even under ideal conditions it is impossible to include all affected (or their advocates)—there is a case for the participatory reading of the deliberative ideal—version B.

DELIBERATION AND ELECTORAL DEMOCRACY

The effective promotion of dispute and contestability in the citizenry require a variety of institutions and procedures, among them are participatory ones which ensure hearing of all voices and which guard against unaccountable authority and illegitimate domination.

Majority vote revisited

The participatory version allows for egalitarian procedures of decision-making that revolve on the actual preferences of the citizens discounting their normative quality. In this perspective, majority vote can be seen as a mechanism that makes collective

action possible when consensus has not been obtained, and constitutional rights, legal protections, and so on function as control forms to hinder technocracy and paternalism—to block that rationality puts aside all other concerns. Constitutional barriers prevent majoritarian tyranny and political power from being camouflaged as rationality. Only the possibility to block and to revise on the basis of a popularly enacted and constitutionally entrenched government can redeem the claim of moral value of democratic procedures. Thus, there can be no democracy without government organized by egalitarian procedures (Brunkhorst 2004: 97). The participatory reading of the deliberative principle renders many institutional and even aggregative arrangements of representative democracy justifiable (Nino 1996: 128).

With regard to the majority principle, Habermas understands it epistemically. It represents a *conditional agreement* internally related to truth: the relevant decisions claim to be correct in relation to actual circumstances and procedural norms. Minorities give licence to the majority on behalf of their own standpoints, because they have the opportunity to work to gain support for their views and thus become a majority at the next crossroads. Votes therefore only represent *temporary stops* in the continuous discussion about what should be done (Habermas 1996a: 179). Such a procedural interpretation of the majority principle makes it consistent with the concept of freedom when not applied to irreversible decisions. In this way discourse theory allows the individual to submit to laws that are not correct.

It can be objected, however, that in most cases it is unclear what is a correct or optimal decision, that the level of conflict is too high for there to be any prospects of consensus. The truth relation is therefore problematic (McCarthy 1994, 1996; cf. Warnke 1996: 75ff). We may therefore ask whether the majority principle is not in itself a respectable device compelling compliance. According to Rousseau (1762), the majority principle is conditioned by a general right to vote, which is a reason for accepting it. Democracy has a numeric dimension because it consists of individuals that can be counted, which gives the majority's opinion a certain weight in itself. The interests of the majority must simply be preferred to those of the minority, as Tocqueville (1835–40) contended. Further, when more votes support a particular solution, 'we can assume that interests of more people are satisfied' (Nino 1996: 127-8).[16] If we assume that the judgement competence among the citizens is distributed approximately equally, and they have more than 50 per cent chance of being right, 'the majority rule will be the best rule for producing outcomes which are the common good' (Christiano 1990: 163).

Another point here is that the unanimity requirement in reality upsets the principle of equality, because it pays undue attention to special interests and idiosyncratic arguments—it gives also quarrellers a right to veto. Majority decisions are regarded as more legitimate, because they treat everyone in the same way (D. Ingram 1993: 302; Christiano 1996: 88). The majority principle respects the

[16] Hence the Condorcet's theorem saying that if each member of a decision making body is prone to adopt the right decision, the probability that the decision is right also increases as the number of members increases. See also Feld and Grofman 1988.

formal equality of the citizens—even though it does not ensure full political equality: (not only does majority vote make minorities permanent, it also *creates* a 'majority' that does not represent the opinions of the majority. This is due to cyclical majorities, strategic voting, and manipulations of the voting order. The outcome of legislative processes is likely to be determined by who controls the agenda and where in the voting cycle a decision appears.) Nevertheless, the majority principle can be seen to have value in itself as it reflects the moral respect for persons. This creates problems for discourse theory, because if the majority principle can be justified in itself, if it is found to have independent legitimizing power, the freedom of the individual is threatened. In that case, the right to have a say is no guarantee against unjust encroachments on the freedom sphere of the citizens (Engländer 1995: 494).

The majority principle thus cannot stand alone. It has to be subjected to constitutional constraints. Furthermore, as laws can not merely be posed or decided, but must be validated through prior public deliberation, the legitimacy of majority decisions rests on the substantial arguments put forward in their favour. As a rule collective decisions are made subsequent to extensive communication processes among affected parties. Deliberation contributes to clarify what the disagreement is about, so that a majority decision becomes understandable and tolerable to the affected parties. Thus, bargains struck between competing parties can achieve legitimacy in so far as the parties have had equal opportunities to fight for their cause and the reasons for the dispute have been brought to light. This is why the opposition does not take to the streets.[17] As Dewey (1927: 53, 207) reminds us, 'majority rule [. . .] is never merely majority rule': it is preceded by argumentation and is justified with reasons that are found convincing for at least a section of the citizenry. Another section of the citizenry would only be prepared to be out-voted when its views are set aside for reasons and not merely by the force of numbers. A reason is convincing only as long as it is somebody's reason. It is the democratic process of law-making that provides citizens with a basis for believing that there are reasons for the law (Bohman 1996: 197; Nino 1996: 135). Hence there are agreements short of consensus that claim to be legitimate as they rest on reasons that have considerable weight. They may pass the test of discursivity but not necessarily that of universality.

Working agreement

Rational consensuses rest on mutual convictions, according to Habermas. Due to the impartiality constraint of practical discourses, participants will converge in their recognition of the same validity claim and have *identical reasons* for observing an agreement. Conversely, a *compromise* is seen as an outcome of strategic bargaining processes and is indirectly legitimated through the procedures that set

[17] And this is why the inertia which often results, and which public choice theory predicts, when unanimity is required, can be avoided. Discourse theory envisages a shift in blocking standpoints due to the force of the better argument.

the terms of a fair contest (Habermas 1996a: 399). Bargaining may be depicted as the employment of credible threats and warnings in order to achieve given ends. In this case the parties will have *different reasons* for complying and will find the solution sub-optimal with regard to their initial preferences. Both parties make concessions at the expense of their principles or initial goals.

The consensus requirement of discourse theory is very demanding and one that does not necessarily follow from compliance with the proper rules of argumentation. Actors may remain at odds with each other even after a rational discourse. According to Rawls, there are unavoidable limits to a qualified agreement because of 'the burden of judgement', namely, obstacles to agreement that arise even when the actors reason as rationally as possible (Rawls 1993: 54). Such obstacles may be that relevant data are contradictory, that the actors weigh different views differently, that many concepts are approximate, that experience and personal biography affect the perception of what is seen as correct or good, and that there may be different but equally strong normative arguments in the same case; and even when people agree on the notion of justice they may 'still be at odds, since they affirm different principles and standards for deciding those matters' (ibid.: 14).

Consequently, in addition to the problems caused by weakness of will, the indeterminacy of norms, myopia and bias, different rules for deliberation, and complex moral standards, there are inherent cognitive limits to rational consensus. Even under ideal conditions a consensus may not occur. Because of this, one should not be epistemically optimistic when it comes to the prospects for political consensuses in modern, complex and pluralist societies.[18] Nevertheless, the basic procedure through which conflicts and ambiguities are handled and pluralism accommodated must itself rest on some principles—be they the rules of communication, the liberal principle of toleration or the minimal deontological core of constitutions—that command moral respect and that all could, in principle, agree to with identical reasons. Only conclusions that are based on the same premises can claim validity and establish the requisite stability of political orders.

Moral discourses require one single correct answer. But in a practico-politico context there are various degrees of agreement even when the appropriate rules of deliberation are respected. A rational debate may not lead to a shift in opinions and beliefs but may help to clarify arguments and challenge the reasons provided. Higher degrees of understanding may be reached when the deeper convictions and reasons are spelled out. The parties may recognize that they have different evaluations and that there is no easy way out if they are to continue living peacefully together. In such cases the parties make concessions and opt for a solution that is, after all, sensible and reasonable—it reflects notions of justice in a pluralistic context.

[18] 'The precise characterization of the acceptable reasons, and their appropriate weight will vary across views. For that reason, even an ideal deliberative procedure will not, in general, produce consensus' (J. Cohen 1997: 414). Consequently, there are various degrees of agreement including discursive disagreement and reasonable disagreement as well as moral compromises and deliberative majorities (see Bohman 1996; Grimen 1997; Gutmann and Thompson 1996; Valadez 2001; Skirbekk 1993).

My point is that an outcome might fall short of a rational consensus but still be the result of a deliberative process based on inter-subjectively justifiable reasons. Here deliberation does not define justice or the common good but is a good means to advance independently defined notions of these concepts (cf. Christiano1990: 163). In line with this, one may think of the possibility of reaching an in-between consensus, an agreement that testifies to some movements of positions and normative learning, which do not result in a rational consensus, but in a *working agreement*. Such a conclusion rests on different, but reasonable and mutually acceptable grounds. It is achievable among reasonable persons, who act on the basis of insight in the burden of judgement and justice.

Short of fulfilling the demanding requirements of a rational consensus, deliberation may function, due to its epistemic merit, to increase the level of knowledge and judgement in such a way that different reasons become understandable and mutually acceptable; hence, establishing a working agreement, which denotes an agreement that is based on *reasonable reasons*. Such agreements are 'incompletely theorized' (Sunstein 1995) as they depict agreements at a certain level, leaving the deeper, principled questions unclarified. They are not as stable as rational consensuses, as they reveal different legitimating reasons emanating from different worldviews, descriptions of the situation and concepts of justice or correctness. With regard to justice-pluralism, we may think of the situations where actors have to deal with disagreement about rights and disagree about which distributive principle—such as merit, desert, equality, or needs—should be applied. A working agreement, thus, differs from a pure convergence of interests and also from a *modus vivendi* resting on mutual respect for conflicting interests, as it is stabilized with normative arguments—with non-egoistic justifications. Moreover, it is more than an overlapping consensus based on the method of avoidance—the exclusion of unreasonable comprehensive worldviews—and the convergence of different, although *non-public reasons*.[19] Working agreements build on the public use of reason, through which the actors, on the basis of existent plural value systems and the saved-up level of trust and confidence,[20] manage to establish a cooperative scheme that compels compliance and support. Actors are swayed through the idealizing presuppositions of communication and the role of conversational constraints to agree without being entirely convinced that this is a rational or optimal result. The result may be seen as *a regime, a doctrine, a policy* or an *emerging polity* such as the EU based on common norms and entrenched rules, and as something that does not merely protect us but also represents a Pareto improvement. It reflects a binding structure of common commitments, one that may be unstable and renegotiated and overrun in the

[19] Rawls 1993: 151; Habermas 1998a: 85 6. See also Habermas 1995; Rawls 1995. Rainer Forst (1994: 156) argues that Rawls rather conceives of the private use of public reason in public affairs than of the public use of reason. See also the discussion in Chapter 2.

[20] See Habermas's comment on my proposal with regard to a background consensus and '*die Vertrauenskaptial, das die Diskursteilnehmer im Laufe vorgangener Diskurse gemeinsam angespart haben*' (2007: 432).

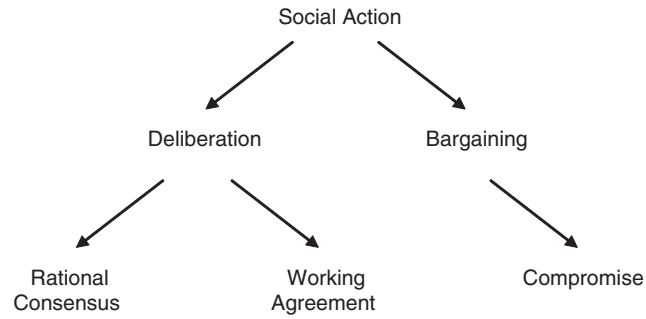

Figure 3.1 Typology of agreements

future, but that commands respect for the moment. This is an arrangement not merely based on the mutual interests and welfare of the constituent members but also on their willingness to uphold and contribute to a binding order.

The category of working agreement is needed not only for normative but also for explanatory purposes, namely, in order to fill in the lacuna left open by discourse theory between stricken compromises emanating from threat-based bargaining and communicatively achieved rational consensuses, as illustrated in Figure 3.1. The original conceptualization concedes too much to rational choice in analysing political behaviour and does not take heed of the way political action is intrinsically linked to justification—in whatever form. Habermas has contributed to filling in this lacuna (meeting the criticism of Schnädelbach) by introducing the concept of *weak communicative action* based on the decoupling of understanding and agreement (Habermas 1998b), contending that one should distinguish between understanding (*Verständigung*) and rational consensus (*Einverständnis*). The latter depicts a consensus, as mentioned, which arises when actors can accept a validity claim for *the same* reasons. *Understanding*, in a more narrow sense, is what we have when one actor is able to see that another actor, *on the basis of her specific preferences* and under given circumstances, may have good reasons to act in a particular way, without the former actor, on the basis of *her* own preferences, being willing to make those reasons her own. We may, thus, distinguish between actor-independent and actor-relative justifications of action, where the former category provides a basis for a stronger form of mutual understanding than the latter does.

There is a distinction as to what types of validity claims are activated in the two cases. The only requirements for *understanding*—for weak communicative action—to come about are that a hearer believes that the speaker: (a) has an adequate understanding of the world, and (b) actually expresses his true beliefs and opinions. In other words, the speaker must meet the validity claims of *truth* and *truthfulness* but not of *rightness* (which is basic to the strong version of communicative action). The justificatory element is lacking; hence this is an unstable solution (Eriksen and Weigård 2003: 42). Working agreements, in

contrast, are based on normative notions of rightness—on reasons that are intersubjectively justifiable and hence respectable. They pass the test of discursivity but not necessarily the test of universality. Working agreements rather than rational consensuses are what can be expected from deliberation according to version B of the deliberative theory. Why is that so?

DELIBERATION AND POPULAR GOVERNMENT

Is deliberation solely needed for respecting and integrating the wants and beliefs of the citizens in the forging of a common will, or does it also have a role in making clear what is in the equal interest of all?

Reasons for legitimacy

According to version B of deliberative democracy, there is no democracy without egalitarian procedures of law-making, because only then can the citizens effectively influence the laws that affect them, determine whether the reasons provided are good enough, and possess the power to sanction the power-holders. Even though deliberation increases the likelihood that losers comply with majoritarian decisions due to its epistemic merits, it cannot replace institutionalized forms of control, including majority vote, veto positions and participation, which are equally open to all. From the vantage point of this model, the most that can be expected with regard to collective will formation are decisions based on reasonable—mutually justifiable—reasons. The principle of democracy in this reading, then, does not assert that the laws should meet with the rational assent of all, but rather that they are legitimate when they are the outcome of an open and fair (legally institutionalized) process and can be defended against criticism and accepted with reasonable reasons.[21] However, such may not be firm: as the ultimate test of the legitimacy of the law-making procedure, the rational consensus unavoidably provides the standard, because the reasons must be convincing in the same manner for the order to be durable and stable. In moral discourses there must be one single correct answer. It is this that can test the substantive normative standards constitutive of version B. The normative basis for this is rather thin, as it must be based only on what human beings have in common, namely, their right to freedom, equality, dignity, democracy, and the like.[22]

Version A of the deliberative principle should therefore be reserved for the procedure of testing the core basic norms of the political order. That is, in a discourse on the constitutional essentials under idealized conditions, actors

[21] See Habermas 1996a: 110, fn. 14; cf. Bohman 1996: 183.

[22] In this sense the discourse principle expresses the moral individualism of modernity that is constitutive of the participatory model version B.

would be able to reach a rational consensus on what is in the equal interest of all the affected parties. By abstracting from pressing constraints, by discussing typical situations and anticipating future states of norm application, actors would be able to test the legitimacy of a norm in a coherent manner and come to a rational agreement. This does not imply infallibility, according to Habermas, as both moral-justification discourses and pragmatist-application discourses are subject to a *dual fallibilist proviso*. In retrospect we can see that we were mistaken about the 'presuppositions of argumentation' as well as have failed to anticipate relevant empirical circumstances (Habermas 2003: 258). As far as this makes up the modern form of self-reflexivity the citizens would be able to think in worst-case scenarios and institutionalize safety mechanisms—constitutional barriers—against the putative hubris of communicative rationality.

CONCLUSION

Underlying the distinction between the two models of deliberative democracy is the question whether the ideal discourse can ever actually be carried out or should merely be thought of as a device for the representation of free and equal citizens—a fictional situation for the anticipation of all situations where the norms are to be applied—according to a criterion of validity external to discourse à la Rawls's or Scanlon's contractualism. From the epistemic point of view the discourse can be thought of as a *fictional discourse* for representing equal and free citizens. The requirement of an actually carried out discourse among affected parties, which Habermas opts for, is due to the fact that participation is necessary to establish what is just and right because the moral worthiness of an interest is not always clear and because a self-critical attitude is forced upon the actors—inducing them to critically examine their own preferences—under the exacting conditions of a rational discourse. It is also difficult to simulate a democratic discourse because of the unpredictability of spontaneous human interaction—the productive world-disclosing effect of human discourse—which makes for the unexpected, the unpredictable, and undetermined new. In institutional terms the requirement of an actually performed discourse links in with the communicative networks of the political public sphere with equality, freedom, inclusion, and open agenda as generic conditions, and hence with the radical democratic idea of citizens' self-government through politics and law.

As we will now see—in the succeeding chapters—it is the codes and categories of the democratic law-state that make possible the contestation over the proper institutionalization of democratic rule beyond the nation-state.

Part II

Elements of Democratization

The EU faces pressures both in terms of efficiency and in terms of democratic legitimacy. With the two latest enlargements, bringing the total of member states to twenty-seven, its ability to live up to expectations of efficient and legitimate problem-solving is now put to the test. In present (and future) debates about forging a citizens' Europe, the EU faces the challenge of finding an appropriate balance between the competing requirements of efficiency and legitimacy. The reform processes in the wake of the Maastricht Treaty can be read as a series of successive attempts at making the EU more democratic. However, even in Europe, which in the nineteenth century invented institutions such as liberal democracy, universal suffrage, trade unions, party politics, and so on, there is contestation over how best to conceptualize democracy. There is disagreement over normative standards; over appropriate terminology; and even disagreement over the factual record: how best to describe the Union in institutional terms and account for it in theoretical terms.

In the EU, democratic legitimacy may be obtained in two ways. It may be obtained indirectly via national democracy or directly on the basis of the polity's own actions and procedures. As long as, or to the degree that, the EU is an intergovernmental organization in the hands of the member states, when it is merely a means for them to solve their perceived problems, its legitimacy basis can be derived from the democratic processes of opinion formation and decision-making at the national level. But when this is no longer the case, when the EU's actions profoundly influence the identities and interests of the member states and their citizens, when the EU becomes a supranational entity, democratic theory requires it to establish a legitimacy basis of its own. Hence, we talk about *direct legitimacy* obtained through the processes and procedures of the Union itself.

In Chapter 4, I address the legitimacy problems of the Union and how they can be alleviated. The EU, as every system of domination, is in need of justification, but such may take different forms and they may refer to different institutional solutions. As it becomes clear that neither a scaling down of the EU to the form of an international organization, nor a value-based conception, making the EU into a unified nation-state, is a viable option, we are left with the third option: the EU as a post-national, rights-based union. This is also the conception of the EU pursued in the rest of the book.

In Chapter 5, I continue the analysis of the constitutionalization process of the Union, which was initiated in Chapter 4, now with emphasis on the Charter of Fundamental Rights. There is a tension between democracy, which is limited to the nation-state, and human rights, which are universal and point to the ideal republic. The Charter is a step in the direction of institutionalizing a framework of a cosmopolitan order. In the following chapter, I examine the cosmopolitan dimension of the Union, arguing that this should be the standard of justification for a European foreign and security policy. But public forums are needed for the justification of a political order. In Chapter 7, the layered public sphere in Europe is analysed from the vantage point of deliberative democracy, which gives rise to the differentiation between a *general*, a *segmented* and a *strong public*.

4

Europe: On the Search for its Legitimacy

INTRODUCTION

Today's Europe is marked by deep changes. One of the most remarkable developments is the rapid pace of integration, which promises to alter fundamentally the political geography of Europe. The rate of change is astounding given the uncertainties and disagreements as to the future design of the EU and the rest of Europe. It is astounding also given the many challenges currently facing the EU. These result from the EU's successes, as much as from its failures. As main achievements, the EU has succeeded in entrenching peace, has successfully included new members, and it has established a Single Market and a Monetary Union.

It is still, however, generally recognized that the EU suffers from important *legitimacy deficiencies*. These are linked not only to aspects of the EU's structural and institutional make-up, but also to the normative justifications that it can readily draw upon, as we have seen in Chapter 2. This onus on legitimacy is lent further urgency by the recent enlargements, and by attempts to expand cooperation in the fields of justice and home affairs, and foreign and security policy. The EU is a novel type of entity whose principled and constitutional status is ambiguous and incomplete, and whose underlying telos is not clear.

These and other reasons prompted the EU to launch a broad debate on the future of Europe in 2001. The most tangible manifestation of this commitment was the setting up of the Convention on the Future of Europe (February 2002 to July 2003). The Convention succeeded in putting together the Draft Treaty establishing a Constitution for Europe (European Convention 2003a), which was adopted by the ensuing IGC with some minor amendments. The Constitutional Treaty was thereafter to be ratified by the member states, but was rejected by French and Dutch voters in spring 2005. The EU then installed a 'reflection period', which culminated in the final rejection of the CT and the drafting of a new Lisbon Treaty, which was rejected by Irish voters in 2008. The latter preserves many of the provisions of the CT.

During the Convention debate, it was clear that those who criticized the EU in legitimacy terms often did not agree, nor did they necessarily emphasize the same

problems.[1] The same applies to the current academic debate. Some are concerned with costs and efficiency, others with technocracy and lack of popular participation, others with the absence of a sense of community and identity, and yet others with legal-institutional and constitutional defects. The issue is not that of applying a set of ready-made prescriptions, as there are several. The question is *which prescriptions*. In other words, *how* can the EU 'repair' its alleged legitimacy deficit?

These observations emphasize the fact that there are several options with regard to the probable development of the EU, and these rely on qualitatively different normative standards. What, then, are the basic choices facing the members? How to conceptualize the relevant range of developmental paths for the Union? Three normatively distinct and stylized options can be derived from the structure in place and from the debate on its legitimacy.

To face the constraints of enlargement, one option is to scale down or to reduce the ambitions of the polity-makers in the EU so as to make it into a mere free-trade arrangement. Onus is then on *efficient regulation*, and the four freedoms of market integration. Another strategy is to deepen the collective self-understanding of EU citizens, so as to make the EU into a *value-based community*, founded on a common European identity and conception of the European heritage and value-basis. The purpose of such a strategy is to forge a people, or demos, and in this manner enable the EU to cope with its legitimacy problems. A third option is to make it into a constitutionally entrenched *rights-based political union*, based on a set of common civil and political rights, to empower the citizens to be and to see themselves as the 'co-authors' of the law.

These options have dramatically different constitutional implications. The first speaks of the EU as a *problem-solving entity* based on derived legitimacy and a narrow economic citizenship; the second of the EU as a *value-based community* premised on social and cultural citizenship; and the third of a *rights-based post-national union*, based on a full-fledged political citizenship.

Which option is the most viable? To which of these does the EU's constitution-making process speak? Viability refers to normative status as well as to empirical relevance. The purpose of this assessment is to offer a contribution to the breaching of the gap between normative standards and principles on the one hand and empirical realities on the other.

The following pages first clarify the normative foundation and mode of legitimation that each strategy is based on. Then each strategy is spelled out and operationalized, and an assessment of its most important merits and demerits is provided. This includes a brief assessment of each in relation to the constitution-making process. How viable are the strategies in normative and in empirical terms?

[1] For a rich source of different views, consider the more than 1,080 responses to the first sixteen articles of the proposed constitutional treaty (<http://european convention.eu.int/amendemTrait.asp?lang=EN>(accessed 23 March 2009).

THREE STRATEGIES OF LEGITIMATION

The recognition that informed the decision to establish the Convention, as expressed in the Laeken Declaration (European Council 2001a), was that the EU is standing at a crossroads, with qualitatively different developmental paths available to it. The Convention on the Future of Europe was unprecedented. Its appointing, composition and resulting draft Constitution are testimony to the seriousness with which the EU has taken this question in the last few years. Almost all the way up until this event, however, those in charge of the integration process consistently *failed* to engage in such a debate. Neither did they provide a set of agreed-upon blueprints for how to think of the EU in legitimacy terms. They have voiced support for certain standards and principles, but these have only recently been expressed in polity terms. One of the main instigators here was the German Foreign Minister Joschka Fischer. In his May 2000 speech, talking as a *private citizen*, Fischer spoke of the need to establish a European federation.[2] Since then, numerous heads of state have presented their visions for Europe.[3] The constitutional issue was brought up and explicitly addressed by the European Council at the Laeken summit in 2001. In the Laeken Declaration, the heads of state and government asked: 'What might the basic features of [a European] constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?' (European Council 2001a).

These actions notwithstanding, there are several visions of Europe, and these differ considerably. Moreover, the range of visions has increased with the EU's enlargements. The very act of enlarging to the east and the south has had profound implications for the entity, which already had very weak sanctioning powers and which greatly depends on the member states for the execution and implementation of its decisions.

For analytical purposes, as noted, three key strategies may be identified that can be used to 'repair' the EU's legitimacy deficits. They are suggested paths of institutional development for increasing legitimacy. The strategies are based on

[2] Calling for a transition from a *Staatenverbund* to a parliamentarized federation; a full parliamentarization of the EU ('From Confederacy to Federation Thoughts on the Finality of European Integration', speech by Joschka Fischer at the Humboldt University in Berlin, 12 May 2000 (full text available in Joerges et al. 2000)).

[3] Among key national politicians, a brief list of the contributors includes German Chancellor Gerhard Schröder, British Prime Minister Tony Blair, French Prime Minister Lionel Jospin, Greek Prime Minister Costas Simitis, and Belgian Prime Minister Guy Verhofstadt. Some envision the EU as a federal state much in line with the German model, whereas others would like to see it more as an intergovernmental organization. Schröder would like to turn the Council into an 'Upper House', whereas Jospin speaks about the Federation of Nation States that should be understood 'as a progressive and controlled manner of sharing or transferring powers at European level'. Verhofstadt (2006) entitled his pamphlet 'The United States of Europe'. For some of the academic responses to the debate see, e.g., Joerges et al. 2000.

three different conceptions of rationality—instrumental, contextual, and communicative—and their adherent warranting notions—efficiency, identity and justice. The latter conception of rationality does not solely designate consistency or preference-driven action based on calculus of success, nor mere norm conformity or accordance with entrenched standards of appropriateness, but rather public reason-giving: when criticized, plans of action can be justified by explicating the relevant situation in a legitimate manner. Hence, the notion of communicative rationality and deliberative democracy based on the contention that reasons make a difference.

The instrumental logic designates the EU as an organization whose special purpose is to solve the perceived problems facing the nation-states, associated with an increasingly globalized economy; social dislocation and threats to social and welfare arrangements; migration-induced multi-ethnicity; environmental problems and risks; and international crime and security threats. Legitimacy depends on the ability to solve problems effectively and the capacity to deliver the goods that people demand (cf. Scharpf 1999). Electoral responsibility through nation-state democracy and judicial review make for public accountability and are deemed sufficient for this kind of inter-state cooperation.

The contextual logic conceives of Europe as more of a community in which the different national modes of allegiance and identification are to be harmonized. The success of the EU depends upon developing a shared identity and a value basis for integrating different conceptions of the good life, and a diverse range of societal interests (cf. Miller 1995). Here the notion of a European identity prevails, but one which, nevertheless, has to be revitalized and fostered through participation in civic-type associations.

The third logic conceives of the EU as a rights-based post-national polity. As such it has proceeded beyond intergovernmentalism, and has established a polity that is sensitive to cultural difference. The EU, in this view, is in need of direct legitimation and a firmer basis of popular participation than the one provided for by the democratic processes at the state level. Here the integration process hinges on the ability to establish a fair system of cooperation founded on basic rights and democratic procedures for deliberation and decision-making.

The three logics are developed and discussed as distinct strategies, and as ideal types of polity formation, in a Weberian sense (see Table 4.1). The objective is to try to sort out more clearly which principal alternatives the peoples of Europe are faced with, with onus on the best match possible between the relevant normative and empirical dimensions. This is important in order to clarify the nature of the choices and the costs and benefits that can be associated with each strategy. It is also a way to substantiate the implicit hypothesis that the third strategy is the most viable. Normative viability, however, offers little assurance of empirical success, as such. It hinges on support, sustenance and susceptibility, on allegiance and favourable conditions of power. Viability therefore also relates to degree of conformity with prevailing constellations of power.

Table 4.1 Three logics of integration

Type of entity	Conception of rationality	Mode of legitimation
Problem solving entity	Instrumental	Efficiency
Value based community	Contextual	Collective self understanding
Rights based union	Communicative	Justice and norms of fairness

The strategies presented here, then, provide different answers to the question of the EU's legitimacy, and hence to the question of legitimate governance. That is not to say that they are equally valid from a normative point of view, nor that they are entirely optional, that is, that they can be adopted entirely without constraints. A polity will most likely exhibit a complex and historically contingent weaving together of the strategies presented here. If, for instance, the strategies are applied to the nation-state, one will see that it is also based on a mixture of strategies. But given that the nation-state is presently undergoing deep transformations, and that the EU has not solidified in terms of final shape, the examination must reflect a certain element of open-endedness. The EU may also solidify with considerable sectoral, or even geographical, variations—a *condominio* (Schmitter 1996)—depending on which strategy predominates.

The main question posed here is: is the EU moving towards a post-national, rights-based Union? To establish whether this is the case, it is necessary to examine the extent to which the constitution-making process complies with deliberative standards of legitimacy. A more thorough assessment would require probing deeper into the mixes and whether the previous embrace of one such serves to facilitate or stymie the adoption or grafting on of another strategy.

STRATEGY ONE: THE EU AS A PROBLEM-SOLVING REGIME

The first strategy is premised on a consequentialist notion of legitimation.[4] It depicts an enlarged EU that instead of clarifying and addressing the question of identity and democracy opts for a looser organizational form that emphasizes binding economic cooperation. There is little onus on collective tasks and obligations beyond the narrow interests and preferences of the member states. This type of organization comes close to the notion of the EU as a 'special purpose association of functional integration' (Ipsen 1972). Membership in the EU derives from

[4] Regimes are defined as 'implicit or explicit principles, norms rules, and decision making proce dures around which actor expectations converge in a given issue area of international relations' (Krasner 1983: 2). They are in standard literature seen as a means to reduce costs of going alone and/or as a result of market failure; hence can be seen as created by egoistic rational actors (Keohane 1984).

its discernible benefits. According to this strategy, the EU is best conceived of as a functional type of organization whose purpose it is to promote the interests of the member states. Here citizenship is merely economic, based on rights associated with the four freedoms, where the citizens are seen as producers, consumers, users, and customers; a 'market citizenship' (Everson 1995). This is to ensure participation in the market through free border-crossing (E. D. H. Olsen 2008).

The pattern of integration that informs this strategy reflects the constellation of constraints and opportunities of interdependent states steeped in a largely self-help international system. Asymmetrical relations of power pattern the integration and systemic constraints propel it in an economic direction. 'European integration exemplifies a distinctly modern form of power politics, peacefully pursued by democratic states for largely economic reasons through the exploitation of asymmetrical interdependence and the manipulation of institutional commitments' (Moravcsik 1998: 5). Such cooperation is maintained through institutions complying with an intergovernmental rather than a supranational logic.

From this reading of the EU and the integration process, several traits pertaining to its legitimacy can be discerned. For one, the EU is seen as a *derivative* of the European nation-states—hence, in democratic terms indirect legitimation is seen as sufficient. Democracy is associated with the nation-state and each nation-state is concerned with protecting core aspects of national sovereignty. For the EU itself, its legitimacy is related to its performance. It is a stakeholders' democracy; government for the people. As such it is highly conditional. It cannot draw on anything but actual performance and is therefore unstable. According to this notion, support is withdrawn whenever expectations are not met. Given the nation-states' concerns with sovereignty, there are also clear limits to the scope of this performance-based mode of legitimation.

This strategy envisions little redistribution within an enlarged Europe, except as side-payments in complex rounds of bargaining, or for the sake of stability. Rather, enlargement provides the member states with an expanded market and increased security vis-à-vis former foreign powers. Further, when it comes to enlargement and increased cooperation in the area of security and defence there is considerable disagreement as to the merits and applicability of this strategy. It is difficult to form a collective will, and the member states are apt to pursue their own interests in these areas, given their concerns with sovereignty. The risks of defection are high. Only states that share common economic or security interests will be likely to cooperate. On the other hand, when faced with high risks of defection, the EU has a strong incentive to include only those states that really matter. Extensive cooperation and a strong sense of obligation towards a common defence and security policy, within the framework of a loosely structured economic organization, will likely only be available in situations of crisis and when there are obvious external threats. Hence, for the intergovernmental logic to work, the EU in its present form needs to be scaled down.

Indicators of Strategy One pertain to the discernible and tangible material benefits associated with EU membership; cooperation and membership as premised on an ongoing calculation of costs and benefits; and the explicit

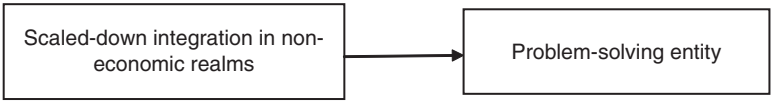

Figure 4.1 Integration on the basis of problem solving

recognition that the legitimacy of the EU is founded on its performance and as ultimately premised on the democratic legitimacy of the member states. One possible concretization of this strategy could consist of the following elements:

- significant formal and informal constraints on supranational institution-building;
- very weak or non-existent supranational decision-making and sanctioning ability, at least in non-market matters;
- very limited scope for redistribution;
- weak and highly constrained fiscal and taxing ability;
- limited scope and range of regulatory measures beyond the operation of the Common Market;
- highly constrained and delimited process of democratic will formation;
- the absence of a European identity;
- no independent civil and political rights basis;
- limited powers of judicial oversight.

Stymied expectations?

There are obvious advantages associated with this strategy. For instance, there is no need to clarify what are common concerns and what are issues to be handled separately by each member state. Efficiency in terms of the satisfaction of the members' interests lends legitimacy and there is no need for a particular value basis to ensure this.[5]

However, the strategy rests on a set of problematic normative assumptions. Outputs or functional results are not a viable long-term source of cooperation but are themselves in need of legitimation. The general verdict in the political theory literature is that explicit efforts to ensure a common value basis and/or a set of supportive institutions with sanctioning ability are required to sustain cooperation over time. A collective identity or other 'non-majoritarian' sources of legitimacy are required in order to coordinate action through bargaining and voting and solve the problem of collective action. This requires further elaboration.

According to the instrumental logic, the EU is merely a means for efficient decision-making. Hence, the reference to the notion of 'output-oriented

[5] See Abromeit 1998; Scharpf 1999. Also belonging to this group of scholars are Moravcsik 1998 and Majone 1998.

legitimation', which highlights positive results or consequences for the 'stakeholders'. This consequentialist view posits that it is the results that count in *intergovernmental* organizations. Such an organization or international regime is democratically controlled as long as the nation-states can monitor, revise, or recall its delegated powers. The veto power of all participants makes for legitimation in itself, as parties will not consent to decisions that are contrary to their interests. Only decisions that no one will find unprofitable, or that will make no party worse off—*Pareto-optimal solutions*, will be produced. The notion of *instrumental rationality* becomes the requisite tool for assessing the performance of intergovernmental organizations. Action is conceived of as motivated by preferences and anticipation of consequences. The question is whether the best means among alternatives is selected in order to realize given preferences, that is, according to their expected consequences for antecedent ends. Legitimacy is a question of aligning policy outcomes with citizens' preferences. However, functional interdependence and interest accommodation are inherently unstable, as actors will opt out of cooperation whenever they are faced with a better option. Interests make parties friends one day and enemies the next (Durkheim 1893: 204). Therefore, a political order cannot be reduced to the pursuit of self-interest or to the requirements of functional adaptation. Interests generate unstable equilibriums (Axelrod 1984) and are themselves in need of legitimation. Hence a common identity, shared values or norms of fairness are required to motivate collective action, and fair procedures are needed to create legitimation.

Empirically speaking, whilst this strategy might have worked in the earlier EU, or more appropriately the EEC, because of *a tacit consensus* on vital issues and values, foremost reliance on this would for the EU nevertheless represent a regression or a step backwards from what has already been achieved. It is reasonable to anticipate further losses in legitimacy and motivation as a consequence of frustrated and stymied expectations.

The newcomers from the former Eastern Bloc as well as further enlargement will most likely exacerbate such problems. Current and potential candidate countries, such as Turkey, Ukraine, Moldova, and Georgia, differ a lot from their Western European neighbours in terms of their basic economic structures, the composition, level, and type of economic performance, as well as in their relative and absolute wealth. In a Europe with far greater economic differentials we cannot expect that the current consensus on economic harmonization as the overarching goal can be sustained or will be tacitly accepted, because some will find it *unfair*. The continued inclusion of poorer countries raises concerns in those member states that stand to lose EU contributions through enlargement. Further, the distributive consequences of deregulation and market-making in the newer member states in Central and Eastern Europe, and potentially in new member states, as mentioned above, may result in a cry for redistribution and justice within an enlarged Union. Finally, in a more complex, diverse and value-pluralist Europe, it may be more difficult to reach consensus on any overarching goal, even of an economic character.

Recent developments in policy, political, and institutional terms have rendered the intergovernmental mode of legitimation inadequate. The principles,

organizational and institutional structures, and action programmes, associated with the current EU, impress upon analysts and decision-makers alike that it has emerged into a polity *in its own right*, and is no longer a mere derivative of the member states. Compliance with Strategy One would require a major downscaling of the EU amounting to a transformation of revolutionary proportions. We will see, in Chapter 8, that the EU's impact on the citizens, the consumers, the workers, the clients, and the producers as well as on the nation-states is profound. Hence, in normative terms the consequentialist mode of legitimation is insufficient. Indirect and performance-based legitimation does not suffice to justify the present-day EU.

STRATEGY TWO: THE EU AS A VALUE-BASED COMMUNITY

The second strategy is premised on the need to further clarify the value basis of the European community, through a collective process of self-interpretation.[6] Who are the peoples of Europe and who do they want to be? One option is to revitalize the Christian and humanist values, which can serve as the foundation on which a deeper sense of unity and community can be created. Both the Convention that forged the Charter of Fundamental Rights of the European Union (2000) and the Convention on the Future of Europe discussed the question of Europe's religious heritage. For instance, a penultimate draft of the preamble of the Charter stated: 'Taking inspiration from its cultural, humanist and religious heritage, the Union is founded on . . . ' (Charter Convention 2000a). This sparked a lot of opposition. The final version of the preamble did not contain the religious reference but instead referred to 'the spiritual and moral heritage' of Europe.[7] In the Constitutional Convention, Christian-democrats, the pope and others actively sought to have a reference to Christianity included in the draft, but did not succeed. However, the preamble does refer to Europe's religious inheritance, and this was retained in both the Constitutional Treaty and the Lisbon Treaty.[8]

[6] This kind of reasoning is quite prevalent among politicians. Consider for instance Valéry Giscard d'Estaing's remark to the effect that Turkey could not be a member of the EU because it is not 'European' (interviewed in *Le Monde*, 8 November 2002). One can also find traces of this in many academic analyses. Many of these analysts use this as a key standard or reference from which they develop their own positions, often hybrids or composites of this with additional ingredients or modifications. See, e.g., Bellamy and Castiglione 1998, 2000. Other analysts take this as their desired position but lament its unattainability. See, e.g., Grimm 1995; Guéhenno 1996; Offe 2003a.

[7] However, the notion of spiritual religious was retained in the German language version (Schön lau 2005: 105 6).

[8] In the plenary debate on the proposed Article 2 of the Constitutional Treaty on the Union's values, twenty nine Convention members underlined the need to make reference to religion as part of Europe's value foundation. References were made to God (modelled on the Polish Constitution), to Christianity, and to Judean Christian roots (European Convention 2003b: 18).

In this perspective, the EU is a geographically delimited entity, but one which has not yet fully discovered its common identity, which can serve as the basis for developing stable goals and visions. Revitalizing traditions, mores and memories of whatever common European values and affiliations there are—be they the cultural tradition of Greek and Roman antiquity, of the Christian-Jewish religion or of the Enlightenment—may provide the EU with a more solid basis for further integration and hence for developing into a federal state. This perspective posits that because of a common destiny, a common fate induced by common vulnerabilities, people are turned into compatriots who are willing to take on new collective obligations to provide for each other's well-being.

Power in this strategy is based on the socio-cultural mobilization of people—from below and/or above—around particular ethical-cultural values. This process generates a set of obligations, functioning to defend and protect our sense of 'we-ness', and which are used to mobilize support for the realization of political projects. These obligations are part of a larger system of protection and integration, which infuses the central socializing institutions with a set of identity-forming values that establish and maintain clear bounds to those that do not belong. Once established, the sense of common identity is maintained through a system of border control, which excludes those deemed as others, and a system of military defence that protects against external aggression, influence, and control.

From this reading of the EU, to be legitimate a *common identity* is needed for securing *trust*. It is required to enable actors to cooperate and to let their differences be settled by impartial procedures. Every political order presupposes some kind of cultural substrate to foster allegiance and respect for laws. Even if, as I reiterate in Chapter 9, the EU is something less than a state, it requires identity due to its ability to make collective decisions, that is, in order for subjects of collective decision-making to comply with common norms. The ultimate objective of such a strategy is to establish a we-feeling, and a sense of brotherhood and sisterhood, that is, solidarity. Such a search for a common European identity can make the EU into a value-based community, which does provide a sound basis for citizenship. It is also a means of drawing bounds, by defining who are Europeans and who are not. Such a strategy may also contribute to consolidate the member states at the present level of institution-building.

The anticipated developmental sequence in Figure 4.2 is very close to that depicted in the nation-building literature, as the development of a rights-based democratic order is seen to depend upon a set of shared common values. Indicators of Strategy Two refer to a set of identifiable values that permit an unambiguous determination of who are Europeans and what the boundaries of the EU are; cooperation and membership are presented as informed by, and as vital to the realization of, a set of identifiable values; and the explicit recognition that the legitimacy of the EU is founded on a set of values that permit conception and sustenance of the EU as a value-based community. In this model rights are seen to stem from a culturally relative value consensus. One possible concretization of this strategy could hold the following elements:

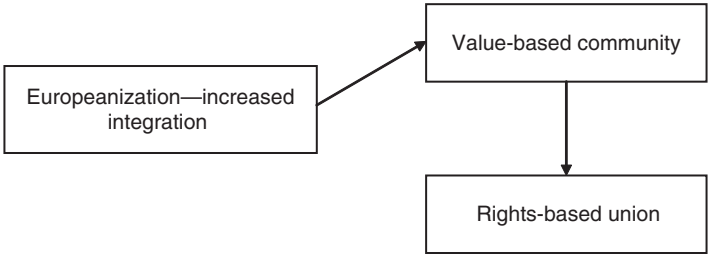

Figure 4.2 Value based integration

- the active development of a European *commune bonum* or we-feeling, through measures to stimulate the emergence of a European common culture, and a sense of Europe as an 'imagined community';
- the identification of a set of values associated with traditions, mores, and memories that can be deemed as truly characteristic of and as exclusively pertaining to 'Europe';
- socialization of people into becoming 'Europeans', through schooling, symbolic measures and social redistributive means, all motivated by the development of a European identity;
- a set of clearly delineated criteria for who are Europeans and who are not. The onus is on positively identifying Europe and distinguishing Europeans from others in culturalist terms, rather than what Europeans have in common with others; and a very open and comprehensive, multi-level process of democratic will formation that places great onus on participation.

The advantages of this strategy pertain to the clarification of identity and self-esteem that make for collective action—solidarity and patriotism—among the members. It provides the EU with a more evident and solid basis for inclusion/exclusion, which in turn makes it possible to establish a set of clear territorial bounds for the further extension of the EU. In this strategy, further democratization is possible if the people(s) of Europe are able to come together to discuss who they are and what their common goals are.

Forms of democratic legitimacy

Democracy is here not only about satisfying pre-established preferences or producing goods and commodities for a society, but is also a way to find out which problems need collective attention, which values deserve to be realized, and how to make hard choices between non-commensurable entities. It is a way to establish standards and to set priorities on the basis of a common identity. Hence, the second notion of legitimation—which for the sake of simplicity can be named communitarian—sees democracy foremost as a place to deliberate upon the

common good, and to establish bonds of solidarity within the *politeia*. It posits that persons address each other as fellow citizens within specific communal settings. Here they are called upon to take stands on collective problems in democratic assemblies. Such interaction, the presumption is, helps mould and shape their preferences, and a clearer conception of the common good or the common interest is developed, which turns people into compatriots—brothers and sisters—capable of collective action. This will engender civil compliance and character of the members of the group (Sandel 1996). In this perspective, legitimacy stems from primordial sources of belonging, which constitute the identity of the group and provide the *cultural substrate* of collective decision-making (Miller 1995). Identity, in this perspective, is established through a hermeneutical process of self-clarification, that is, a process of reflection and deliberation in which the members reach an understanding of who they are and who they want to be. In this reading, democracy is not one among several alternative principles of associated life that may be chosen at will; rather, it designates the very idea of communal civilized life itself. While democracy for rational choice theory is a means for the maximization of preferences, for communitarians it is considered as an instrument for the preservation of society—for ensuring the integrity of a pre-established context and given values (Forst 1994).

The problem with this *communitarian republicanism* is that it pictures democracy as a process of collective self-discovery, which does not allow for the autonomy of the political sphere of action and which gives human rights a binding status only as long as they correspond with that society's collective self-understanding. The problem raised by this strategy, then, is twofold. For one, the EU is a post-communitarian (and post-national) entity, which consists of different value systems and forms of allegiance. It is marked by value pluralism, and by conflicting views on the common good, within and among groups, local communities, and cultures. For it to function, the required modicum of a common will cannot simply be based on the basic commonalties of the existing collectives, that is, the nation-states. It must also draw on a different source of integration. One such is constituted by the system of rights that underpin the forms of constitutional democracy that are found in Europe. The second problem is the status of those rights whose validity derives from collective deliberations. If they are reflections only of the deliberations of a particular community, what is their status in moral and legal terms? How valid or universal are they?

A fortress Europe?

There are also normative problems in this strategy associated with developing a cultural basis for inclusion/exclusion, that is, for which countries to include. If taken far enough, such a distinction can conflict with universal human rights. Where many members share certain values, the rights and status of minorities could become threatened. The normative problem is that people have rights that should not be trumped by collective utility calculations or by value communities.

Empirically speaking, it is far from clear what values and virtues are uniquely European, as opposed to universally shared, or shared among smaller or more localized groups and collectives of people. For instance, there is little doubt that in value terms, as well as in institutional terms, there are significant differences in Europe in the amount of support for European integration and for supranational structures. Historically, following Rokkan (1975), it is possible to define a European 'core', which, roughly, corresponds to the six founding members of the EU. This notion of a 'core' is also somewhat reflected in the present notion of flexible integration, which opens up for a group of member states to pursue the integration process further than the rest (provided they comply with certain guidelines). Deepening and widening the EU seems to have exacerbated the tensions between the 'core' countries and those in the 'periphery'. Rather than value-based consensus, the more likely prospect of the pursuit of such a strategy may be to foster 'deep diversity'.[9] It may even stimulate a retreat to Europe's heartland, in that those least committed to integration withdraw from the Union. Indeed, the Lisbon Treaty contains a provision on voluntary withdrawal from the Union.[10]

If the EU, however, is successful in establishing a value-based community, such a community will have a set of clearly demarcated bounds to the outside world. Depending on the nature of the values that are embraced, there is a prospect of a 'Fortress Europe', namely, the neglect of the legitimate needs of bordering states. There are thus both normative and empirical problems involved in this model that cannot be solved adequately by bringing 'the peoples' of Europe together in communal and public settings.

TRANSCENDING THE NATION-STATE

In legitimacy terms, the preceding strategies conceive of the EU either as an organization in the hands of the member states or as an entity that has superseded the member states, in that it can claim a uniform sense of belonging and attachment. Neither captures well the EU in its present form, nor provides a set of recommendations for the future development of the EU that appear to be consistent with current developments.

Enlargement to the east and the south was a daunting challenge, as the structure that was initially set up to accommodate six member states, and was found wanting even then, now accommodates twenty-seven and perhaps even more in the future. Many of the member states included with the two latter enlargements lack solid traditions of a liberal political culture and have only recently become democracies. The EU is also actively involved in a further

[9] Deep diversity refers to a 'plurality of ways of belonging' to the polity and is open to multiple conceptions of citizenship, which coexist within the same state (Taylor 1993).

[10] The conditions are spelled out in Art. 50 TEU, as amended by the Lisbon Treaty.

deepening of the integration process, as it still seeks to expand its competences in justice and home affairs and—despite the disagreements and setbacks suffered during the Iraq war—in the areas of common security and defence.

After a lengthy process of technocratically driven integration, which culminated in the Treaty on European Union, signed in Maastricht in 1992, we have witnessed increased awareness among analysts and EU officials alike of the lack of popular support and sanction. In the process leading to the Maastricht Treaty, the peoples of Europe struck back and only a series of hard-won referenda allowed ratification of the Treaty. This series of events was the single most important incident to alert people to the EU's profound legitimacy deficit (Weiler 1999a).

In the past fifteen years, the process of European integration has picked up new momentum, in both depth and breadth and has further underlined the need to clarify the nature and status of the EU. The TEU made clear that the EU could no longer simply draw its democratic legitimacy from the member states. Is then the EU a novel entity whose legitimacy has to be established and considered with reference to the EU itself? If so, the question as to in whose interest the EU exists relates to a more profound concern, namely, to whom the EU 'belongs' and what kind of entity it is and should be. Thus we are faced with profound questions as to what the European Union's identity is based on, what its basis of allegiance rests on, and how its boundaries are to be determined.

STRATEGY THREE: THE EU AS A RIGHTS-BASED UNION

The third strategy is based on a rights-based procedural notion of legitimation. It is premised on the recognized need for continuing the process of institution-building at the political level. It envisions a wider, cosmopolitan conception of democracy. It is premised on the notion that in order to obtain legitimacy, decision-makers will be forced to pay attention to a wide range of popular opinions—European as well as non-European, transnational movements, such as international non-governmental organizations, and supranational and international bodies of norm enforcement.[11] This is so because they now face a set of rights-holders who are cognisant of their entitlements.

The normative essence of modern constitutions is, as was discussed in Chapter 3, tied to the respect for the integrity and dignity of the individual. This respect also has to be rooted in a political culture based on tolerance of difference and on the principle that disagreements should be settled by argument, which should be reflected in the working principles of the polity. The politico-institutional nexus of the modern state entails rights both for protecting the integrity of the individual and for making possible participation in collective opinion- and will-formation processes, namely, political rights.

[11] See, for example, Habermas 1998a, 2001a; Held 1995; Preuss 1998; Weiler 1999a.

In this perspective, only deliberation can ensure legitimacy, as it entails the act of justifying the results to the people who are affected by them. Public deliberation is the way to find out what is good, right and just in the political sphere of action. It is possible to test the quality of arguments referring to the common good or justice only in a debate in which all affected parties are involved. This is the task of the public sphere, the realm outside of state administration and the market in which people gather and become a public and hold the decision-makers accountable. As I reiterate in Chapter 7, the quest for a European public sphere—or a set of strongly overlapping publics—is of utmost importance for democracy to thrive, given that the EU has become a polity with considerable governing competences, and whose decisions affect both its citizens and member states profoundly. For the peoples of Europe to become citizens—who not only see themselves as the subjects of the law, but also as its authors—they have to be equipped with political rights and the requisite resources.

The third strategy envisions a pattern of integration that is responsive to normative pressure and *communicative power*. This notion entails that the deliberations that emanate from a multitude of public spheres are channelled into and shaped, transformed, and tested by a set of basic individual rights and democratic procedural arrangements. In this reading, rights are, as mentioned, legally institutionalized relations of universal respect for the autonomy and dignity of persons. Legal rights are founded on the notion of reciprocal recognition, and as such can foster a sense of community allegiance.

The strategy is premised on ongoing constitution-making to establish a set of principles that provide the entity with democratic legitimacy. Such a strategy is also consistent with the integration process, as the EU constitution lies less in the founding Treaties and more in the gradual 'constitutionalization' of the EU legal system (see Stein 1981; Weiler 1991, 1999a). The presumption is that public support will reside in a *constitutional patriotism*, which emanates from a set of legally entrenched fundamental rights and democratic procedures, but which also reflects political effect and identification.[12] In empirical terms, this will spring from a mutually supportive process, where constitution-making is carried forth so as to establish an EU citizenship based on entrenched political rights, reformed decision-making procedures, and clearer divisions of competences along vertical and horizontal lines, that is, between the EU institutions and the member states (vertical) and among the institutions at the EU level (horizontal). Such a process will, in so far as it occurs, likely stimulate further parliamentarization, thus making the European Parliament a full-fledged parliament and the Council a 'second' chamber and co-legislator with the EP.[13] Other institutional measures could include the use of optional referenda and other methods aimed at amplifying

[12] Cf. the statement by the French president, Jacques Chirac: 'So a Europe which is more ethical, which places at the heart of everything it does respect for a number of principles which, in the case of France, underpins a republican code of ethics, and, as far as the whole of Europe is concerned constitute a shared code of ethics' (Press Conference, Cologne, 4 June 1999).

[13] This model deviates from the one outlined by Habermas (2004) with regard to the federal aspects. Habermas speaks of a *federation of nation states* and sees the *Chamber of nations* (the Council)

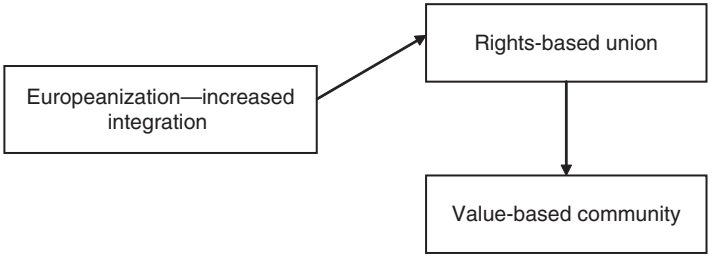

Figure 4.3 Rights based integration

the role and sphere of public deliberation (in a multitude of increasingly convergent public spheres) and critical scrutiny of decision-makers as the most prominent means to ensure the common will to prevail in the EU system. The legitimacy deficit can thus be 'mended' by involving the citizens of Europe directly or via their representatives in the EU system of deliberation and decision-making. In this manner a European demos is also shaped, but the approach is quite different from that pursued in the second strategy listed above. What is more, in the third strategy, the EU's foundation and its boundaries are justified within a cosmopolitan framework. Figure 4.3 depicts how a common sense of allegiance and attachment can be fostered through legal-institutional means. In this strategy the requisite common values—for solidarity—is the outcome of institutionalized cooperation, deliberation and collective decision-making processes at the European level.

Indicators of Strategy Three refer to the further delineation of a set of civil and political rights that permit Europeans to conceive of themselves as constitutional actors; an ongoing commitment to those legal and political institutional reforms that are conducive to the furtherance of post-national constitutional patriotism, including representative and accountable institutions; extensive constitutional deliberation; and the explicit recognition that the legitimacy of the EU is founded on a constitutional structure that appeals to fundamental principles of justice. One possible concretization of this strategy could look as follows:

- the active development of a European constitutional structure with a firmly entrenched rights basis which includes civil, political, social, and economic rights;
- a set of fundamental rights and democratic procedures, which also ensures that citizens are considered as and also consider themselves as rights-holders;
- a delineation of powers and responsibilities along horizontal and vertical lines;

as the main legislative body, while this model envisages full parliamentarization. Institutionally speaking, the role of the member states will be more like that of the German *Länder* in the federal model of Germany (albeit the division of powers and competences will not equal that of the German model). I return to this issue in Chapter 9.

- a modicum of solidarity and trust;
- a wide scope and range of regulatory measures; and
- a certain scope of redistributive measures, and an independent and significant fiscal capacity and taxing ability.

With regard to the internal structure and the workings of the EU, the question of forming a coherent will is also related to the question of division and distinction of powers and competences between levels, as some policy areas are more conducive to, and in need of, concerted action. The questions listed above cannot be assessed merely with reference to how much the EU has of each, because that would ignore the important 'federal', or 'subsidiarity', aspect of this process. The question also pertains to whether these policy areas can be justified as requiring collective EU action and a common EU position—in other words: the will, the need, and the ability to federalize.

There are obvious advantages associated with this strategy, as the EU is seen to build on the very principles and rights that are uniquely 'European' (even though they are universally valid) and normatively uncontroversial, since every member state subscribes to them and since these moral norms are increasingly spread worldwide. One may also see this as a way to reduce the normative problem of limiting the EU or defining a set of acceptable boundaries. The EU's borders are set by the constraints embedded in the functionality of popular representative democracy in Europe as well as the viability of such in other similar regions.

The challenge to this way of solving the legitimacy problems pertains to the sheer heterogeneity, as well as the weakly developed common understanding of the European project, both of which are likely to become further exacerbated through continued enlargement. This is so because different developments, experiences, histories, traditions, and languages put the political discourse—the communicative community—under strain. It may be difficult to obtain the kind of civic solidarity, common understanding, tolerance, and respect for pluralism that are all necessary for integration through democratic deliberation to take place.

The EU is a dynamic entity. It is an 'organization in motion', marked by polycentricity and flexibility and whose direction and underlying telos are still not clear. There is little consensus on what the EU is or should be. This may be problematic, as it can hamper the EU's ability to handle emerging or new problems. Continued enlargement and new collective measures regarding social policies and foreign and security policies require more willingness to pay and to form deep and long-term commitments. A 'we-feeling'—a sense of solidarity and trust—is needed. However, the unclear and ambiguous notion of the EU may also be a resource, as it may make it easier for a wider range of different collective moods and interests to find reasons to comply and may, short of consensus, foster a working agreement. This process may foster the required 'civicness' and trust; a common sense of identification can be created through an inclusive deliberation process. The demos is to be shaped by political means.

Reducing the ambitions of the EU, making it into a mere special purpose-regime is highly questionable as a solution to the legitimation problems. When

faced with today's challenges, as reflected in changes wrought by globalization to both welfare and territorial borders, such an entity may not be capable of handling the problems effectively. There are, however, traits of the emergence of a rights-based union in the present reform process of the EU.

CONSTITUTIONALIZING THE EU?[14]

The establishment of the Convention on the Future of Europe is the single most important sign that the EU has involved itself in constitution-making. As noted above, the Laeken Declaration paved the way for the Convention to open up an explicit discussion of the question of a European constitution. It also left the Convention with a very open-ended mandate. This was framed as a list of fifty-six questions, which were cast under six broad headings. The Convention's President presented these in the following manner:

- fundamental questions on Europe's role;
- the division of competence in the European Union;
- simplification of the Union's instruments;
- how the institutions work, and their democratic legitimacy;
- a single voice for Europe in international affairs; and finally,
- the approach to a Constitution for European citizens. (Giscard d'Estaing 2002: 10)

The Convention was asked to address a wide field of questions, ranging from core principles to rather mundane and technical or institution-specific questions. The Convention was also given considerable leverage to develop its own interpretation of its mandate.

There is wide agreement among analysts and decision-makers alike that the Convention achieved more than an Intergovernmental Conference would have.[15] The subsequent IGC that adopted the Constitutional Treaty made some adjustments to the text, but retained many of the important changes proposed by the Convention. The Lisbon Treaty (2007), which was drafted after the negative referenda on the CT, preserved most of the important achievements of the CT.[16] However, whereas the Constitutional Treaty would have replaced the existing Treaties with one single document, the Lisbon Treaty follows the logic from

[14] The assessment in this section is based on documents issued by and written on the Convention, personal attendance at six plenary sessions, interviews with Convention members and social move ments, and attendance at several conferences on the Convention.

[15] See Closa 2004; Craig 2003; Crum 2005, 2007; Göler 2006; Hughes 2003; Kokott and Rüth 2003; Magnette 2004; Maurer 2003; Shaw 2003.

[16] See MEP Andrew Duff's 'True Guide to the Lisbon Treaty', available at <http://www.eurointelligence.com/article.581+M5aca4ee4d7b.0.html> (accessed 6 March 2008). Duff was a member of the Constitutional Convention and is a specialist on constitutional affairs.

former treaty changes of amending existing Treaties.[17] If ratified, the Lisbon Treaty will imply the following revisions and developments of treaty law, all of which were introduced by the Constitutional Convention:

- same legal value of the Charter of Fundamental Rights as the Treaties, which thus becomes binding (Article 6.1 TEU);[18]
- recognition of the legal personality of the Union (Article 47 TEU);
- partial abolition of the pillar structure;[19]
- recognition of the primacy of EU law (Declaration 17);[20]
- reduction and simplification of the legislative instruments and decision-making procedures, as well as the introduction of a hierarchy of norms (Articles 288–92, 296 and 297 TFEU);
- clearer division of competences between the Union and the member states (Articles 1–6 TFEU);
- decision-making by qualified majority as the main principle in the Council (Articles 16 TEU and 238 TFEU);
- the election of a President of the European Council for a term of two and a half years (Article 15.5 TEU);
- introduction of a High Representative of the Union for Foreign Affairs and Security Policy (Article 18 TEU);[21]
- a citizen's initiative (Articles 11 TEU and 24 TFEU);
- voluntary withdrawal from the Union (Article 50 TEU);
- the convention method as a non-binding procedure for treaty change.

[17] The Lisbon Treaty amends the *Treaty on European Union* (TEU) and the *Treaty establishing the European Community* (TEC), renaming the latter *Treaty on the Functioning of the European Union* (TFEU). In the following analysis, articles refer to the final numbering in the consolidated treaties as amended by the Lisbon Treaty.

[18] The Charter is not an integral part of the Treaty, as was proposed in the Constitutional Treaty. The Lisbon Treaty contains a Protocol with specific measures for the UK and Poland seeking to establish national exceptions to the justiciability of the Charter: 'Protocol on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom'.

[19] Meaning the structure of three categories of cooperation with different areas of competence: the Economic Community (Pillar I); the Common Foreign and Security Policy (Pillar II); and Police and Judicial Cooperation in Criminal Matters (which are outside of Community law) (Pillar III). Follow ing the introduction of a single legal personality (Art. 47 TEU), the third pillar will disappear after a transition period of five years (Protocol on Transitional Provisions, Art. 10). Policies in the field of justice and home affairs, including Schengen, will then be integrated into the first pillar. The partial abolition of the pillar structure is further evidenced by Art. 289 TFEU referring to the 'ordinary legislative procedure', which is specified in Art. 294 TFEU, and Art. 16 TEU on qualified majority. However CFSP/ESDP remains intergovernmental.

[20] The legal primacy, which was included as Art. I 6 of the CT, is affirmed by the Lisbon Treaty, now as a declaration.

[21] The CT introduced a 'Union Minister for Foreign Affairs', but with the exception of the title being changed, this invention remains unchanged in the Lisbon Treaty. The High Representative will have a double hatted post as President of the Foreign Affairs Council and Vice President of the Commission.

This list suggests a marked change in the direction of a federal rights-based Union: the constitution-making process has been informed by Strategy Three. The assessment in the following section will test this assertion. If the process were to result in a constitution that is wholly consistent with Strategy Three, it should fully reflect the fundamental tenets of the democratic constitutional state—highlighting basic rights and representative democracy. In order to make a European constitution from the perspective proposed in this book, we would expect the Convention, which drafted the original text, to have:

- proposed a European Constitution with a fully incorporated Bill of Rights;
- included provisions to ensure that the EU will be based on representative and accountable government, subject to strict requirements of transparency;
- called for a division of powers and competences within the EU in compliance with individual autonomy, that is, ensuring that the Union's sphere of competence is consistent with the requirements of political citizenship;
- included provisions for constitutional change based on the principle of popular, and not member-state, sovereignty;
- considered the proposal in symbolic and substantive terms, calling for a 'Constitution for Europe', and not a mere Constitutional Treaty, and;
- proposed a transparent, deliberative, and widely representative method for framing the Constitution.

On the first point, that of proposing a full-fledged Constitution for Europe, it is notable that the Convention was set up merely as a *preparatory* body, that is, it was only designated to come up with one or several proposals that the subsequent IGC (which started its work in October 2003) would discuss. The Convention had not been designated as a Constitutional Convention, neither was it equipped with decision-making powers. The IGC is, according to Article 48 TEU, the body formally endowed with the authority to undertake treaty changes. This weak formal status of the Convention meant that whatever it would come up with could be overturned by the member states, either during the IGC or at the ratification stage. The process was therefore steeped in, and had to relate to, the core tenets of national-sovereignty protection embedded in Strategy One. Yet, the Convention did come up with a proposal draped in constitutional cloth and garb. In symbolic terms, the legitimacy of the Union was said to derive from the citizens *and* the States of Europe.[22] The effort made by the Convention later seemed successful, and it became clear, as the negotiations of the IGC unfolded, that the common proposal put forward by the Convention was difficult to alter substantively by the governments.

The Constitutional Treaty included the complete Charter of Fundamental Rights as Part Two. The inclusion of the Charter is a significant sign of the embrace of Strategy Three. To corroborate this, it is necessary to examine the

[22] Article I 1 of the Constitutional Treaty (2004). This wording was changed in the Lisbon Treaty, in which 'the High Contracting Parties establish among themselves a European Union' (Art. 1 TEU).

nature and composition of rights in the Charter, as well as whether the institutional structure of the EU might seriously curtail such rights. For one, to be fully reflective of Strategy Three, the Charter would have to strengthen the rights of EU citizens. In addition, for the Charter to be fully effective, the Constitution would have to reform the institutional structure of the EU.[23]

The purpose of the Charter was to make *existing rights* more visible to EU citizens, not to add new rights or new competences to the Union. The Charter was, however, culled from a wide range of sources, including EU law, the European Convention on Human Rights (ECHR), national constitutional traditions, and the European Social Charter. As a result, it contains a comprehensive list of rights. In terms of the range of rights, it does *not* differ much from conventional state-based Charters or Bills of Rights. Further, the underlying philosophy of allegiance that can be discerned from the Charter is one that is reflective of Strategy Three: a universally oriented and essentially secular constitutional patriotism, rather than a communitarian-republican commitment to a set of specific and uniquely European cultural values, even though the Preamble mentions the religious inheritance of Europe.

The Charter, whilst in symbolic terms a potentially important spearhead for institutional reform, suffers from some structural defects. The Charter adopts the citizenship provisions in EU law. These are based on a weak notion of citizens' public autonomy (Fossum 2003a).[24] Concomitantly, Title IV of the Charter, entitled 'Solidarity', contains a wide range of social rights, reflective of Strategy Two. The commitment to social values could be seen to refer to a common sociocultural substrate in Western Europe—the welfare state and social rights. Such solidarity could be seen as necessary to sustain a European polity with redistributive measures. However, their status is that of ordinary rights or policy objectives rather than fundamental rights proper (Menéndez 2003: 198). This designation is indicative of the weak competence the EU has in the field of social rights, thus raising questions as to its ability to serve as a market-correcting vehicle. Such a role is necessary if the Charter is to serve as a proper promoter of a rights-based Union founded on the principles of justice and freedom. A related issue here is that the scope of the Charter was circumscribed by horizontal provisions in the Constitutional Treaty (Articles II-111 to 114), which entails that it was only to apply to the actions of the EU institutions and the member states' authorities when implementing EU law. With Lisbon, this was replaced with a cross reference to the Charter, which, however, is made binding and given the same legal value as the Treaties (Article 6.1 TEU).

These comments indicate that when assessing the Strategy Three thrust of the constitution-making process, the Charter, which I return to, cannot be considered in isolation. It has to be seen in relation to the highly complex and composite

[23] See the discussion in the next chapter.

[24] Some of the more than thirty constitutional proposals that were submitted to the Convention contain citizenship provisions that could rectify this. See, for instance, MEP Jo Leinen's (2002) draft proposal 'Draft Constitution of the European Union'.

EU, with strong remnants of a Union derived from the member states, and with a strong focus on the internal market. The further question, therefore, is whether the other reforms proposed by the Convention would have helped strengthen the bite of the Charter.

Accountability and representation

The second point above pertains to representative and accountable government. Several of the proposals in the CT, which are also retained in the Lisbon Treaty, would heighten the democratic quality of the Union, both in terms of representation and in terms of accountability. Representative democracy is laid down as a founding principle of the Union (Art. 10 TEU). The elevation of co-decision to the standard legislative procedure (subject to important exceptions)[25] would help to amplify greatly the role of the EP within the EU institutional system, as it essentially places it on a par with the Council as a legislative chamber. Increased transparency requirements (CT Arts I-50, III-398 and III-399)[26] would improve individual and inter-institutional lines of accountability. In the same vein, the elimination of the pillar structure and the recognition of Union legal personality (Art. 47 TEU) would make the Union more institutionally coherent and strengthen the Court's presence within the EU's institutional system. The President of the Commission would be selected with a view to the political composition of the Parliament: 'This candidate shall be elected by the European Parliament by a majority of its component members' (Art. 17 TEU). Still, the Parliament would not be allowed to take initiatives but would have to work through the Commission. Furthermore, the division of responsibility between Commission and Council as executive bodies would remain unclear. Hence, the CT, as well as the Lisbon Treaty, is deficient in democratic terms.

The third point, that of the *division of powers and competences* and their consistency with political citizenship requirements—the protection of a broad spectrum of rights at the EU level—is hard to assess. The division of powers between levels would become clearer than in the present system, but the large number of shared competences means that there would be considerable uncertainty. Although a simplified version of qualified majority voting would become the norm, the member states retain unanimity in critical issue areas such as social policy, taxation, and foreign and security policy. The vertical division of competences would leave few issue areas within the exclusive remit of the Union. Key

[25] Decisions to be adopted jointly by the Council and the EP on the basis on proposals from the Commission. This is now the 'ordinary legislative procedure' (Art. 289 TFEU, the procedure is defined in Art. 294 TFEU), which applies to the vast majority of legislation within the Common Market as well as in the area of Justice and Home Affairs.

[26] There are minor changes from the Constitutional Treaty to the Lisbon Treaty in this regard. Cf. Articles 15 and 298 TFEU.

areas in which the Union would be equipped with exclusive competence are monetary policy, common commercial policy, and the customs union—all areas related to the internal market and hence conducive to a narrow economic citizenship. Those devices that are generally held to be market-correcting are in areas of shared competence, in the coordination of economic and employment policies, and in areas of supporting, coordinating or complementary actions (cf. Arts 4-6 TFEU). Symbolically, at least, this division does not appear consistent with Strategy Three and would apparently continue to leave a strong Strategy One imprint upon the EU.

The fourth point is that constitutional change should be based on the principle of popular and not member-state *sovereignty*. The Convention did not abandon the principle of member-state sovereignty and it essentially retained national veto in treaty/constitutional change (cf. Art. 48 TEU). It did, however, insert new provisions on convening a Convention at the treaty preparatory stage, but precisely how extensive its application would be, and when it would be triggered, is uncertain. The retention of national veto is not compatible with the notion of popular sovereignty, as this is spelled out in Strategy Three.

National veto also touches on the fifth point, namely, the essential designation of the document as a constitution. Since the veto was retained, the Convention proposed a *constitutional treaty* and not a democratic constitution proper. A treaty is a contract between states and not a concordat between citizens. The retention of the veto also raises the prospect of a European constitution serving less as a vehicle for further development, and more as a *system of restraint*, as is the conception of a constitution propounded by the Buchanan Constitutional Economics School (cf. J. M. Buchanan 1975). As it would be difficult to forge agreement among twenty-seven states or more, such a constitution could turn into a straitjacket (a fear that many members of the Convention harboured). The complexity in this regard is moreover illustrated by the controversy over the label 'constitutional'. This was believed by many to be one of the factors leading to the popular rejection of the Constitutional Treaty, and the label was dropped in the Lisbon Treaty. The content of the new treaty, however, remains very much the same.

These observations suggest that whereas the constitution-making process initiated by Laeken contains the strongest commitment to Strategy Three ever expressed by the EU, a very strong nation-state presence within the EU is also retained. The resulting Constitutional Treaty, as well as the Lisbon Treaty, contains a strong commitment to the protection of *national identities*: 'The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' (Art. 4 TEU). The commitment to universal values expressed above is thus combined with a strong commitment to national identity. This latter commitment is combined with new provisions to strengthen national democracy in EU matters. This is done through making national parliaments more involved in the decision-making processes at Union level rather than remove items from the Union's remit. A Protocol on national parliaments and a

Protocol on subsidiarity were introduced by the CT, both of which were provisions to strengthen the role of national parliaments within the EU system.[27] This latter provision may therefore serve to modify the Strategy One imprint here.

From closed to open process—and back again?

The last point listed above pertains to the manner of forging a constitution. For it to be wholly consistent with Strategy Three, it would have to be transparent, deliberative and widely representative. The Constitutional Convention was set up as a deliberative body. This (and other) traits have been seen to mark off the Convention approach from the former method of convening an IGC alone, which has brought about the type of treaty-based constitution that the EU is currently in possession of. The IGC method of treaty-making and change is fundamentally intergovernmental in its orientation and has many of the traits of *inter-state diplomacy*. The member states are dominant actors, and parliamentary and other deliberative bodies play a marginal role. The negotiations take place in a closed, secretive, and 'bargaining' manner—all of which are characteristic features of Strategy One. The IGC method stands in marked contrast to the Convention's work and procedures.

The Convention, while intended to be deliberative, was not set up as a Constitutional Convention. Neither had there been a process of obtaining a popular mandate for a constitution through election or other direct consultation. In these circumstances, it would seem to be particularly important for the Convention to compensate for some of these defects through its own work. This means that two traits would have to be amplified: (a) its ability to reflect and project the range of visions and arguments in Europe, that is, its representativeness; and (b) its ability to foster agreement through deliberation.

The Convention's composition largely duplicated that of the Convention that forged the Charter of Fundamental Rights, that is, it was made up of a majority of parliamentarians (46 out of 66 voting members, and 26 out of 39 from the candidate countries). It also had appointed representatives from the member-state governments, but these were in a clear minority. The inclusion of both sets of representatives could be construed as a compromise solution, between a government-led forum (reminiscent of an IGC) and a parliamentary assembly (cf. Closa 2004). This construction makes it important to establish whether the government representatives operated under tight control by their respective governments or had a fairly open mandate. Perhaps the most conspicuous trait of the Convention was its domination by representatives from the EU institutions and the member states. There was no direct sub-national representation and no direct representation from civil society. Both categories had a limited number of observers present. In terms of mirroring the composition and diversity of

[27] 'Protocol on the Role of National Parliaments in the European Union', consolidated with the Lisbon Treaty.

European society, the Convention suffered from a number of weaknesses. Of particular note was the low share of women. Further, the Convention failed to even faintly reflect the increasingly multicultural nature of many of its member states (Shaw 2003).

That said, the Convention's composition was far more representative than any previous constitution-making body in the EU. But its biased composition weakened any claim to represent or properly reflect European society. Presumably, then, what could matter more to its legitimacy would be its deliberative quality—its ability to foster consensus through deliberation. Its deliberations would run for more than sixteen months, and its working method was to be marked by openness and transparency. Its president, Valéry Giscard d'Estaing, underlined the deliberative character of this body in his inaugural speech on 28 February 2002. Each member was asked to refrain from acting as a spokesperson for the organization that appointed her or him; there would be time to deliberate; decisions would be reached by consensus rather than through voting; and the end result—one proposal—had to be agreed upon consensually. Giscard d'Estaing concluded:

> If your contributions genuinely seek to prepare a consensus, and if you take account of the proposals and comments made by the other members of the Convention, then the content of the final consensus can be worked out step by step here within the Convention. (Giscard d'Estaing 2002: 14)

The work of the Convention did comply with some of the tenets of the deliberative model but to a variable degree.[28] The process was structured to ensure that different views could come to the fore and throughout the process opinions and positions changed. The proposed draft was also accepted by a very large majority of Convention members.[29] The Convention's variable character in deliberative terms is evidenced, for instance, in how it served to de-legitimize situated interests, as Magnette (2004) puts it, in particular in the first stages of the process. But as the process unfolded, and as the different portions of the draft appeared, the deliberative norms were more frequently violated. The president did so himself when he, on 22 April 2003, floated a personal proposal to the newspaper *Le Monde* prior to presenting this to his colleagues in the Praesidium, in an effort to break a deadlock on institutional questions (European Convention 2003d: 3). In the last few months of the Convention's work, the process was de facto reorganized into three sections: members of the European Parliament, national parliamentarians, and government representatives. The core institutional interests thus gained a prominent position in the final stages of the Convention's work. There was also resort to voting in the Praesidium.[30] In the final days, there were

[28] See, in particular, Beyer 2007; Eldholm 2007; Fossum and Menéndez 2005; Göler 2006; Magnette 2004, Maurer 2003.

[29] Nine (eurosceptical) Convention members submitted a 'Minority Report' (European Convention 2003c).

[30] This took place on 23 April 2003 as part of the Praesidium's fierce reaction to the proposal Giscard d'Estaing had floated to the press.

instances of brinkmanship and high tensions, and Giscard d'Estaing was accused of attaching different weight to members, de facto privileging the government representatives. In fact, analysts maintain that the European Convention managed to produce results 'by consensus', thanks to Giscard d'Estaing's manoeuvre (defining the meaning of the term consensus himself); 'the Praesidium under the Leadership of Giscard had a unified conception and exercised all its agenda-setting powers' (Tsebelis and Proksch 2007: 177, 180).

Giscard d'Estaing's actions and much of the Convention's work was driven by what may be termed *forward linkage*. The fact that the Convention's work had to be scrutinized by, and was ultimately subject to the approval of, each member state in the IGC and the subsequent ratification stage, deeply shaped and affected its work. It was probably one important reason for the Convention's working close to the text of the treaties, so that much of its work revolved around assessing the provisions in place (adding, revising, embracing and slashing). Forward linkage is also reflected in heightened government interest in, and concern with, the Convention. Over time, a number of member states replaced their initial government representatives, either with foreign ministers or with more senior ministers.[31] This tightened the links to the respective governments and served to shift some of the inevitable intergovernmental bargaining into the Convention. This forward-linkage aspect could mean that whatever agreements were struck in the Convention would have greater probability of lasting through the IGC. But it could also affect negatively the Convention's legitimacy as a deliberative body.

The Convention's draft and the later outcome of the IGC was presented and understood as a compromise, but is better seen as a *working agreement* as was worked out in Chapter 3. In the operation of the Convention, to some extent induced by its hybridity—partly an IGC and partly a free-standing deliberative body—we see the complex interweaving of the bounded mandate and bargaining approach to decision-making (characteristic of Strategy One) coexisting in considerable tension with the deliberative approach to decision-making (characteristic of Strategy Three).

A working agreement

Deliberation may result in a consensus, a working agreement, or an open conflict; or it may prepare the ground for bargaining and voting. The drafting of the Constitutional Treaty represents an instructive example of a deliberative process shaping a working agreement. The quality of the Convention method in terms of openness, broad participation, lengthy discussions, critical opposition, and so

[31] Roche replaced MacSharry (Ireland); Lopes replaced Joao de Vallera (Portugal); de Vries replaced van Mierlo (the Netherlands); Fischer replaced Glotz (Germany); de Villepin replaced Moscovici (France); Balázs replaced Martonyi (Hungary); Kohout replaced Kavan (Czech Republic); Yakiş replaced M. Yilmaz (Turkey); and Korčok replaced Figel (Slovakia) (Closa 2004: 199).

forth, was conducive to an agreement that was more than a compromise but less than a rational consensus. The participants managed to reach an agreement about the EU's 'constitutional' structure *without* making it into a unified political order.

The members of the Convention clearly had different reasons for complying with the end result; however, they did not see it merely as the best possible outcome given present constraints. Some, such as the federalists, saw it as a move towards a more democratic Europe. Realists and 'technocrats' saw it as a necessary instrument for better handling cumbersome decision-making processes. A third group, consisting of neo-liberals and many of the 'eurosceptics', saw it as the best alternative to the status quo. Federalists, realists, and eurosceptics, thus, had different reasons for accepting the Convention's draft. Accordingly, conservatives, socialists, greens, and liberals in the EP could all find reasons to defend the draft in their respective constituencies. The agreement was not a simple compromise, that is, a bargain struck between the contracting parties. This is so because the parties 'learned' and established a new basis for handling European affairs through the Convention process. Deliberation not only had epistemic merit, and value as a constraining factor, but also served as a shaper and transformer of opinions. Some actors changed opinions during the process—some members that were reluctant and even hostile to the 'constitutional project' at the outset became active supporters (cf. Fossum 2005; Göler 2006; J. P. Olsen 2004; Karlsson 2008). In the Convention there were several kinds of actors:

> The *big interests* presented their positions (usually in terms of 'public interest') without, in most cases, underlining their agreement or disagreement with other opinions; the *dialecticians* emphasized these lines of agreement or conflict; while the *radicals* denounced and maybe thereby paradoxically strengthened the pro European consensus; the *facilitators* then tried to reduce the 'cognitive dissonance' through explanations. (Magnette 2004: 220)

The process of making the Constitutional Treaty, then, was not a simple tug of war of inter-state bargaining, designating that parties failed to get what they wanted and then struck a deal that was better than no deal at all.[32] Rather, this was a process where deliberation constrained the power play of the great powers and, as has been revealed from participants' own accounts, from interviews with participants and from numerous analyses, this was a process that improved members' information on and judgements of the issues under debate. One paradoxical cause may also be, as one analyst observes, that constitutional scepticism also provided momentum and preference change. 'Many constituencies that were historically opposed to the idea of the European Constitution as an inspiration towards and mark of European political community became converted to the constitutional process not as a polity-consolidating device, but as a polity-limiting device' (Walker 2004: 30).

[32] Such a reading of the process has been proposed, among others, by Andrew Moravcsik (2005), who describes the Convention's draft as a 'constitutional compromise' which merely reflects the power of the involved parties, and Tsebelis and Proksch (2007), who ascribe much of the end result to Giscard d'Estaing rigidly steering the process.

The Constitutional Treaty was contested as it embodied widely different conceptions of the Union. But how did the actors manage to agree in the first place—on what terms did they manage to handle their differences at all? The core principles that animate the actors' deliberations are the well-known deontological principles of democracy, rule of law, and human rights, as is reflected in the consensus over the Charter of Fundamental Rights. The process clearly revealed that all the actors share these core codes of legitimate rule but they *disagree* on how they are to be specified and entrenched in institutional form. In other words, the EU reflects the ongoing search for the most appropriate entrenchment of such consensual principles in organizational and constitutional form. Denoting the Constitutional Treaty as a working agreement may help to explain why the EU came out with a partial agreement only, and why the CT was ultimately rejected.

CONCLUSION

Many see the EU as currently caught between the Scylla of unfettered marketization and the Charybdis of overambitious nation-building. This tension certainly runs through the EU, as a system in motion in a more fundamental sense. But this does not mean that it is necessarily locked in between two incompatibles. There is a third way, as presented in Strategy Three, which has become steadily more manifest and apparent since the early 1990s. This third way, it should be noted, has deep historical roots in Europe.

Since the French Revolution, nation-states have not existed in isolation as bounded geographical totalities, but have interacted and, time and again, affected each other adversely, and grown in interdependence. This is a process very much speeded up by the EU, whose institutions provide mechanisms for encouraging member states to consider the external effects of their decisions on others, and which has 'established the bold idea to disconnect nationality and citizenship and this idea may well evolve [in]to [a] general principle which ultimately transforms the ideal of cosmopolitan citizenship into reality' (Preuss 1998: 149). In this respect, the EU pursues the modern idea of statehood, as divorced from nationhood: the polity is not bound by pre-political bounds.

In the next chapter I turn to the Charter of Fundamental Rights and the question of its proper place in a democratized Europe.

5

Chartering Europe

INTRODUCTION

The position of human rights is strengthened internationally but this is a development that is not without difficulties. Human rights are universal as they appeal to humanity as such, and with their expansion within international law they have also gained an authority that limits the state's self-legislation. There is a tension between democracy and human rights, because so far the principle of popular sovereignty has only been made applicable to the rule of particular societies; it is at this level that democracy is institutionalized. Democracy is in other words limited to the nation-state, which primarily is geared to self-maintenance. This brings the nation-state into a potential conflict relationship with other states. Human rights, for their part, no longer follow from democratic states' self-legislation only, as was the case with the declarations that came about during the French and the American Revolutions. They also follow from international legislation under the direction of, among others, the UN, and are enforced by special human rights courts. From a normative point of view this development is most welcome.

The question arises whether a Charter of Fundamental Rights at the regional level, and in particular in the EU, can close the gap between abstract human rights and the need for democratic legitimation. Is it a means to resolve the tension between popular sovereignty and human rights? I will address these questions and present two sets of arguments in favour of a constitutionalized bill of rights in the EU. The first one has to do with reducing *arbitrary power* and norm enforcement, which is the lingering problem of human rights in international politics. The second has to do with the *normative validity* of human rights. How can they be defended and are they really a necessary ingredient of democratic rule? One may object that we do not need the Charter while such rights are already protected by the established constitutions in Europe, either on the national or the regional level of judicial oversight. Even if the Charter merely represents consolidation of existing law, I maintain that it enhances transparency and the legal certainty of the citizens of Europe, on the one hand, and that it is a contribution to global democracy on the other hand, as it provides a more consistent basis for the EU's external policy, and can thus be seen as a step towards a rightful world order.

In this chapter I deal with the reasons for a Charter, while I will address the external dimension of the EU and return to some of its limitations in the next chapter. I proceed by first briefly examining the content of the Charter. Then I

discuss the tension between human rights and democracy. Is the Charter a means to solve the legitimacy gap of human rights politics? In the following section the discussion is about the normative foundation of human rights and the alleged tension between law and morality involved in constitutionalizing human rights. Law may be seen as complementing morality, but is there really *a moral right to human rights*? I end the chapter by discussing the right to justification as the basic human right, which is a strong argument for further democratization of the EU in order to handle the problem of a human rights politics.

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

> [Yet] international law (*jus gentium*), since its origins at the beginning of modern times, has been characterized by a dualism of its normative focus: on the one hand, the concern for human rights, which was first grounded theologically and metaphysically on natural right; and on the other hand, especially since the end of the Thirty Years War in 1648; the principle of inviolability of the sovereignty of the particular states, which was primarily oriented towards the preservation of peace. (Apel 2001: 32)

Prohibition of violence against sovereign states was prioritized over the protection of human rights, thus the Westphalian order safeguarded the rulers' *external sovereignty*. The international order is founded on the principles of coexistence and non-interference among sovereign states.[1] The latter principle, however, cannot prohibit governments from turning the power apparatus of the state against their own citizens—it cannot prohibit genocide—and cannot be sustained.

Human rights and the parameters of power politics

The principle of state sovereignty which international law warranted after the 1648 Peace of Westphalia, is a principle that does not protect human rights. States enjoy equal status and can autonomously make their own choices and pursue their own interests and preferences without the interference of others. The UN Charter, adopted in 1945, affirmed the principle of non-intervention as the foundational norm of the society of states. Article 2(4) of the Charter reads: 'All

[1] However, see Walzer (1977: 89): '[O]f course not every independent state is free, but the recognition of sovereignty is the only way we have of establishing an arena within which freedom can be fought for and (sometimes) won. It is this arena and the activities that go on within it that we want to protect, and we protect them, much as we protect individual integrity, by marking out boundaries that cannot be crossed, rights that cannot be violated. As with individuals, so with sovereign states: there are things that we cannot do to them, even for their own ostensible good.'

Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' The legal use of force against sovereign states is limited to instances of individual and collective self-defence and where the UN Security Council determines that there is a threat to or a breach of the peace and authorizes action aimed at restoring international peace and security (UN Charter, Article 39). But our moral consciousness tells us that when people's basic rights are violated, when crimes against humanity are committed, ethnic cleansing or genocide is taking place, something MUST be done. The UN and the accompanying growth in international law ever since its inception represent the transformation of this moral intuition into political and legal measures. The purpose of these institutions was first to constrain the willpower of the nation-states in their external relations to other states. The politics of human rights by means of systematic legalization of international relations implies the domestication of the state of nature between countries. In principle there are now institutions above the nation-state that constrain the internal willpower of the state, that is, the power exerted over its citizens. These are, however, hindered by the limitations of the international law regime, as it is based on the principle of unanimity and as it lacks executive power.

However, initially this is not the only problem with a human rights regime. The problem with human rights as the sole basis for international politics is due to their non-institutionalized form. Human rights exhibit a categorical structure—they have a strong moral content: 'Human dignity shall be respected at whatever cost!' The basic constituency for all morality is individual human beings and not states, societies, groups, or peoples. The enforcement of human rights without a context-sensitive procedure of application can give rise to new kinds of atrocities and wrongdoings. However, increasingly human rights are incorporated in both international law and the constitutions of the nation-states. Through this constitutionalizing process, persons and groups have become recognized as subjects of international law. Individuals are subjects of international law on the basis of such documents as for example the Charters of the Nuremberg and Tokyo War Crimes Tribunals,[2] the Universal Declaration of Human Rights (1948), the Covenant on Civil and Political Rights (1966), and the European Convention on Human Rights (1950), and now also the Charter of Fundamental Rights.

[2] The American prosecutor in the Nürnberg Tribunal, Robert Jackson, on 21 November 1945 made the following statement as to the precedence of the Tokyo and Nürnberg tribunals: 'We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. [. . .] And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgement. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law' (cited in Deitelhoff 2006: 166).

The UN was primarily founded to prevent the recurrence of war. Democracy was not a condition for membership. Increasingly the UN has taken up human rights and democratic questions and has been supporting women's and children's rights, environment, development, participation, and so forth, in many ways.[3] The UN helps facilitate transitions to constitutional democracy at the state level. The influential paragraph 28 of the *Universal Declaration* makes clear that human rights are moral claims on any coercive institutional order (Pogge 2002: 65). It states that: *Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.* As a consequence, human rights are not any longer merely moral categories but are positivated as legal rights and made binding through the sanctioning power of the administrative apparatus of the states. Further, by this a right to democratic self-rule is also in the process of being established within international law (Franck 1992). This has changed the very concept of state sovereignty. Today, for a state to be sovereign it has to respect basic civil and political rights. In principle, then, only a democratic state is a sovereign state, and in such a state the majority cannot (openly) suppress minorities.

Human rights are important because they directly point to the constitutional principle of modern states, whilst also constituting a critical reference point for their validation. The *democratic law-state* is founded on the rights of individuals, their autonomy and dignity. It claims to derive legitimacy from the protection of individuals, their freedom, security, and welfare. This is seen in all liberation movements and claims for secession: they are first recognized by international society when they can show that basic rights are violated by the power-holders. There was a remarkable shift in the discourse of how and when to intervene in the 1990s. 'Interventions once aroused the condemnation of international moralists. Now failures to intervene or to intervene adequately in places such as Rwanda or Sierra Leone do' (Doyle 2001: 212).

Pace the Iraq War, which may have altered views, the parameters of power politics have changed. States are losing their autonomy due to the growth of horizontal networks and constraining regulations (Czempiel 2002). However, the problem of arbitrariness in the enforcement of norms in the international order is not resolved. The urgent task is to domesticate the putative state of nature between countries by means of human rights, that is, the transformation of international law into *a law of global citizens*.[4] Thus there is a need for political institutions that are capable of non-arbitrary and consistent norm enforcement, and in the advent of a democratized and empowered UN, regional institutions like the EU are of utmost interest. Does the Charter of Fundamental Rights contribute to this? First, I would like to spell out the characteristics and content of the Charter.

[3] The UN has been innovative and rather controversial; see Falk 1998.

[4] On this see e.g. Apel 1997; Habermas 1998a, 1999a, 1999b; cf. Brunkhorst et al. 1999.

A modern charter

The Charter of Fundamental Rights of the European Union was solemnly proclaimed at the December 2000 Summit in Nice. All articles on the rights of EU citizens in the Treaty on European Union were collected in one document of fifty-four articles, inspired by the European Convention for the Protection of Human Rights and Fundamental Freedoms (without replacing it), the Social Charters adopted by the Council of Europe and by the Community, and the case-law of the European Court of Justice.

The decision to frame a Charter of Fundamental Rights was taken at the Cologne European Council (3–4 June 1999). In October 1999, at the Tampere European Council, it was decided to establish a sixty-two-member Convention, headed by Roman Herzog, former President of the Federal Republic of Germany and of the German Constitutional Court, to draft a Charter of Fundamental Rights of the European Union.[5] This is the first time that the EP was represented in the same manner as the member-state governments and the national parliaments in a decision of a constitutional nature.

The Charter contains provisions on civil, political, social, and economic rights. Put together, these are intended to ensure the dignity of the person, to safeguard essential freedoms, to provide a European citizenship, to ensure equality, to foster solidarity, and to provide for justice. The number and range of rights that are listed are comprehensive. In addition to provisions which most charters and bills of rights hold and which pertain to such clauses as the right to life (Article 2.2 prohibits the use of the death penalty), security, and dignity, there are numerous articles that seek to respond directly to contemporary issues and challenges. For instance, there are clauses on protection of personal data (Article 8), freedom of research (Article 13), protection of cultural, religious and linguistic diversity (Article 22), protection of children (Article 24), right to collective bargaining (Article 28), and protection of the environment (Article 37). The Charter enumerates several 'rights to solidarity'—social rights. Even though the realization of these is not within the actual competence of the Union they nevertheless constitute vital reasons for exceptions to market freedoms (Menéndez 2003: 192).

The Charter also contains a right to good administration (Article 41). It contains several articles on non-discrimination and equality before the law. Article 21.1 states that '[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'. Article 21.2 contains a clause banning discrimination on the grounds of nationality.

[5] The Convention consisted of (a) representatives of the Head of State or Government of the member states, (b) one representative of the President of the European Commission, (c) sixteen members of the EP, and (d) thirty members of the member state Parliaments (two from each of the member states). It was led by a Praesidium of five.

In the preamble it is also stressed that 'it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments'. The Charter is firm and forward-looking; Article 3 prohibits the cloning of human beings.

Legitimate governance

The founding treaties of the European Community had no reference to fundamental rights. However, as integration deepened and as the Community came to have more far-reaching effects on the daily lives of citizens, the need for explicit mention of fundamental rights was recognized. The ECJ developed this idea[6] as the Community is not bound by the ECHR in the same way as the subscribing member states. The EU is not itself a signatory of the ECHR. It has been maintained that the power of the legislative and administrative bodies of the Community needs to be constrained by a set of fundamental rights, in the same way as constitutions and the ECHR constrain the authorities of the member states. The problem was attended by the IGC leading to the Maastricht Treaty, and in the Amsterdam Treaty recognition of the concept of fundamental rights was stated (Article 6.2 TEU).[7] By this clause the EU is obligated to respect the rights guaranteed by the ECHR and deriving from the constitutional traditions of the member states. However, this is rather weak and imprecise: 'The rights regime of the European Union is inconsistent in terms of content as well as variable in terms of implementation and levels of enforcement between Member States' (Duff 2000: 4–5).

The principle of legal certainty is secured only in a limited sense at the Community level. The citizen cannot be sure what rights she really is entitled to. Not all the member states, for example, have ratified all the ECHR's subsequent protocols and the ECJ has no clear and incontestable foundation on which to base its rulings. Another source to the initiative of making a charter of fundamental rights stems from the fact that the EU which is 'a staunch defender or human rights externally [. . .] lacks a fully-fledged human rights policy'.[8] When basic institutions are lacking in the EU with regard to human rights, it is difficult to *lead by example*. The ensuing document is intended to do something about this deficiency. The Charter substantiates the rights mentioned in Article 6.2 of the TEU by spelling out the specific obligations of the institutions.

The proposed Charter can be read as an explicit statement on the EU's commitment to *direct legitimacy*. That is, that the institutions and rights provided

[6] The leading case is *Internationale*, 11/70 [1970] ECR 1125.

[7] As amended by the Treaty of Nice (the version that is in force pending the ratification of the Lisbon Treaty) (Official Journal C 325 of 24 December 2002). In the remainder of the book, the usage of TEU refers to this document except where otherwise appears from the context or is explicitly stated.

[8] And further, 'the Union can only achieve the leadership role to which it aspires through the example it sets' (Alston and Weiler 1999: 4 5).

to the citizens by the EU in themselves shall provide the necessary basis for legitimate governance. It documents the fact that the EU is a full-blown polity. However, the Charter is not without ambiguities and constraints, as mentioned in Chapter 4. It only applies to the actions of the EU institutions and the member states' authorities when implementing EU law, it is not designed to replace other forms of fundamental rights protection. It is not binding, still it is written *as if* 'it were a binding legal text', following a proposal made by Convention member Gabriel Cisneros and endorsed by president Herzog.[9] If the Lisbon Treaty is ratified, it will acquire the same legal status as the Treaties. I will not further pursue these problems here nor the problems of the status of rights, which are fundamental and which are merely ordinary rights, or the lack of conceptual stringency.[10] Rather, I focus on the need for a charter or a constitutionalized bill of rights and return to some of the problems with the Charter in the next chapter. What is at stake is the sovereignty of the modern state as laid down in the Westphalian order.

Chartering the EU

Even though the Charter is not as yet legally binding, '[i]n practice, [. . .] the legal effect of the solemn proclamation of the Charter of Fundamental Rights of the European Union will tend to be similar to that of its insertion into the Treaties on which the Union is founded' (Lenaerts and de Smitjer 2001: 298–9). The Charter reflects the well-established rights and value basis of the Community. Moreover, since it consolidates existing positive law in one sense it may be seen as already binding, and it is possible to analyse it on the hypothesis that it will become binding (Liisberg 2001: 6). It has also increased its legal bite over a short period of time as the Court of First Instance has invoked the Charter as legal authority in several judgments.[11] It has been referred to by institutional actors like the European Ombudsman and the Commission, and most Advocates General of the European Court of Justice have also made use of provisions of the Charter as legal grounds of their opinions. Advocate General Jean Mischo went further and commented that:

[9] See Charter Convention 2000b. See also Eckhout 2000: 98.

[10] On this, see Lenaerts and de Smitjer 2001; Menéndez 2001.

[11] Among others: Case T 54/99, *max.mobil Telecommunications Service GmbH v. Commission*, Judgment of 30 January 2002, par 48 and 57; Case T 211/02, *Tideland Signal Limited v. Commission*, Judgment of 27 September 2002, par. 37; Case T 77/01, *Territorio Histórico de Álava Diputación Foral de Álava, Territorio Histórico de Bizkaia Diputación Foral de Bizkaia, Territorio Histórico de Gipuzkoa Diputación Foral de Gipuzkoa y Juntas Generales de Gipuzkoa, Comunidad autónoma del Part Vasco Gobierno Vasco v. Commission*, Judgment of 11 January 2002, para. 35. See Menéndez 2008. The case law of the European Court of Justice, the Court of First Instance and the Civil Service Tribunal is accessible at <http://curia.europa.eu/en/content/juris/index.htm> (accessed 23 March 2009).

> I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the cata logue of fundamental rights guaranteed by the Community legal order.[12]

Bills of rights empower the judges to protect liberty; to hinder that democracy by means of majority vote crushes individual rights. It is the protection of individual rights and the constraints on state autonomy that marks the normative basis of the European constitutional development.[13] This is reflected in the early decisions of the ECJ on direct effect and supremacy, in the conditionality clause (all aid and trade agreements are conditional on respect for human rights), in gender-equality and citizenship-rights policies. This process has culminated with the Charter of Fundamental Rights, whose preamble states that:

> The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

This provides the background for the ensuing assessment of the Charter. I contend that it may be a means to resolve the tension between sovereignty and human rights for the following reasons.

First, the Charter marks the *EU as a rights-based polity* with extended domains of competences. It is not merely an instrument for solving the problems of the member states or a common market. In many regards it is a political entity performing most of the functions of the nation-state. Consequently, the rights of the citizens need safeguards. The Commission, the EP and the ECJ form a new supranational power-wielding regime with far-reaching consequences for the ordinary man and woman in Europe (Sandholz and Stone Sweet 1998). The Charter denotes the EU as an entity built upon the individual, her freedom and well-being, with rights that should not be overrun by collective welfare claims or national concerns. The citizens of Europe have now, in principle, achieved rights over and above their native states. The Charter 'is a legally enforceable text which underlines the importance of the rule of law in the EU and it is the ultimate proof of the focal role that EU citizens have come to play in the European integration process' (Lennaerts and De Smitjer 2001: 300).

Second, the Charter enhances the *legal certainty* of the individual citizens of Europe as everybody can claim protection for the same interests and concerns. A bill of rights secures consistent rights enforcement in the EU area. This is required as different conventions, treaties, and constitutions are at work and court rulings in these cases often reflect national traditions and customs. A bill of rights, even one that is not more than the codification of existing law, reduces the

[12] Opinion of Advocate General Mischo, delivered on 20 September 2001 in Joined Cases C 20/00 and C 64/00, *Booker Aquaculture Ltd trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd v. The Scottish Ministers.*

[13] See Pescatore 1983: 155 7; Stein 1981; Mancini 1990; Kumm 2005a: 289.

room for discretion of the ECJ and national courts when dealing with EC law of fundamental rights. The need for legal certainty has also been accentuated by the recent development towards an actual common area of freedom, security, and justice. It is in policy fields such as migration law, border control, police cooperation, and so on that the rights of the citizens are most often threatened.[14] One may also add that the process of enlargement may gain from raising the standards with regard to the protection of human rights as they temper the temptation to merely requiring compliance with the economic and administrative accession criteria on the side of the applicant states. In this regard, it should, however, be recalled that the strengthening of human rights in the Communities went hand in hand with the plans for enlargement towards southern Europe—Greece, Spain, and Portugal (Verney 2006; Piedrafita 2006). What is more, at every turning point in the integration process—deepening or widening the Communities—there has been increased attention to rights.

Third, the Charter is *a public document* and it has been shaped, interpreted, and enacted by political actors. The process is close to a constitutionalizing one. This new regime moves the system of human rights beyond the present one, which is in the hands of the courts. The Charter was made by representatives of the citizens of the member states. It was openly drafted by representatives of national governments and national parliaments, the Commission, and the EP and also received inputs from NGOs.[15] To some extent it was subject to public debate.[16] The Charter was politically decided and in this way is a means to *democratizing human rights politics*. This is badly needed for legitimacy reasons, that is, in order to decrease the impression of judge-made law, of juridification, in the EU. Legitimacy was also the reason for the European Council's decision in Cologne:

[14] The EU Committee of the House of Lords in England urged for a legally binding charter based on the ECJ as the legal authority, because: 'Within the framework established by the Maastricht and Amsterdam Treaties, there is greater scope than before for EU actions and policies to impinge on individual rights and freedoms.' In its first report on human rights, the Committee emphasized that 'the Community has no criminal jurisdiction, no police, no criminal courts, no prisons' and that a number of ECHR provisions would thus be largely inapplicable within the Community. While it remains the case that the Community has no explicit powers in these areas, important changes have taken place: 'There is provision under Title VI of the TEU, for closer operational co operation between police and customs officials, also involving Europol, in the prevention and combating of crime. While such co operation remains essentially inter governmental there is greater involvement of Community institutions and a greater choice of legally binding instruments' (House of Lords European Union Select Committee Session 1999 2000, Eighth Report: EU Charter of Fundamental Rights, 16 May 2000).

[15] The process is unique in the EU. There are reports of processes of a 'genuine' dialogue within the Convention, which led to change of positions over time (Schönlau 2003, 2005).

[16] The drafting of the Charter took place in an open manner, in contrast to the IGC 2000 process, which was mainly conducted behind closed doors. The Convention consulted with other organiza tions and conducted open hearings to representatives from civil society; 186 NGOs submitted more than 300 contributions to the Convention on different aspects of the Charter (Kværk 2007). The contributions can be accessed at <http://www.europarl.europa.eu/charter/civil/civil0 en.htm> (ac cessed 23 March 2009).

> Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. [. . .] There appears to be a need [. . .] to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens. (European Council 1999)

In general, a charter containing a bill of rights increases transparency and comprehensibility for ordinary citizens and makes positive law liable to public scrutiny. It enhances the possibility of public reflection and democratic deliberation, which are needed to avoid technocracy and paternalism in formulating and enforcing rights. Participation is needed also for other reasons. In situations where rights collide, *a correct interpretation* of the situation is required for choosing the appropriate norm, and only affected parties can eventually provide adequate information about context-sensitive concerns. Human rights require democratic legitimation and public deliberation to be correctly implemented.

Fourth, the Charter process represents a very important development in the constitutionalization of the EU: 'Europe could finish its federalizing process under the flag of human rights' (Bogdandy 2000: 1337). From a cosmopolitan point of view such rights are important as they contribute to establish democratically controlled institutions at a regional level to cope with global problems. This entails that 'international law' is pushed beyond the limitations of the Charter of the United Nations which on its behalf prohibits violence, and thus aggression against other states, but forbids the intervention in the internal affairs of a state (Article 2.7). The EU has clearly progressed beyond this initial stage of a purely voluntary association. It is an entity with *supranational elements* equipped with executive power. This is, as we have already seen, evidenced in the supranational character of the legal structure, which is supported and enhanced in particular by the European Court of Justice. In its rulings, it has long asserted the principles of supremacy and direct effect. National law gives way to Community law, and there is a need for safeguarding the rights of the citizens. Through its institutions, it forms a supranational regime with extended competences and certain democratic qualities.

It goes without saying that further democratization is highly needed to redeem the basic promise of citizenship; of membership in a self-governing body, which entails the *co-originality* of democracy and human rights. But what exactly is the connection between rights and popular rule?

THE NORMATIVE FOUNDATION OF HUMAN RIGHTS

Why is a bill of rights really needed for democracy to prevail when also taking into consideration that it is made by politicians who may remove these rights?

Why not a charter

In controversies over human rights one frequently encounters not only the accusation that this is a means for Western societies to dominate the rest of the world, but also that human rights, abstractly framed, threaten value-based communities and primordial bonds of belonging and have atomistic effects.[17] Human rights are foreign and when not mediated by the facts and values of the context in which they are to be implemented they may have counterproductive effects. They in fact endanger the very values and subjects they are intended to protect. Many communitarians and republicans claim that legal rights entrenched in constitutions are not needed and/or that they have negative effects on social integration. The latter pertains to the fact that they constrain politics as they relieve the political agenda of certain questions and they enhance the propensity to act egoistically. Rights constrain democracy and undermine the ability to act collectively. They entitle the citizens to act against each other and against the polity, as they are no longer bound to ground or justify their actions morally and legally. They can act upon rights solely in order to safeguard their self-interests (Sandel 1982). And, 'the more rights the judges award the people as individuals, the less free the people are as a decision-making body' (Walzer 1981: 391). I will first address the latter objection, that is, the relationship between law and morality, and then the former by asking if there really is a right to human rights.

Jeremy Waldron (1993) claims that there is an inherent contradiction involved in the process of constitutionalization of rights as they build upon the concept of individual autonomy—on the concept of a morally responsible person—while at the same time constitutionalize distrust of them as responsible political actors. Rights relieve the actors of the virtues and responsibility that rights, so to speak, presuppose. 'However, there is no inconsistency in saying that human beings are able to think and to act morally on the one hand, and that they quite often commit appalling acts on the other' (Fabre 2000: 91). Virtues, institutions of civil society, and public deliberation are important to bring about civility, trust, and solidarity required for democratic participation, but modern law based on individual rights entitlements in the form of legal statutes is equally important. Even political anarchists need the law to coordinate their common affairs. Law constrains defection and free riding, because it connects non-compliance with sanctions. It is a way to solve the problem of collective action. There may be reasons to oppose even a rational agreement, and nobody is obligated to comply with collective norms unless all others also comply. Pure virtues and unsanctioned social norms are too weak to govern behaviour in larger collectivities, and are too weak instruments to harness individual behaviour. They need to be supplemented with legal statutes that connect breaches and defection with sanctions. Agreements have to be institutionalized and terminated in formal contracts. This is why the role of the law is such a conspicuous feature of governance

[17] For a discussion on this, see Honneth 1997.

in modern societies. It makes agreements into rights, laws, or contracts, which make them binding on all the members in the same way. Law is not merely a symbolic system; it is also an action system that confers upon all the same obligations (Habermas 1996a: 107). The constitutional state sanctions norm violations and bans the use of violence, and therefore makes it possible for parties to act morally or in a communicatively rational manner without facing the danger of losing out for strategists (Apel 1998: 755). Law complements morality and enhances the moral role of legal systems. Instead of threatening morality and virtuous action, rights and obligatory enforcement of action norms make such behaviour possible.

What is peculiar to human rights is that they are moral claims, and as such can be justified with regard to the duties that bind the free will of autonomous persons, in other words, the autonomy, or the integrity and dignity, of the individual. Moral rights protect the autonomy of the self-legislative individual and can be seen as having intrinsic validity. However, human rights are not merely moral entities, they are also entrenched in positive legal norms as judicial rights. From this angle, one gets another take on the relationship between democracy and human rights, between virtues and rights.

Private and public autonomy

The most important difference between basic rights and human rights is that the latter concerns humans as such, while the former—*basic rights*—are given to individuals in so far as they are citizens, that is, members of a state (Höffe 1996: 51). Human rights have a moral content that is not absolvable in positive law, and thus have prepositive validity: they exist so to speak prior to political communities and they constitute the reference point for criticizing positive rights. 'Even if human rights can be realized only within the framework of the legal order of a nation-state, they are justified in this sphere of validity as rights for all persons and not merely for citizens' (Habermas 1997: 138).

Human rights can thus be morally justified, but they are also embedded in positive, legal norms as *judicially* enforceable rights (Habermas 1996a: 40). When enacted or positivated they are turned into fundamental or basic rights. They become legally binding on all rights-holders and confer upon all the legal duty to respect the law and thus to mutually grant all consociates the same rights. Kant made use of the term 'the system of rights' to characterize the modern *form* of liberal, civil law, namely that it contains a guarantee of *equal right to freedom* to all citizens. The state is a union of people under laws, and the constitutions and laws adhere to the principle of political rights: 'A constitution allow[s] the *greatest possible human freedom* in accordance with laws which ensure *that the freedom of each can coexist with the freedom of all the others*' (Kant, cited in Reiss 1991: 23).

This guarantee of freedom justifies positive law in general by the principle that what is not prohibited is allowed. This is the principle that makes it possible to combine each individual's free choice with anybody else's free choice. Individual

rights guarantee actors' liberty to do as they please—negative freedom. They allow selfishness and irrationality because they exempt individuals from the burden of justification. The citizens are given rights that protect their private autonomy, that is, the right to pursue their goals as long as they are within the confines of the law. This is because freedom in modern societies not only has a moral character, that is, securing autonomy, but also a juridical one, that is, securing a legal domain of non-interference.

Kant's point is that citizens who recognize each other as free and equal, must give each other the same and the greatest possible degree of freedom if they want to regulate their coexistence by means of the law. In Habermas's opinion this follows when *the discourse principle* is applied to the form of the law. Only laws that can be accepted by everyone in an open debate can be considered legitimate, and only laws that guarantee equal and as much as possible of freedom to everyone will be able to pass such a test. The citizens can regulate their coexistence legitimately by means of the law only in so far as they are also given the opportunity of participating in the legislative process. Thus we see that the rights cannot only guarantee the citizens' private autonomy, they must also ensure their *public autonomy.*

This has the additional implication that the citizens are free to take a stand towards the law. They must be free not only to choose whether they wish to comply with the law or not, but also whether they want to take a stand at all. The citizens can, as we discussed in Chapter 2, neither be forced to approve nor to participate if the law is to claim legitimacy. Everyone must have the opportunity to choose *exit* or to not have an opinion at all. The discourse principle warrants this as it only allows for citizens' legal autonomy and *the form of the law.*

The law form provides relief from the burden of justification. The democratic constitutional state by implication depends on a population of citizens that to no great extent make use of their right to non-participation, for example by not taking part in elections. It requires a certain dosage of *civic virtue* and a population that values freedom and that emotionally and 'patriotically' embraces constitutional rights. The liberal constitutional state is not self-sufficient, and on this the discourse theorists and the communitarians agree.

By implication, rights should not be thought of as possessions or as innate protections of private interests, but rather as what compatriots grant each other mutually when they are to govern their coexistence by law. 'Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another' (Young 1990: 25). Thus, rights are inter-subjective entities which entail recognition of reciprocity and depend on successful socialization and individuation processes to work adequately. Persons capable of respecting others' rights, and of using their own rights in a responsible way, are required for rights to function properly.

Fundamental rights are not only an instrument for the collective will formation, but have an absolute status. They have a value in themselves. They precede and limit collective will formation, at the same time as they must be justifiable in an open discussion. Individual rights must therefore not be regarded as

limitations on actors' private autonomy or on the autonomy of the legislator, as is frequently the case in the way liberals see them (Hayek 1944). Rights are both constraining and enabling. There is a dialectics here: a qualified common will can be formed only when the individuals are free, but it is only by means of the collectivity, that is, the community and its resources, that the conditions for free opinion formation can be established. In Habermas's terms democracy and the constitutional state are equally basic and *co-original*. Individual freedom, which human rights guarantee, is both a condition for and a result of the legislative process (Günther 1994: 471; Maus 1996: 838). Individual rights are both a result of and a prerequisite for democratic legislation. When the laws are made by the legislative authority in which everyone participates they cannot be unjust, because in such an endeavour people are treated as an end in themselves; they cannot do injustice to themselves (Kant 1797).

However, in practical terms there is a tension between human rights and democracy since the latter only exists at the level of the nation-state, that is, in particular states, while human rights are ensured by international/supranational non-democratic bodies such as courts and tribunals or, what is more often the case, enforced by the United States and its allies. But how can human rights be defended in their own right, and not only as an 'instrument' for democracy? An answer is required as our moral intuition tells us human rights need protection regardless of their contribution to democracy. Here I follow a proposal made by Rainer Forst (1999a, 1999b).

Is there a right to human rights?

One may ask if the referred conceptual strategy fully grasps the normative dimension of human rights. Habermas's conception of 'private autonomy' is, with the danger of over-simplification, framed on *the right not to communicate*. Legal rights relieve the actors of the obligation to provide justifications—there is *a right to be left alone* (J. L. Cohen 1994). As we have seen, Habermas conceives of the core content as being moral, but there is no justification of the intrinsic value of human rights. Why do we need human rights and to what extent can we claim to be protected by them? A wider justification is needed, not only because positivized laws can be unfair and because meta-legal perspectives are called upon to change and rectify legal orders and make new laws. It is also required because we need to know more specifically why human rights are *necessary*. A normative foundation is required in order to refute the accusation that human rights are particularistic and 'Western' values. There is need for a culturally neutral but at the same time culturally sensitive defence of human rights.

Demands for human rights are moral demands as they are put forward to secure some vital interests. They are always concretely justified with regard to someone's frustrated need or unsatisfied interest and they are articulated when people are maltreated or humiliated. Human rights do not merely exist or not exist, they are not given by nature or God(s) and they are not merely discovered.

Rather they are created and recognized by people in certain situations and are enacted by political and judicial decision-making bodies (Köhler 1999). They arise in difficult and severe situations and are responses to normatively demanding hardships.

> The conception of natural rights, sacred and inherent in man, was written into the constitutions of the eighteenth, nineteenth, and twentieth centuries, not because men had agreed on a philosophy, but because they had agreed, despite philosophic differences, on the formulation of a solution to a series of moral and political problems. (McKeon 1948: 181)

We may well remind ourselves of the words of Hannah Arendt (1951: 295f): 'We became aware of the existence of a right to have rights [. . .] and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights.' Experiences of injustice which are common to all human beings give rise to demands for change and rectification—reiteration; and, underlying claims to particular undertakings, to social and political remedial actions, there is a need for explanation and justification. Why is this happening to me, and why do I have to obey certain rules and norms? They may have no abstract or philosophical idea of what it means to be a 'human being', but in protesting they believe that there is at least one fundamental human-moral demand which no culture or society may reject: the unconditional claim to be respected as someone who deserves to be given justifying reasons for the actions, rules, or structures to which he or she is subject (Forst 1999b: 40).

At the heart of human rights demands is the need of every human being for meaning and reasons—as a universal feature of human kind.[18] Religions may be seen as a response to this need as they are representations of meaning: they explain man's place in the world, give voice to experiences of hardship, angst and pain, and provide justification of evil or injustice—*teodicé*. This need is also, so to speak, built into the very structure of the employment of human language. In every society, in every social structure, the demand for justification and explanation is present; and every human being expresses this demand from the earliest years.

In modern societies the demand also takes the secular form of reason-giving in the first person singular and translates into the justification of political authority. As was discussed in Chapter 2, all social orders must be prepared to give reasons for their existence if they are to be recognized by their members. It is from this basis, observing *the right to justification*, that other rights may be justified, including the basic principle of democracy. Only norms and statutes that are justified to those affected and that are accepted by all in a free debate can claim to be truly legitimate.

Joshua Cohen (2004) sees human rights as claims for inclusion in a political society under conditions of global politics. They are not purely negative rights (as

[18] Cf. Alexy 1996: 209 35, on the place of reason giving: raising claims to correctness is the most universal human experience.

basis for merely humanitarian help) but ones which include claims for institutionally defined goods and opportunities. Hence disagreements over human rights pertain to requirements for membership and inclusion. From this normative point of view there are also reasons for institutions beyond a particular state in which individuals have obtained membership and which protect the basic rights of the citizen. Such a state can fail to respect a 'correct' understanding of human rights and can also fail to respect individuals with no membership rights and other states' legitimate interests.

> Since human beings are both moral persons and citizens of a state, they have certain duties in an international context. As a moral person, a member of the community of all human beings, one is a 'world citizen' insofar as one has not only the duty to respect the human rights of others, but also a duty to help them when their rights are violated, as when the basic rights of human beings are systematically disregarded in another state. (Forst 1999b: 53)

For the rights of the *world citizen—kosmou politês*—to be respected, human rights need to be institutionalized in bodies above the nation-states that actually bind individual governments and international actors. Such bodies must command resources that make threats credible. This is needed for consistent and impartial norm enforcement but the problem of democratic legitimation lingers as long as those affected by the norms do not have a say in the law-making process. Technocracy and paternalistic practices of norm-enforcement represent barriers to an adequate human rights politics and contradict the core principle of human rights—that is, that the individual has a right to justification—as well as the principle of democracy understood as government by the people.

Towards post-national citizenship

As the principle of popular sovereignty points to a particular society, while human rights point to an ideal republic, only with a *cosmopolitan order*—democracy at a supranational world level—can the opposition between the state citizens and world citizens finally find its solution. In this perspective, the UN needs to be democratized and made into a polity with sanction-based means of law enforcement. Law should be made equally binding on each of the member states. Save this, human rights politics easily degenerates into empty universalism and new imperialism. States may continue to violate human rights with impunity.

Constitutionalizing the Charter of Fundamental Rights in the EU would be an important step in this direction, not least because of the democratic aspect of the Union. The system of representation and accountability in the EU gives the citizens at least a minimal input in the process of framing and concretizing the rights to be enacted. What is required then are rights which are specified with regard to the explicit duties of power-wielding bodies—that is, bodies with executive power. The Charter observes this right by securing a right to vote and to political accountability. However, the grant of a 'right to vote and stand as a

candidate at election to the European Parliament' (Article 39) is not worth much until the EP has become a legislative body in the Union with at least as much competence as the Council.

The shortcomings of the Charter direct us to the deficiencies of the EU as a rights-based political order. There is need for further constitutional reform for the Charter to play an elevating part in enhancing the proper role of the citizen—as a *Staatsbürger* or *citoyen*. The constitution-making process after the Laeken Declaration was an attempt to meet these requirements. I pursue this perspective in the next chapter.

CONCLUSION

There is a tension between international law's recognition of sovereign states and the regulative idea of equal rights and freedom for all, which is reflected in an actual opposition between democracy and law, and between domestic and foreign policy. The growth in international law limits the principle of popular sovereignty. However, legal orders are orders of peace; and one might say that the principle of popular sovereignty is about to be transformed into a law for the citizens of the world. The Charter of Fundamental Rights is an important step in the process of institutionalizing a framework of a cosmopolitan order where violations of human rights can be persecuted as criminal offences according to legal procedures.

The world order is changing and comprehensive democratization is needed for the post-Westphalian order to achieve functional stability and normative legitimacy. The EU is of utmost interest for cosmopolitans and is the most promising example of a powerful post-national organization. It has moved beyond an international organization, and thus the limitations of the Charter of the United Nations, which prohibits violence but forbids the intervention in the internal affairs of a state. This move is underscored by the Charter of Fundamental Rights, which designates that the EU is not only about member states' interests or about a Common Market in Europe, but about the citizens of Europe, their freedom, welfare, and equality. We may remind ourselves of the words of Kant, who asserted that the destruction of welfare and freedom were the greatest of social evils:

> And there is no possible way of counteracting this except a state of international right, based upon enforceable public laws to which each state must submit (by analogy with a state of civil or political right among individual men). For a permanent universal peace by means of a so called *European balance of power* is a pure illusion, like Swift's story of the house which the builder had constructed in such perfect harmony with all the laws of equilibrium that it collapsed as soon as a sparrow alighted on it. (Kant 1792: 92)

6

The Cosmopolitan Dimension

INTRODUCTION

The EU has for a long time been described as a 'civilian power' (Duchêne 1972). It has been reluctant to use coercive means in order to solve conflicts and achieve its goals. This has been an integral part of its identity from the very start of the European Political Cooperation (EPC) in the 1970s. It is contended that present efforts to establish military capability will endanger the 'civilian' aspects of the EU (cf. Manners 2006). The enhanced military capability at the European level through peace-keeping and conflict-preventing missions will make the EU an actor like other actors in the world system. But is coercion foreign to a 'humanitarian polity'? Can absence of coercive means be the defining characteristic of a normatively justifiable political entity?

As we have seen, coercive means are needed because only with the threat of sanctions can the law compel compliance. From this perspective the defining characteristic of a 'civilian power' cannot be the absence of coercive means and merely the pursuance of honourable goals, but rather whether it respects basic humanitarian principles. Every organized community acts on its interests and on preferences that may be good or bad in ethical terms. The propensity to act on presumably honourable motives cannot itself represent the criteria for judging the polity's normative quality because these may very well be arbitrary. A policy based on good intentions may very well neglect others' interests or values or fail to give them due consideration. A robust criterion can be derived only from the constraints set by 'international law', here taken to mean *the cosmopolitan law of the people* which depicts a possible community based on certain universal principles (Kant 1797: 172). From this perspective, it is only by subjecting its actions to a higher-ranking law—to human rights and criteria of justice—that the EU can qualify in normative terms.

I suggest as a criterion of a legitimate foreign policy that the EU does not aspire to become a world organization—a world state—but subscribes to the principles of human rights, democracy and rule of law for dealing with international affairs, hence underscoring the cosmopolitan law of the people.[1] A system that

[1] See Beck and Grande for a different take on what a cosmopolitan Europe means. Their '*kosmo politische Europa*' is one which does not distinguish between empire and civilian power, and one that is not confined to the EU but stretches from Los Angeles and Vancouver to Vladivostok (Beck and Grande 2004: 23).

allows some to have special obligations towards one another, which they do not have to everyone in the world, could be 'legitimate only against the background of a global system that prevented such special responsibilities from generating injustice on a larger scale' (Nagel 2005: 120).

The aim of this chapter is to establish this normative criterion, its theoretical and institutional underpinnings, and provisionally assess whether the EU in fact complies with it. The quest for *institutional underpinning* pertains to the problem of the present world order regarding human rights politics: as long as human rights are not properly institutionalized, when they exist merely as moral rights, they can be used at will. Human rights politics can easily become imperialistic in the name of morality and the risk of *arbitrariness* is inevitable as some may continue to violate human rights with impunity. What is at stake with human rights protection and the institutionalization of human rights beyond the nation-state is the sovereignty of the modern state as laid down in the Westphalian order in 1648.

The question of *theoretical underpinning* pertains to how such an order can be conceived in action-theoretical terms. A cosmopolitan order is one in which actors subject their actions to the constraints of a higher-ranking law and we need an approach that does not rule this out as a logical possibility. An extended conception of agent rationality—actors can act out of a sense of justice—expands the range of possible options available at the international level. This opens for an analysis where material as well as ideal factors play a role in international politics.

I start by addressing the institutional questions and explore the tension between human rights and democracy, and the quest for a law-based supranational order. I then ask whether the recent constitutional development of the Union can help reduce the tension between human rights and democracy. In addition to submitting national practices to supranational review, the EU has incorporated human rights as a horizontal clause in all its external relations. In order to assess the EU's compliance with its own standards I address the allegation that this is merely 'cheap talk'. I give some examples of why this is not always necessarily so, and bolster this by a theoretical perspective that allows for ideal factors to play a role as opposed to 'realist' approaches that rule out such a possibility. Finally, I address the dangers involved in cosmopolitanism with regard to unchecked power, and see the EU as a regional entity that effectively bars against such.

DEMOCRACY'S LIMITS

The Westphalian principle of state sovereignty is a principle that has protected the most odious regimes. It was only when Hitler's Germany attacked Poland that the Second World War broke out, not when the persecution of Jews started. This directs us to the limitations of nationally founded and confined democracy. While human rights are universal and refer to humanity as such, democracy refers to a particular community of legal consociates who come together to make

binding collective decisions. The validity of the laws is derived from the decision-making processes of a sovereign community. The propensity to adopt rights, then, depends on the quality of the political process in a particular community. But such processes often fail to respect the rights and liberties of the citizens as well as other states' legitimate interests. Even though the contradiction between rights and democracy is, in principle, a false one—since there can be no democracy without the protection of individual rights, and since rights are not valid unless they have been democratically enacted—in empirical terms there is a contradiction as democracy is institutionalized only at the level of the nation-state. States are geared towards *self-maintenance*, as the primary responsibility of the decision-makers is their own constituency. The state is, so to speak, limited by the people: 'The individual may say for himself: "Fiat justitia, pereat mundus (Let justice be done, even if the world perish)," but the state has no right to say so in the name of those who are in its care' (Morgenthau 1993: 12). Hence, democracies may be *illiberal*. To resolve the tension between human rights and democracy the authors of the law must also be its addressees. This is the core principle of cosmopolitan democracy. Here the inhabitants would see themselves as citizens of the world and not merely of their native countries. According to cosmopolitans, the urgent task is to domesticate the existing state of nature between countries by means of human rights, transforming international law into a law of global citizens.[2] But what does cosmopolitanism entail?

> Three elements are shared by all cosmopolitan positions. First, *individualism*: the ultimate units of concern are *human beings*, or *persons* rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations, or states. The latter may be units of concern only indirectly, in virtue of their individual members or citizens. Second, *universality*: the status of ultimate unit of concern attaches to *every* living human being *equally* not merely to some sub set, such as men, aristocrats, Aryans, whites, or Muslim. Third, *generality*: this special status has global force. Persons are ultimate units of concern for *everyone* not only for their compatriots, fellow religionists, or such like. (Pogge 1994b: 89)

In the last decades we have witnessed a significant development of rights and law enforcement beyond the nation-state. Human rights are institutionalized in international courts, in tribunals, and increasingly also in politico-judicial bodies over and above the state that control resources for enforcing norm compliance. Examples are the International Criminal Tribunals for Rwanda and for the former Yugoslavia, the International Criminal Court (ICC), the UN, and the EU. In addition, European states have incorporated the ECHR and many of its protocols into their domestic legal systems. Thus legal developments over the last century have been remarkable and one of their main thrusts has been to protect human rights (Fassbender 1998). Aggressors can now be tried for crimes against humanity, and offensive wars are criminalized. Willpower is tamed by law.

[2] On this see Held 1995, 2002; Archibugi 2003a; Deitelhoff 2006; Franck 1990; Falk and Strauss 2003. I continue this discussion in Chapter 9.

Almost nobody can any longer be treated as a stranger devoid of rights. These rights are no longer present only in international declarations and proclamations. Increasingly they are entrenched in power-wielding systems of action, in constitutions, and in the actual policies pursued; hence there is a *cosmopolitanization* of nation-states. Sometimes human rights protection trumps state sovereignty. The NATO war against Serbia in 1999 to protect an innocent population was formally illegal, according to the UN Charter, but was declared legitimate by the Independent International Commission on Kosovo (2000).

The basic constituency for all morality is individual human beings and not states or groups. Collectives do not make the same strong claim as human beings—'they do not feel pain'.[3] In case of violations of basic human rights, our human reason is roused to indignation and the urge for action, and when conceived abstractly they do not pay attention to the context—for example, to the specific situation and ethical-cultural values—and may violate other equally valid norms and important concerns. As human rights do not respect borders or collectives, as they appeal to humanity as such, they may threaten local communities, deep-rooted loyalties and value-based relationships. When you know what is *right*, you are obliged to act whatever the consequences. In practice there are norm collisions. Only by specifying the implementation context will one be able to choose the correct norm.

Military actions undertaken on moral or humanitarian grounds lead to the moralization of war and the *demonization* of the enemies, according to Carl Schmitt (1932: 53ff). Such actions are seen as evil, and the result may be the escalation of hostilities into total war. This is among the problems of human rights politics: they may mask new barbarianism. Human rights politics is often power politics in disguise. 'He who invokes humanity wants to cheat.' There is 'crime against humanity' (committed by Germans) as well as 'crime for humanity' (committed by Americans) jibed Carl Schmitt when interrogated in Nuremberg. 'The concept of humanity is an especially useful ideological instrument of imperialist expansion' (ibid.: 54). That is, as long as human rights are not positivized and law is not made equally binding on each of the member states, human rights politics easily degenerates into empty universalistic rhetoric. 'When a state fights its political enemy in the name of humanity, it is not war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent' (ibid.).[4]

Today the politics of human rights is criticized for being based on the willpower of the United States and its allies, not on universal principles equally applied to all. There are sanctions against North Korea and Iran, but not against Israel or Russia. Some violate international law with impunity. After the invasion of Iraq the

[3] As discussed in the previous chapter, human rights are universal. They appeal to humanity as such, to the interests of irreplaceable human beings and exhibit a categorical structure they have a strong moral content. Thus borders of states have merely derivative status in a cosmopolitan perspective (Beitz 1979: 182). See also the discussion in Chapter 9.

[4] On the reasons for and against intervention, see for example Beitz 1979: 69ff, 1985; Brunkhorst 1998; Mill 1859; Walzer 1977, 1985.

situation for international law worsened and not only because of an 'illegal' war but also because the Bush administration 'proceeded to normalize torture and set up secret offshore detention camps in the flagrant violation of long standing international legal norms' (Scheuerman 2008: 25). Human rights talk may very well be only window-dressing, covering up for the real motives of big states. Recall that human rights issues were also part of the rhetoric of the United States in the Vietnam War, a country that is accused of intervening in Iraq because of its interest in oil resources. All too often ideals are a sham—they are open to manipulation and interest-politics and new imperialism.

Human rights have a strong moral core and they stem from the cosmopolitan universalist idea of doing good, which set the European nation-states on missions for human rights across the globe, a mission that the United States has overtaken in the twentieth century (Eder and Giesen 2001: 265). One problem with the politics of human rights is thus its arbitrariness at this stage of institutionalization. They are enforced at random. Some states are being punished for their violations of human rights while others are not. Hence, the need for a democratic, law-based, supranational order. Another problem is the following: in concrete situations there will be collisions of human rights as more than one justified norm may be called upon. To choose the correct norm requires interpretation of situations (cf. Günther 1993) and the balancing and weighing of rights (Alexy 1996). The solution to the twin problem of the politics of human rights—the problem of arbitrariness and of norm collisions—is positivization or constitutionalization, which confers upon everybody the same obligations and connects enactment to democratic procedures.[5]

PEACE THROUGH LAW

From the Enlightenment stems the trust in written constitutions and judicial review as a means to civilize relations among men as well as among nations. In Europe we have witnessed a strong development towards the abolishment of force through right, according to Hans Kelsen (1944). But what is the role of force in such an order? In the Kantian perspective the coerciveness of the law is intrinsically linked to equal liberties for all—it is to ensure compliance with such that a polity can legitimately use force. Also in external relations, conflicts between states should be settled as legal disputes by an impartial and powerful third party.

> The problem of establishing a perfect civil constitution is subordinate to the problem of a law governed external relationship with other states, and cannot be solved unless the latter is also solved. (Kant 1784: 47)

[5] Or else the danger prevails that agents and 'leading beneficiaries of globalisation will construct notions of world order and transnational citizenship which allow them to pursue their interests without much accountability to wider constituencies' (Falk 1994). See also Linklater 1998.

A constitution is a system of rights that constitutes the legal medium, and hence is authorized to enforce norms. Legal norms are authorizations for society's use of coercive force against its citizens. 'Force and law do not exclude each other. Law is the organisation of force' (Kelsen 1944: 7). The validity of the laws paradoxically stems from the very fact that they are *obligatory and coercive*. Moreover, if human beings are to choose their own ends they must be protected against coercive interference—thus justice entails coercively enforceable obligations (Nardin 2006: 452). Law is a means for compelling compliance but cannot itself establish its required normative basis. The authority of the law stems from the fact that it is made by the people and hence claims to be just, and that it is made binding on every part to the same degree and amount.

Further, law is a functional complement to politics and morality as it stabilizes behavioural expectations and ensures they can be maintained even when there are breaches and non-compliance (Luhmann 1995: 80). As touched upon in the previous chapters, it solves the collective action problem. Pure agreements do not warrant collective action nor the delegation of sovereignty. There may be reasons to oppose even a rational agreement, and nobody is obliged to comply unless all others also comply. Due to weakness of will and as long as citizens are not reassured that the violation of norms will not be left unsanctioned, general and spontaneous compliance is endangered. Thus, without the threat of force there will be no political association. The medium of law stabilizes behavioural expectation in two ways.

First, it alleviates *coordination problems* by signalling which rule to follow in practical situations (Luhmann 1995: 136). In this way it is also a functional complement to morality as the latter, due to the indeterminacy of norms, cannot tell what one should do in particular contexts. Many justified norms may apply, but which is the correct one in this particular situation cannot be inferred from the bare existence of moral agreements. Even idealistic individuals have no motive or possibility to comply with just institutions 'without the assurance that their conduct will in fact be part of a reliable and effective system' (Nagel 2005: 116). Even angels need 'a system of laws in order to know the right thing to do' (Honoré 1993: 3). Law backed by coercive force is needed to move a collectivity beyond plain humanitarianism and negative rights.

Second, *sanctioning of non-compliance* and defection makes it less risky for actors to act in a morally adequate manner. People may comply with the law out of self-interest because it is costly not to do so. However, law is not merely a constraint on morality. In fact, law enables morality while it makes it possible for actors to behave correctly without personal losses. By sanctioning non-compliance and preventing violence, law-based orders allow their members to act in accordance with their own conscience, out of a sense of duty or justice (Apel 1998: 755). The point is that the law binds the others' will and thereby makes it possible for the individual to act morally without being in a 'sucker' position (cf. Axelrod 1984: 8).

Law-based sanctions are in short supply in international affairs, and presently there are no European prisons, no European army, and no European police corps.

This is a problem as we are instructed by our moral reason to act when states 'fail', when genocide and ethnic cleansing take place. When faced with crimes against humanity and when all other options are exhausted, the international society should be enabled to act, even with military force.

However, in this regard, something is happening in Europe. As an answer to the perceived 'capability-expectations gap' (Hill 1998), and the crises of the former Yugoslavia, the so-called *rapid-reaction mechanism* was established in 2001, designed to permit the Union to respond in an 'efficient and flexible manner to situations of urgency or crisis or to the emergence of crisis' (European Council 2001b). The Kosovo crisis in 1999 and the perceived problems of the EU to cope with security issues after 9/11 have led to a push for a more able security policy (Dannreuther 2004). The *European Security Strategy* (ESS), adopted by the European Council on 12 December 2003 (European Council 2003), outlines the central vision behind the EU's external ability. It reveals that the EU still does not consider the use of military force as the first option (Sjursen 2007a: 238), but the question here is whether this strategy will be pursued in line with cosmopolitan law. I will return to this. First we need to establish whether the EU is internally consistent, that is, willing to bring human rights to bear on member states' self-determination.

PREDICTABILITY AND SECURITY

In 2000 the fourteen other member states imposed sanctions on Austria for letting Haider's Freedom Party—a right-wing, 'racist' party—into government. While it was the member states that then decided to impose sanctions against Austria, the EU itself has now established procedures to ensure that breaches of fundamental principles are sanctioned. The Treaty of Nice amended Article 7 TEU, which specifies the concrete procedures to follow in case of a 'clear risk of a serious breach' on the side of one member state. Moreover, with the Treaty of Nice, a qualified majority vote is enough to take action against the recalcitrant member state. This development of rights protection and polity-building was carried further by the decision to frame a Charter of Fundamental Rights.

As discussed in Chapter 5, the Charter enhances the *legal certainty* of the citizens of Europe as everybody can claim protection for the same interests and concerns. The principle of legal certainty is currently secured only in a limited sense at the Community level. There was no reference to fundamental rights in the founding treaties, but they came to the fore in 1964 when the European Court of Justice set out the doctrine of supremacy of EC law over national law. This was objected to by Italy and Germany because EC law, in contrast to their national constitutions, did not protect human rights. Since the EU is not itself a signatory to the ECHR, the Community is not bound by it in the same way as the subscribing member states.

Another source of initiative of making a charter of fundamental rights is, as we already have touched upon, that it is difficult to *lead by example* when basic institutions are lacking in the EU with regard to human rights. It is difficult to be a champion of cosmopolitan law and urge others to institutionalize human rights when one is not prepared to do so oneself.

Generally, bills of rights empower the judges to protect liberty and hinder democracy by means of majority vote crushing individual rights. A charter, even when it is no more than the codification of existing law, decreases the room for discretion of the ECJ and national courts when dealing with EC law of fundamental rights. The EU Charter is, however, found wanting. It is weakly developed with regard to citizenship rights, as a person must be a citizen of a member state to qualify as a citizen of the Union, and with regard to political rights. The onus is on human rights, which undoubtedly have been strengthened, but it has not introduced 'any concrete policy changes nor altered anything significant within the existing legal, political and constitutional framework' (De Búrca 2001: 129).

There are other limitations to the Charter: it currently only applies to the actions of the EU institutions and the member states' authorities, and it is not designed to replace other forms of fundamental rights protection. Article 51.1 of the Charter states that it only applies to the 'institutions and bodies of the Union' and to the member states 'when they are implementing Union law'. The Charter does 'not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties' (Article 51.2). Moreover, certain human rights concerning the right to asylum, social rights, and minority rights are contested at the EU level. Many of the rights clauses of the Charter have the status neither of fundamental, nor of ordinary rights, but are merely policy clauses (Menéndez 2003). This hampers the impression of a fully credible external rights policy. But most importantly, the Charter was not made binding: it was not included in the Nice Treaty—only solemnly proclaimed. The Constitutional Convention proposed to make the Charter an integral part of the Constitutional Treaty, but this was changed with the ensuing Lisbon Treaty. Still, if the latter is ratified, the Charter will become binding and achieve the same legal status as the Treaties.[6] However, specific measures for the United Kingdom and Poland were introduced to limit the Charter's justiciability.[7] The actual implication of this is still not clear. But for now the fact of the day is that the institutionalization of a human rights policy in the EU is weak.

> The real problem of the Community is the absence of a human rights policy, with everything this entails: a Commissioner, a Directorate General, a budget and a horizontal action plan for making effective those rights already granted by the Treaties and judicially protected by the various levels of European Courts. (Weiler 2004: 65)

[6] Art. 6.1 TEU as amended by the Lisbon Treaty.

[7] 'To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or the United Kingdom' (Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, Art. 2).

CONSTITUTIONALIZING EUROPE

With the incorporation of the Charter of Fundamental Rights, efforts have been taken to improve the emerging constitutional structure. The Lisbon Treaty would further heighten the coherence and the democratic quality of the Union, through means such as the weakening of the pillars, the strengthened role of the EP and the generalization of co-decision and qualified majority voting as decision-making procedures. And so would the strengthening of national parliamentary involvement in EU activities as well as the citizens' right initiative.[8] The legal order of Europe confers rights upon the citizens and subjects law-making to the will of the citizens. The EU has achieved an element of *supranational normativity* based on the principles of fundamental rights, rule of law, and democracy, and the ECJ represents a firm dispute resolution mechanism whose foundation is now bolstered by the entrenchment of the primacy of Union law. However, the member states remain key players. Among other areas they retain control of the Union's sources of funds, unanimity is demanded as regards fiscal policy, the Common Foreign and Security Policy (CFSP), and the European Security and Defence Policy (ESDP), and the Council still controls amendment of the treaties. Even if the Lisbon Treaty were to be ratified, 'Treaty amendments will require unanimity and ratification by all the Member States' (Kokott and Rüth 2003: 1343).

Moreover, as regards external policy, the Lisbon Treaty establishes a High Representative for Foreign Affairs who will be both the Vice-president of the Commission and part of the Council.[9] Wolfgang Wagner (2006: 209) argues that the Europeanization of security and defence policy leads to a democratic deficit as it increases executive dominance—and further that the EP can 'hardly compensate for the weakening of parliamentary control at the national level'. But in this regard the new Lisbon Treaty would represent an improvement from a democratic perspective as it provides for more clarity and transparency, embracing the *parliamentary* model of control.[10] This is so, first, because the EP's supervision is increased. Its consultant role is formally entrenched according to the amended Article 36 TEU: 'The High Representative [. . .] shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration.'[11]

Secondly, the CFSP, whose institutional structure is formally intergovernmental (Pillar II), has been in the making for a long time, making it increasingly difficult for the national foreign ministries to control the policy-making process (Curtin 2007: 249ff). Many important decisions are made by EU institutions like

[8] Articles 11 TEU and 24 TFEU, as amended by the Lisbon Treaty.

[9] Article 18 TEU, as amended by the Lisbon Treaty.

[10] This was further elaborated in Chapter 4, see also Chapter 10.

[11] The article further opens for the involvement of special representatives in briefing the EP.

the Council, associated committees and working groups. The Constitutional Convention included the Foreign and Security Policy on its agenda. This meant that this policy was debated in a *transnational forum* and not in an intergovernmental body, and, thus, reduced the executives' leverage on foreign and security policy. This is welcomed from a cosmopolitan point of view as it embodies a constraint on the 'unilateralism' of the member states. A clause to preclude independent action of member states is firmly stated in the amended Article 32 TEU: 'Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach.'

Thirdly, when it comes to specific provisions concerning a common security and defence policy it is firmly stated the Union's peace-keeping and conflict-preventing missions shall be 'in accordance with the principles of the United Nations Charter'.[12] The UN Charter is mentioned in several places in the Lisbon Treaty as also in previous Treaties, hence underscoring the respect for higher-ranking principles. Now the question is whether cosmopolitanism actually informs the external relations of the Union.

COSMOPOLITAN POLICIES?

The European integration process helped in stabilizing the transition to democracy at the nation-state level, first in West Germany and Italy, then in Greece, Portugal, and Spain in the 1970s and 1980s; and later again in the Central and Eastern European accession states (Judt 2005). Moreover, the debate in the EC on the Second Enlargement—to Greece—in the 1970s was an important factor in establishing *democracy promotion* as a major new legitimating strategy for the EC, complementing the old goal of guaranteeing peace (Sjursen 2006; Verney 2006). In the post-Maastricht period the EU became increasingly concerned with democracy and legitimacy.

For a long time the Community has subscribed to democracy and human rights as the basic criterion for membership. Portugal, Spain, and Greece were not admitted before they had abolished totalitarianism and changed their form of government. In a report to the June 1992 Lisbon European Council, the Commission restated that there were certain fundamental conditions for membership: only European states could become members of the EU; candidate states must have a democratic constitution and they must respect the principles of the rule of law and human rights. This is reiterated in the criteria for membership set by the Copenhagen European Council (1993). These conditions may be 'slippery' (Grabbe 2002: 251f), and the mechanisms for achieving them inconsistent (Schwellnus 2006: 191–2), but they nevertheless point to the principled basis of the Union.

Also when it comes to trade and international cooperation in general there is a commitment to democracy and human rights. The EU insists on the respect of

[12] Article 42 TEU, as amended by the Lisbon Treaty.

minority rights in third countries—non-European countries—and there is political conditionality on aid and trade agreements.[13] Since 1995 the 'human-rights clause' is supposed to be incorporated in all cooperation and association agreements. In 1998 the Union launched an initiative on the death penalty and torture and raised the issue on a bilateral and multilateral basis worldwide, and through the UN. The list of countries having abolished capital punishment as a result of EU pressure is impressive. The EU has affected the human rights situation, in particular with regard to the abolishment or reduction of capital punishment in Cyprus and Poland, Albania and Ukraine, Azerbaijan and Turkmenistan, Turkey and Russia through different kinds of means and measures (Manners 2002: 249–50). In Turkey there has been a *political avalanche* with respect to democratization and human rights, especially since 2002 (Avci 2006: 67). Further, the Union has cut direct budgetary support to Zimbabwe, Côte d'Ivoire, Haiti, and Liberia. The EU has stalled on deepening relations with Russia, Pakistan, and Algeria due to breaches of basic human rights.

The Commission has adopted several cooperation instruments for regional and bilateral relations and the EU holds regular summit meetings with its main partners. It has developed so-called partnership and cooperation agreements, 'aiming to establish an area of prosperity and good neighbourliness'[14] with many countries. It has, so to speak, prompted a *new regionalism*.

> New regionalism appears to constitute a relatively safe space within which Europe can display identity and norm difference from the US: The EU can lay down an identity marker of what it perceives as a more humane governance model in its relations with the developing world, without having to confront or contradict US power head on. (Grugel 2004: 621)

The EU, whose biggest members have been colonial powers, now exports the rule of law, democracy, and human rights (Rosecrance 1998: 22). These policies are reflective of the value basis of the Union. However, one may ask whether this is mainly cheap talk. Is the EU consistent, does it apply the principles consistently to third countries—or merely in places where it is not very costly? The EU is certainly not consistent as third countries are treated differently. For example, Russia is merely marginally sanctioned for its wars in Chechnya (although the EU threatens imposing stronger sanctions). Israel is threatened with sanctions because of its policies towards the Palestinians, but sanctions have not been carried out. Uzbekistan is another example of a country where the *essential elements clause* is not upheld rigorously despite widespread torture and lack of reform.[15] These examples indicate lack of consistency in EU external policies; hence the criticism of hypocrisy and window-dressing. There is also the com-

[13] 'The offer of trade and association agreements, technical and development assistance, political dialogue, diplomatic recognition, and other instruments is now usually made conditional on respect for human rights' (Smith 2003: 111).

[14] Article 8 of the TEU, as amended by the Lisbon Treaty; see also the strategy paper on the European Neighbourhood Policy (European Commission 2004).

[15] *European Voice*, 18 24 March 2004, at p. 15.

plaint that there is more emphasis on the protection of civil and political rights compared to social and economic ones and that commercial interests take precedence, a claim that the urge by some member states for lifting the EU weapons embargo on China seems to substantiate.[16]

JUST CHEAP TALK?

One may take the latter examples as evidence for the EU as a normal interest-maximizing power; one that only uses 'soft power' and pursues 'second order' concerns when this is not costly or detrimental to 'national interests' (Hyde-Price 2006: 222). After the cold war 'the EU was used by its most influential member states as an instrument for collectively exercising hegemonic power, shaping its "near abroad" in ways amenable to the long-term strategic and economic interests of its member states' (ibid.: 226–7).

Such a realist approach faces difficulties. First, in empirical terms, the data presented can be countered by examples suggesting that the EU's rights protection costs. It is beyond doubt that the human rights politics of the Union costs and is not without sacrifices, as both the enlargement and the support to the former Yugoslavia testify to (cf. Sjursen 2002). In numerous documents, declarations, and policy statements the EU has distinguished itself from the power politics of traditional states in international relations. The primary goal of the CFSP is 'to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter' (TEU Article 11). The EU Commission represents 12 per cent of all international financial aid worldwide and combined with the aid of the member states the figure is more than 55 per cent (Petiteville 2003). Europe is the largest contributor to the promotion of democracy in the world (Börzel and Risse 2005). With regard to the abolition of the death penalty 'the EU often finds itself at odds with other developed OECD states, such as the US and Japan' (Manners 2002: 253). In addition, the EU has been very supportive of the UN and has also been a driving force in its reform process.

Second, on methodological terms, to reduce all behaviour to interest maximation and security motives makes it hard to make robust predictions. On such a basis, how to account for the decision to enlarge? Obviously this is a normative commitment. Regarding the fact that the EU and the member states are the world's biggest contributors to democracy, does this really pay off? How can one at all make cost-benefit calculations in such fuzzy questions? Security threats as well as security maximation are highly dependent on psychological factors that

[16] The embargo was imposed after the repression of democracy demonstrations in Beijing in June 1989. At the EU China summit on 8 December 2004 and the subsequent EU summit, the EU confirmed its willingness to work towards lifting the embargo (European Council 2004: 19).

cannot be rationally calculated on a means-ends basis. In general it is hard to establish what constitutes equilibrium when it comes to non-quantifiable entities such as soft security. It is difficult to assess whether the used means are optimal or not as there is no objective metric available.

The upshot is that in theoretical terms one should avoid an approach that predetermines the result as does the 'civilian power' approach as well as that of the realists. The objection with regard to the former pertains to the problem of explaining change or variation. When behaviour is seen as driven by fixed identities or given norms there is no conceptual outfit for explaining deviation or reflection over the putative rationality or legitimacy of the policies. With regard to the latter, the well-known criticism of rational-choice assumptions of preference or interest maximation applies. States conceived of as actors should not merely be seen as monolithic and *rational* in the sense that they form preferences and pursue them consistently, but also as entities having the capacity of being *reasonable* in the sense that they possess a notion of what is just and fair (Rawls 1993: 49) and of what is communicatively rational (Habermas 1996a: 5). Only on the basis of the latter can one understand the international order as one made up of normative rules and the mutually supportive behaviour of the actors. As far as states involve themselves in a discourse, there is in fact an effective international law (Koskenniemi 2005).

However we understand such a system, in whatever form it is seen to come—be it in the sense of a strict non-intervention principle, contractual law, or the protection of human rights—it is only understandable on the basis of some norms that command respect in and of themselves. The international order is thus not 'an anarchical self-help system' but *a delimited normative order*: 'the legal order of each state, each national legal order, is organically connected with the international legal order and through this order with every national legal order, so that all legal orders merge into an integrated legal system' (Kelsen 1944: 354). This is what makes for the putative stability of the international order. It reduces transaction costs and makes contractual agreements possible. Cooperation as well as competition requires a stable and predictable order that makes promises (as well as threats) credible. Such an order sets the 'fair' terms of cooperation but then also limits the actors' sovereignty: 'For the rule *pacta sunt servanta*, the legal basis of all international treaties, as a rule of positive international law, corresponds only in a limited way to the principle of autonomy' (ibid.). Moreover the civic, moral, and social norms of transnational community, which on the one hand underpin international legal orders and make them viable, and, on the other hand, the customs and social practices they build on and foster between civil societies, have been conducive to problem-solving and learning. Without the presence of a state—or coercion—to trigger norms of justice beyond humanitarianism, transnational voluntary cooperation has brought about a whole range of new norms, schemes, and arrangements for protecting the interests of individuals (Cohen and Sabel 2006:164f).

It is such preconditions of legal-normative and civic character that preference maximation is parasitic on, which are overlooked by many realists and which make the analysis of the present world order not 'realistic' enough. What is

overlooked is that actors operate in a context they do not control. This is clearly seen in the tendency to analyse normative utterances as merely *window-dressing* or information-reducing mechanisms—neglecting the force of normative commitments in international interaction. The fact that public deliberation does not necessarily eliminate egoistic motives, but rather forces the actors to hide them, testifies to the force and autonomy of norms. That parties at least are hypocrites—they pay homage to norms in order to reach agreement—underlines the autonomy, validity and importance of norms. 'The force of norms—the feature that makes manipulation and interpretation worth while—is that they do have a grip on the mind; otherwise, there would be nothing to manipulate' (Elster 1989: 100).

From this it follows that one cannot from the very outset deem the well-known rhetoric of the Union about democracy and human rights as mere window-dressing (even though some actors obviously are behaving strategically), as do realists. The latter generally conceive of ideas as information-reducing means, and political talk as strategic communication: cheap talk intended to seduce the audience. Regardless of whether normative commitments are 'really' intended as window-dressing or not, they can have behavioural consequences, hence the *civilizing force of hypocrisy* (cf. Elster 1998: 111f). Irrespective of the actors' intentions, in so far as they appeal to norms that are widely accepted they in fact also confirm their validity. Thus we should distinguish between the genesis and the validity of a phenomenon. That is, regardless of whether they are 'really' intended as window-dressing or not, they may be valid in themselves and have a compliance-generating force. *Cheap talk* often strikes back as it becomes impossible to withdraw promises or refute pledges in an open debate, once they are made public. The mechanisms of soft power related to peer pressure and reputation—blaming and shaming according to standards espoused by transnational civil society—works effectively to expose norm breakers to public attention (Nye 2004). Non-compliers are not left unsanctioned in the international area due to the formation of *communicative power*. Increasingly power-wielders are held accountable to standards espoused by transnational public discourse and protest and also by the 'creeping' legalization of human rights.

One may certainly question whether the EU actually is a regional power with a cosmopolitan imprint, but the assessment should be based on sound criteria and not foreclosed by choosing a conceptual strategy that rules out this very possibility. As we have seen, the EU has committed itself to law-based international relations. Yet the question remains whether it can avoid the dangers of an unchecked delegation of power to a supranational organization, which is the well-known danger of unconstrained cosmopolitanism.

SOULLESS DESPOTISM CONTAINED

A real republic depends on bodies above the nation-state that citizens can appeal to when their rights are threatened. In order to ensure justice at the world level, or

at least to be able to sanction norm breaches such as human rights violations and crimes against humanity, there is need for a system that lays down the law equally binding on all. It is a rather thin normative basis for such an order as it must be based only on what human beings have in common, that is, their right to freedom, equality, dignity, democracy, and the like that are listed in human rights declarations and basic rights stipulations of modern constitutions. The question is, then, how much power the custodian of such an order—the EU, the UN—should have and what kind of organization it should be. It follows from the preceding analysis that the threat of sanctions is an intrinsic part of the law.

The law is a means to compel compliance, but it can only do so without unleashing the threat of force when it applies equally to all and when it is in compliance with moral principles; when it is seen as legitimate. An association is democratic only to the extent that it relies upon the putative legitimate use of force to ensure compliance with its norms, and only democratically made law can claim to be legitimate. Also an organization above the nation-state level equipped with enforcement mechanisms—the capacity to make threats credible—can rightly use force only in so far as its actions are democratically regulated. As I will return to in Chapter 8, the codification and positivization of human rights internationally represent *juridification* as they are made and adjudicated by legal bodies only. Such bodies are in need of democratization, as rights should be given by the rights-holders themselves or their representatives. In a democracy it is the citizens that give themselves the rights. Hence, *no humanitarization without representation.*

Also when it comes to implementation there is the requirement of democratic procedures, as norms need procedurally regulated bodies for their interpretation, specification, and adjudication. Norms, also legal norms, are rooted in practice, are contested and require argumentation and interpretation with regard to concrete interests and values in order to be properly applied. In concrete situations of norm violations often more than one justified norm may be called upon. To choose the correct norm requires interpretation of situations and sometimes also the balancing and weighing of rights. Individuals' rights are limited by others' rights and concerns, and the abstract law enforcement by a *world state* runs the danger of glossing over relevant distinctions and differences.

A world state with far-reaching competences—with an executive government—thus faces severe difficulties as it necessarily must leave much discretionary power to the world executive. It would imply the risk of unchecked delegated politics and a stern democratic deficit. A world state would lack any peer to relate to and hence be an unconstrained sovereign.[17] Consequently, there is a problem with cosmopolitan law in contrast to the existing 'international law' with regard to *legal protection* (Scheuerman 2002: 448). It faces significant difficulties as

[17] There is no uncontested blueprint for the design of a cosmopolitan order as the discussion on the proposal of David Held (1995) testifies to, see e.g., Habermas 1998a, 1999b, 2001a. See further Apel 2001; Archibugi 2003b; Bohman and Lutz Bachmann 1997; Brunkhorst 1999; Brunkhorst et al. 1999; Grant and Keohane 2005; Höffe 1999; Scheuerman 2008.

regards the legal protection of freedom rights. The immense means of power that must be at the disposal of a world state to protect peace may threaten freedom. Hence the danger of *peaceful slavery*. It is the principle of rule of law and the *Rechtsstaat* that safeguards against states' infringement of individual liberties as it requires the government to act on legal norms that are general, clear, public, prospective, and stable. Thus one should recall Kant's warning:

> [T]he distress produced by the constant wars in which states try to subjugate or engulf each other must finally lead them, even against their will, to enter a *cosmopolitan constitution*. Or if such a state of universal peace is in turn even more dangerous to freedom, for it may lead to fearful despotism (as has indeed occurred more than once with states which have grown too large), distress must force men to form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful *federation* under a commonly accepted *international right*. (Kant 1797: 90)

How can the rights of the citizens be protected at the supranational level? I have conceived of the EU as cosmopolitan in the sense that it subjects its actions to the constraints of a higher-ranking law and not as an emerging world organization. This is underscored by the fact that the EU does not possess a system for norm implementation of its own. It depends on national political systems—national administrations—in order to put its measures into effect. This diminishes the tremendous leeway for legislators and courts at the supranational level. Moreover, the putative democratic system of law-making and norm interpretation at the European level, constrained by the power of the member states, warrants that the EU does not become an unchecked entity—one that runs the risk of being *a world despotic Leviathan*. It does not grant the citizens unmediated and unchecked membership in a supranational organization but rather respects the allegiance to particular communities—the nations, provinces, and *Länder*. The EU represents a constraint upon brute state power and excessive nationalism but is itself balanced by the states that have the upper hand in legislative matters. This has consequences for the political theory of the Union, which is addressed in Chapter 9.

CONCLUSION

The criterion of a legitimate foreign policy can be derived from a cosmopolitan approach stating that only under the review of a higher-ranking order can one know whether or not actions are normatively defensible. In addition, to establish this criterion, I have argued that the opposition between democracy and human rights can be solved only by establishing supranational institutions. Furthermore, the threat of force is needed to ensure equal rights for all but can find justification only when used to protect human rights. Hence, the defining feature of a legitimate polity cannot be the absence of military force.

On the theoretical underpinnings of this perspective I have argued that actors in the international order often operate in a normative environment they do not control, and should not be seen merely as interest maximizers, but also as able to act out of a sense of justice or duty. Increasingly, this obligation is structurally entrenched; hence infringement of human rights is not left unsanctioned in the international order. On assessing whether the EU actually abides by this criterion the findings are mixed. On the one hand, inconsistency and double talk are not infrequent. On the other hand, the EU is the most promising example of a post-national powerful regional organization, and one that increasingly becomes recognized, and also figures as a role model for other regions. The effort to include the EU Charter of Fundamental Rights in the rejected Constitutional Treaty, and the fact that it is made binding with the Lisbon Treaty, is a strong indication of heightened consistency between externally projected and internal standards. The parameters of power politics have already changed in Europe, a fact that actually seems to have influenced the external relations of the Euro-polity.

7

A Layered European Public Sphere

INTRODUCTION

The development of post-national democracy in Europe depends on the emergence of an overarching communicative space that functions as a public sphere. Only with a European-wide public sphere in place can the requirement of democracy beyond the nation-state be met. This is so because the public sphere is a precondition for the realization of popular sovereignty. It entitles, in principle, everybody to speak without any limitations on themes, participation, questions, time, or resources. In its widest sense, the public sphere is the social room that is created when individuals assemble and discuss common concerns. The notion of a public sphere is internally linked to normative political theory as it is a medium for political justification—for holding the decision-makers to account—as well as for political initiative, that is, the mobilizing of political support. It is the place where civil society is linked to the power structure of the government. The public sphere, then, not only enables *autonomous opinion formation* but also empowers the citizens to *influence* the political system. It is a precondition for redeeming the claim to self-government—that the citizens can govern themselves through politics and law.

The problem is that the public sphere historically is linked to a concept of a sovereign people that are citizens of a state and that share some basic sociocultural characteristics. Thus, it presupposes both a state, which can ensure the rights of the citizens, and a society that can make for allegiance and a common we-feeling—a collective identity. Can there be a public sphere when there is no collective identity?

Despite the fact that the EU is neither a state nor a nation; its emergence as a new kind of polity is closely connected to its development as a communicative space. Traditionally, political theory has thought of communicative space and public spheres as what goes on inside nation-states. As the EU manifests more and more the characteristics of a supranational polity, this kind of perspective is rapidly becoming deficient. The granting of European citizenship points to conspicuous processes of deterritorialization and dissociation. Generally speaking most states are *multicultural* and every nationality is territorially dispersed. Furthermore, regionalism and nationalism at the sub-state level are creating distinctive communicative spaces below the state level. The upshot is fragmentation and differentiation of national public spheres and the emerging of polyphonic transnational publics that question the close connection between

public sphere and demos. Is there or can there be a European public sphere that can be seen as a vehicle for democracy and collective action beyond the nation-state? In order to answer this we first need to conceptualize the public sphere in sites beyond the nation-state. Does a mere communicative space suffice or does the public sphere have to develop into a democratic sovereign in order to be deemed democratic? These are the interrelated questions that are addressed in this chapter. The analytical point of departure is the two readings of deliberative democracy's basic tenet outlined in Chapter 3 that the laws should be justified to the ones bound by them. One is the 'participatory' reading, which conceives of the democratic procedure as a set of citizenship rights that in themselves set the conditions for justifying the laws (version A). The other, the 'rationalistic' reading builds on the *epistemic account of justice* (version B). Deliberation is held to lead to improvements in information and judgement conducive to rational problem-solving and where the quality of the reasons makes for acceptability.

In the first part of the chapter I address the notion of a European public sphere and the problem of a collective identity. I argue for a thicker concept of the public sphere than that of *a communicative network* revolving on the epistemic value of deliberation, and then distinguish between *a general public sphere, transnational segmented publics* and *strong publics.* In part two, I examine what these types entail in empirical terms and whether this system of publics has any democratic merits in the EU.

CONCEPTUALIZING THE PUBLIC SPHERE

The public sphere is the place where civil society is linked to the power structure of the state. It is 'the informally mobilized body of nongovernmental discursive opinion that can serve as a counterweight to the state' (Fraser 1992: 134). Habermas is the founding father of the most influential concept of the public sphere.[1]

The norm-generating power of reflective argument

The notion of a 'public sphere' signifies that equal citizens assemble into a public and set their own agenda through open communication. Historically speaking, the citizens immediately lay claim to this public through confrontations with the authorities over the general rules of coexistence in the fundamentally privatized, but publicly relevant sphere for exchange of goods and societal work. The medium for this political confrontation is remarkable and without historical precedent: public reasoning (Habermas 1989: 27).

[1] The following part draws on Chapter 9 in Eriksen and Weigård 2003.

The essence of the modern public sphere is *rational* debate. There are no elevated dogmas to be protected or a meta-standard according to which disagreements can be solved. In this type of public sphere, actors have to seek understanding and approval on a broad basis and across established convictions, religions, and status hierarchies. The modern concept of a public sphere is greater and wider than one formed around a particular ethical basis, that is, the *politeia* or the Church. It spread to all of civilized Europe (Taylor 1995: 266).[2] It became possible to appeal to a public that was greater than the nation-state. In this sense, the public sphere predates the modern state.

In conceptual terms, the public sphere is non-coercive, secular, and rational. It is established through entrenched freedom rights—political and civil liberties—that provide citizens with protections from state incursions and with the right to speak freely. Further, the modern public sphere is founded on rational debate and is antithetical to coercion and dogmatic modes of conflict settlement. This idea of the public sphere is, then, closely linked to the principle of universalistic argumentation. The discussion can go on indefinitely, and the participants can address an indefinite circle of interlocutors, who are scattered in time and space. Through a public sphere 'society' becomes reflexive—it thematizes itself.

The development of a public sphere has profound implications for the conception of democratic legitimacy. It alters the power-holders' basis of legitimacy, as citizens are equipped with rights against the state. Decision-makers are compelled to enter the public arena in order to justify their decisions, in order to gain support. They cannot allow themselves merely to pose for the masses, as the emperors in the ancient world did (and some tyrants have tried in recent times). This forms the background for speaking of a modern public sphere that is critical of power. There are no external bodies that guarantee the legitimacy of power—neither divine law nor traditional authority. Authority is established through public discussion. Legitimacy consequently becomes not only precarious, but also a critical resource—something 'outside of the reach of individuals'. We see a transition from the speech of power to the *power of speech* (Lefort 1988: 38). It is neither a given set of institutions nor concrete persons that guarantee the legitimacy of the law. Only public debate in itself has norm-giving power. Hence, democracy became the sole legitimation principle of government in modern, post-conventional societies, based on an inclusive public sphere entitling everyone affected to take part in the deliberation on common affairs.

One may, however, ask whether such depends upon the institutionalization of one overarching, unifying public sphere. Historically, a single authoritative public sphere, representing one collective identity has never existed. There were many

[2] Historically, the all embracing institutional order of the Christian Church gave rise to an institutional order that transcended the boundaries of the principalities and was succeeded by *enlightenment* focused on reason, human rights, and democracy. 'Modern science and enlightenment replaced the universal chance of salvation with the universal chance of education, the universal community of souls with the universal community of mankind based on natural reason and the empirical examination of nature' (Eder and Giesen 2001: 260).

and they were stratified. The dominance of high culture and the *Bildungs-Bürgerschaft* (or *Gelehrtenöffentlichkeit*) were successively challenged by the lower classes and popular publics. The contention between elitist (high culture) and popular (plebeian) publics was manageable because of the existence of a well-developed collective identity—a prevailing *value consensus* (Giesen 1999; Eder and Giesen 2001; Eder 2003). The process of fragmentation and dissolution of given identities based on, e.g., nation, religion, class, and ethnicity has taken place due to the processes of globalization and Europeanization.

A complex public sphere

According to Habermas's revised theory, the public sphere is a common space in society, but it is a space presently divided into different types and categories (1996a: 373ff). It consists of different assemblies, forums, arenas, scenes, and meeting places where the citizens can gather. Today the public sphere is a highly complex network of *public sphere segments*, which stretches across different levels, spaces, and scales. There are subaltern public spheres, municipal, regional, national, and transnational. There are different arenas, where elites and the masses, professionals and lay people, prophets and critics can meet and cooperate with various degrees of intensity and passion. The public sphere extends from episodic café and street gatherings, via organized professional, cultural, and artistic public spheres, to abstract public spheres, where listeners, readers, and viewers are isolated and spread in time and space. There are strictly situated public spheres, where the participants meet face to face; there are written public spheres, and there are anonymous, faceless, public spheres made possible by the new electronic technologies.

Habermas thus adjusts to the critique that his early, 'bourgeois' concept of a public sphere involved a fixed, ontological distinction between *res publica* and *res privata*—between the common good and special interests respectively.[3] Further, the criticism has been that the original use of the concept involved *one* uniform and national public sphere, and that the increasing division and duplication of the public sphere which followed in the twentieth century (for example as represented by the labour and feminist movements) consequently had to be regarded as a decline and not as a contribution to the democratization of society.[4] Already, in the early modern period of Europe, the *Vielstimmigkeit* (multi-vocality) of the popular publics and the level of contention are striking (Eder 2003: 92; Tilly 1986). This is even more so in well-developed late modern societies, characterized by dominant discourses, worldviews, and entrenched forms of collective understanding coming under pressure, and where more

[3] He now carefully points out that 'We must distinguish *procedural constraints* from a constraint or limitation on the *range of topics* open to public discourse' (Habermas 1996a: 313).

[4] For more information on this debate, cf. especially; Cohen and Arato 1992; Calhoun 1992; Fraser 1992; Habermas 1992; Luhmann 2000: 274ff; Nanz 2002.

unconstrained patterns of communication emerge. New forms of communication develop; new discourses emerge and are in constant flux and contestation. The public sphere has become polymorphous, polyphonic and even anarchistic. Today it forms, according to Habermas, '*einen wilden Komplex*', which is vulnerable to perversions and communication disturbances. On the other hand, this open public sphere is a medium for *unlimited* communication, and is hence sensitive to social pathologies. The question is whether this variety of public spheres, which creates different identities, does not also disrupt and fragment the political community, that is, lapses into 'identity politics': the disruptive effect of groups demanding recognition for their difference. How is order possible in this cacophonic symphony?

One should note that there are different kinds of publics with different functions. While anonymous mass publics or *silent publics*, according to Klaus Eder, are conducive to merely a statistical aggregation of preferences, *speaking publics* may be able to integrate opinions and form a collective will. The former subvert established orders through *scandals* whereas the latter organize morally motivated *campaigns* (Eder 2003: 104).

A system of influence

The public sphere is 'a communication structure rooted in the lifeworld through the associational network of civil society' (Habermas 1996a: 359). *Civil society* is a common space for free communication secured by legal rights to freedom of expression and assembly, where problems are discovered, but also thematized and dramatized and formed into opinions and wills acted upon by formal decision-making agencies. The public sphere 'sluices' new problems into the political system. In Gramscian terms, *it besieges the parliamentary system without conquering it* (cf. Habermas 1992: 452). However, to explain this ability to influence politics, we must see the public sphere not merely as a context of discovery, as a 'warning system' with sensors, but also as a 'system of influence' (Habermas 1996a: 359).

The latter directs us to *strong publics*: institutionalized deliberation close to the centre of the political system that is legally regulated, that is, sites in which there is a requirement to provide justification and a stronger regulation of discourses. Nancy Fraser (1992) distinguishes between *weak* and *strong* public spheres. The latter concept alludes to parliamentary assemblies and discursive bodies in formal institutions that have obtained decision-making power, while the concept of weak public spheres signifies deliberation outside the political system. For the latter, I prefer the term *general public* because it entails free and open access to opinion formation processes, and has in many instances proven to be both 'strong' and powerful, as in revolutionary situations, constitutional moments, and when bare public opinion and protest has forced corrupt leaders out of office.

This sphere is also powerful in the affairs of routine politics in mass-mediated societies because politicians in general are very vulnerable to the moral force of publicly conducted criticism.

Will formation and decision-making, as opposed to mere opinion formation, are reserved for institutionalized discourses, strong publics, in the political system. Here we should note that we have to do with a *trustee* (based on an open mandate) as opposed to the *delegate* notion of representation. While a delegate is a mere agent, who is sent to parliament to express the opinions of his/her constituency and who is subject to an immediate recall if deviating from this mandate, a trustee 'has ampler room for maneuver. He can vote as he thinks best, using his discretion, disregarding occasionally, if only temporarily, the opinions of his electors' (Holmes 1995: 181). A trustee is a deliberative person who operates on the basis of a broad set of viewpoints and opinions, which are integrated through reason-giving aiming at establishing a common ground for collective decisions that may be justifiable towards the constituency. Strong publics transform the influence of civil society and the general public sphere into *communicative power* and this in turn serves to justify political decisions in parliament. Parliaments are quintessential strong publics, but there are also others. Historically, strong publics have existed within the nation-state, but now, especially since the Second Word War and the establishment of the UN, there are also transnational strong publics, such as panels, tribunals, committees, and conventions (Brunkhorst 2005).

The discourse-theoretical proceduralization of popular sovereignty not only makes a conceptual space for a distinction between general and strong publics, it also makes visible transnational communicative spaces; spheres above and between the nation-states in which affected actors can reason about common affairs but where access is limited. This is so because it is premised on rational discourse, not on primordial values or collective identities. When it comes to the EU, however, the problem of collective identity, which is seen as intrinsic to the democratic deficit, lingers and represents a barrier to the development of a general public.

COLLECTIVE IDENTITY AND THE PUBLIC SPHERE

The EU is in its present form held to suffer from a *democratic deficit* due to a weak parliament and the absence of European-wide parties and a European public sphere based on a symbolically constructed people (Scharpf 1999: 187). The lack of a collective identity renders the prospect for a viable European public sphere rather bleak. There is no agreement on what constitutes common interests, and different languages and disparate national cultures are obstacles to opinion formation and common action. The intermediate structures of civil society in the shape of a Europeanized party system, European organizations, social movements, and European media are lacking as well as a common language making

possible a transnational binding debate (Grimm 1995). A common public debate—which would enable the citizens to take a stand on the same issues, at the same time and under the same criteria of importance—is, thus, not achievable under current conditions.

Post-national identity

Often, there is a communitarian string to the 'no public sphere thesis'. The public debate is seen as something quite distinct from a discussion of private concerns, i.e., as if there is an ontological distinction between private and public spheres of action. The latter is marked by a common will on the basis of which the legitimacy of preferences and interests can be judged. A collective identity is seen as a requisite from the very outset. This view presupposes a homogeneous culture and a united people that come together in public spaces to deliberate and decide about the common concerns of the *politeia*. It pictures the public sphere as something rather distinct and stable, as a place where enlightened and equal citizens can assemble to discuss public matters on the basis of a shared conception of the common good. This is the concept of the *res publica* handed down from the Greeks where citizens met in the Agora as friends and brothers to deliberate before decisions were reached in Ekklesia, which resurrected in the medieval, Italian renaissance and in the seventeenth century as republicanism in England, France, and Germany. 'Republic' is an anglification of the Latin *res publica*, which was considered to be the opposite of *res privata*. The term denotes what people have in common outside the family, as well as the institutional structure of public life. This model of the public sphere presupposes a homogeneous political community (Benhabib 1992: 90ff). A *volonté générale* is possible because citizens are equal and share common values. In case of conflict, parties can reach an agreement on the basis of a hermeneutical interpretation of who they are and who they would like to be with reference to a pre-political accord. On the basis of a group identity a citizenry develops into a collective subject—a nation—capable of action.

In this communitarian model there is no distinction between deliberation and decision-making, between opinion formation and will formation. The model does not capture the way the modern public sphere is institutionalized in opposition to government, the manner in which it is situated in the civil society and rendered possible by the fact that the citizens have rights that they are entitled to use also against the state. In modern times, this concept of the public sphere is closely associated with the rise of nation-state democracies either based on the primordial collective identity or in the form of the active moulding of 'a national community of fate'.[5] The notion of a collective identity based on common origin, heritage, language, memory, or remembrance, goes together with the conception of citizenship-based government in which the sovereign people via law can form a

[5] See further Guéhenno 1996 and Miller 1995 for a similar position.

collective will and rule themselves autonomously. The democratic sovereign is created in a public room in which the people lay down the law authoritatively and make it binding on every part to the same amount and degree. This concept of a public sphere presupposes the organizational principle of a state, which depicts the sanctioning means and sovereignty of a territorially circumscribed polity necessary to warrant the citizens' freedom rights. But these two dimensions can be separated.

While the legal and organizational principles of a state-like polity can be seen as a condition for empowering citizens to take part in a general debate of common concerns, the other precondition of a public sphere, that of a collective identity or a common we-feeling, seems to be more questionable. Habermas (1996a, 1998a) opposes a communitarian reading of republicanism, and posits that a *post-national identity* is possible. Such an identity, which is reflective of constitutional patriotism, is seen as based on the procedural requirements of modern democracy and the continuing voluntary recognition and appreciation of this, a practice which is conducive to the accommodation of difference and plurality. Constitutional patriotism portrays loyalty in political terms hinging on the validity of legal norms as well as on the justification of policies and the wielding of power in the name of fairness. It makes possible solidarity between strangers as it is founded on mutual respect. Consequently, the modern collective identity should not be conceived of as stemming from a primordial identification, but from the practice of identifying commonality revolving on a collective self-understanding. It has to be *made* rather than merely *discovered*.

It is from this assertion that the thesis 'no European demos without a European democracy' is derived. 'The initial impetus to integration in the direction of a postnational society is not provided by the substrate of a supposed "European people" but by the communicative network of a European-wide political public sphere embedded in a shared political culture' (Habermas 1998a: 153). But can a public sphere that is conceived of as merely a communicative network really perform such functions?

A communicative network

The public sphere is constituted by the freedom rights granted by modern constitutions. They make *freedom of communication* possible and spur the public use of reason. We should therefore conceive of the public sphere not as an entity existing prior to decision-making bodies, i.e., as a place where 'the people' come together and deliberate upon who they are or would like to be, and then form a collective will of 'the nation' or 'the class'. The public sphere should not be seen as pre-existing and conceived of independently of decision-making agencies, but as emerging in opposition to them (Lefort 1988: 38). It developed into a vehicle to test the legitimacy of legal provisions and as a counterweight to governmental power. This view of the emergence of the public sphere is based on the contention that the state originated, more or less, through war or brute force. As Schmitter

(2000: 118) notes, it was most often the case in Europe that the state was established 'long before a "feeling of belonging to a (single) community" existed among its subjects and, indeed, played a significant role in bringing about such a feeling'. All democracies have non-democratic roots. Only subsequently was state authority democratized, i.e., subjected to the rule of law and the principle of democracy. In brief, first came the state, then the nation, and finally democracy. Such a strategy may not be applicable for the EU. Identity-building from above may be risky in a context of already democratized nation-states in Europe (Peters 2005: 117).

In the discourse of theoretical reading, the public sphere is not an institution, but rather a *communication network*. This network of 'subject-less interaction' is not given special, restricted functions that aim to realize particular results. It is a forum where what happens is determined by what can be made generally understandable, interesting, believable, relevant, and acceptable, through the use of everyday language. A public sphere not only consists of a *speaker* attempting to convince an *addressee* that she/he is right; there is also a neutral third party present—a *listener*. Deliberation takes place in front of an audience. When we have such a *triadic relation* between a speaker, an addressee, and a listener, it is the neutral observers that have to be convinced. It is the spectators that must be won, but their approval can neither be bought nor enforced. The public sphere is that meta-topical social space constituted only by the common action carried out within it. The public sphere is a forum where the communication is subjected to the procedural constraints of discourse only. There is no a priori exclusion of (base) preferences or private interests but rather a discursive testing with regard to their generality and universality. The public/private distinction is then not conceived of as ontologically fixed but rather due to language games and argumentative presuppositions that sift out irrelevant claims (Habermas 1996a: 313).

This is a very thin concept of the public sphere as it consists of actors united merely on the basis of similar problems, knowledge, and interests. But how can a collective opinion come about unless there is *one single public sphere* and unless certain commonalities are in place? In other words, how can a collection of actors be transformed into a group with a distinct collective self-understanding capable of exerting influence, unless there is a sense of a shared culture and a common mission or vision? A certain minimum of unity, trust, and solidarity is necessary for actors to come together at all in public spaces to fight for the realization of collective goals and be prepared to take on new obligations, including being prepared to surrender some of their own sovereignty. This contention is supported by the fact that a collective identity revolves on distinctions. To have things in common requires that others are excluded.

> A critical condition for a genuine Europeanization of public debates would be the enlargement of the imagined collective 'we' beyond national borders (for example, to 'Europe' or 'the Western community') and a growing importance of corresponding disassociations (from 'East' or 'South' or possibly from 'Ameri ca'). (Peters 2005: 90)

The symbolic establishment of a demos—a people—founded on a sense of unity and belonging, is a precondition for a democratic sovereign capable of regulative as well as redistributive measures, for the people to obey the law out of duty as well as for the willingness to pay for the misfortune of their compatriots. Such a solidaristic cultural substrate is required for the formation of a collective identity strong enough to ensure that the compatriots not only see themselves as members of a community based on liberty but also of one based on equality and solidarity. In this perspective, the public sphere conceived of as a communicative network is too weak. A single European space underpinned by a common self-understanding is needed for a qualified political debate on major European decisions. Only in such can public opinion formation amount to communicative power. Even though everyone is entitled to equal respect and concern, there is, in normative terms, a need to distinguish between what we owe each other as human beings—as citizens of the world—and what we owe each other as compatriots—as fellow citizens of the same political community, which hence establish the relevant characteristic in virtue of which the citizens should be treated equally in the sense that their relationships raise obligations of justice and justification.[6] Consequently there is a need for a collective self-understanding symbolizing who the people is. European citizens must be able to see themselves not only as rights-bearers but also as community members. But there is no reason to 'homogenize' the requisite 'culturalist substrate' along communitarian or nationalistic prescriptions. The requisite cultural substrate—the collective 'we'—can be created through inclusive processes of opinion formation and law-making. Irrespective of how it is created, the public sphere, thus, functions on the basis of a certain dosage of solidarity along with liberal norms of tolerance and respect. Such a public sphere is critical and is conducive to a *reflexive identity*, that is, a self-confident identity that also recognizes *difference*. The German public debate making conscious earlier wrongdoings (*Bewusstmachung*) and coming to grips with the past (*Vergangenheitsbewältigung*) is an exemplary role model for such an endeavour in the European context (Giesen 1999; Delanty 2005).

A democratic sovereign capable of action

Habermas distinguishes between opinion formation, which is the domain for a public sphere located in civil society, and will formation, which is the domain for decision-making units within the political system. Public spheres do not act, as they possess no decision-making agency in a constitutional state with a division of powers. In pluralistic and complex societies, public opinion is 'anonymous'—it is 'decentred' into the network of communication itself—it is dispersed, and has no power to govern. Habermas maintains that popular sovereignty has to be located in the interplay between institutionalized and non-institutionalized

[6] In Chapters 9 and 10, I elaborate this point.

bodies for deliberation and decision-making. This *desubstantialized concept of popular sovereignty* is seen to reside in the dispersed process of informal communication and not in a demos—a people—substantively defined. The implication of this theoretical move is lower ambitions on behalf of popular rule. It implies renouncing the possibility of political rule via democratic will formation. Due to the sharp distinction between opinion formation in the general public sphere and will formation in parliamentary assemblies, it becomes difficult to explain in what sense public deliberation and political decision-making are connected. Thus, the very idea of popular sovereignty is at stake. As pointed out in Chapter 3, it is difficult to determine who is the political subject, and how the deliberative practice intervenes in the formation of a collective will or a majority will. A reason is convincing only as long as it is *somebody's reason*. A disintegrated and decentralized concept of popular sovereignty, such as that advocated by Habermas, does not suffice to establish an authoritative basis for law-making in the name of all. It is not fit to establish the foundation of common convictions that is necessary in order to formulate a collective will.

Habermas's conceptualization draws on the epistemic account of the normative basis of deliberative democracy—version A. This is not easy to harmonize with the participatory dimension of democracy pertaining to the role of citizens' volitions in collective decision-making. Political deliberation has many functions and merits. From a moral point of view, its value consists in subjecting the decision-makers to the constraint of justifying the laws to the ones affected. The basic problem with the pure epistemic value of deliberation that Habermas salutes is (a) how to make possible the free, open, and rational assessment of the constitution, and (b) how to account for compliance-generating mechanisms, based on 'rational motivation', that are in force despite the fact that the epistemic publicity principle has not been meet. According to version B of deliberative democracy, the authority of the law stems not merely from discursive processes but from the notion of a common will entrenched in institutions and procedures, which constitutes a higher authority able to legislate and sanction non-compliance unilaterally, that is when law is laid down authoritatively by a people or the symbolic representative of such, and made equally binding on every part. Public opinions that are not formed in a general public sphere made up by a politically integrated citizenry, and consequently subjected to a constitutional test, cannot claim to be legitimate and thus lack the moral force needed to implement decisions also against opposition.

THREE NOTIONS OF THE PUBLIC

Even though the rationalistic interpretation of the democratic procedure is problematic, it nevertheless opens theoretical space for conceptualizing public spheres beyond (and below) the nation-state. This interpretation of the discourse-theoretical proceduralization of popular sovereignty highlights the role

of public deliberation in problem-solving sites and the positive feedback from voluntary and spontaneous cooperation on polity-building. This interpretation opens a conceptual space for transnational public spheres.

Structures for deliberation and problem-solving emerge beyond the state and re-establish the link between *input* and *output* congruence—between decision-makers, participants and affected parties—which economic globalization distorts. Communicative spaces are created that put decision-makers to a test and where soft power pushes hard power. Transnational deliberative bodies, which exert *communicative pressure*, raise the information level and contribute to rational problem-solving because they include different parties on the basis of their knowledge and interests. Such bodies inject the logic of impartial justification and reason-giving into the participants. They may have democratic value even if the ideal communication requirements have not been met, because deliberative interaction forces participants to justify their standpoints and decisions in an impartial and neutral manner.

The normative requirement of the public sphere to be both a forum for deliberation and opinion formation, as well as a medium for collective action, makes it necessary to distinguish between different levels of institutionalization of public debate. Will formation, as opposed to mere opinion formation in the general public, is reserved for strong publics: institutionalized discourses in the political system.

The proceduralization of popular sovereignty in discourse theory—abolishing the presupposition of a collective subject—makes conceptual space for transnational communicative spaces, that is, the emergence of civil society relations beyond the nation-state. These are spheres above and between the nation-states in which affected actors can reason about common affairs and exercise communicative pressure. There may thus be many public spheres in the post-national configuration and some which are not confined to national borders. In fact, there are virtual and speaking publics, and overarching publics transcending limitations of time and space made possible by new media technologies and audiovisual 'constituencies'. New forms of communication are evolving and citizens' involvement in public debate may be seen as spontaneous and elective rather than obligatory and native. Conceptually we may distinguish between three types of public, as outlined in Table 7.1:

- *overarching general publics*, which are communicative spaces of civil society open to all linguistically competent persons to participate on a free and equal basis and, due to proper rights entrenchment, deliberate subjected to the constraints of reason only;
- *transnational segmented publics*, which evolve around policy networks constituted by a collection of actors with a common interest in certain issues, problems, and solutions;
- *strong publics*, which are legally institutionalized and regulated discourses among specially appointed or elected persons authorized to make collectively binding decisions at the polity centre;

Table 7.1 Typology of public spheres

Type of public	Participation	Legitimacy basis	Function
General	Open	A sovereign demos	Opinion formation
Segmented	Restricted	Common interests	Problem solving
Strong	Specialized	Trusted authority	Will formation

The question is what these types entail in empirical terms and whether this combined and interlinked system of publics has any democratic merits. Are there any traits of a general European public sphere where all can address the same issues at the same time, or are segmented transnational publics and institutionalized strong publics all we can report on? In assessing the publics' democratic merits, we should also take into consideration their role in the reform process of the EU.

A GENERAL EUROPEAN PUBLIC SPHERE?

A general public in Europe is not totally missing as there are new European audio-visual spaces—newspapers, television, and the Internet, new social movements and identity politics across borders, and English might develop as an unavoidable first language. The multilingual TV channel *EuroNews* operates on a large scale. In addition, newspapers such as the *Financial Times*, *International Herald Tribune*, *The Economist*, *BBC World*, *ARTE*, *European Voice*, *Deutsche Welle* (broadcasting in English) and *Le Monde Diplomatique* with editions in most major European languages—and certainly not least the Internet—create audio-visual spaces in Europe. Many of these efforts are market-driven (Schlesinger 2007), but still address the broad political and economic issues of the continent. Many NGOs, such as Attac, keep Internet pages in several languages, and thus facilitate a transnational European debate, which is further developed by new transnational media.[7] Some media operate as a motor for Europeanization, and the European debate is catching on (Trenz 2005a). In comparison with other actors—from civil society, state and party organizations—Ruud Koopmans and Barbara Pfetsch (2003: 30) find that the German quality newspapers 'emphasize the collective identities, norms, and values that Europe should stand for'. There are also traits of a Europeanized public debate. The 'Haider affair' as well as the cases of mad cow disease, BSE (*Bovine spongiform encephalopathy*), reveal that

[7] Examples are *Cafébabel.com*, a multilingual online magazine in seven languages offering analyses of current affairs from a European perspective (<http://www.cafebabel.com>), and the Europe wide policy journal *Europe's World* (<http://www.europesworld.org>). One may even hint to examples on the global level, and the non publicly funded http://www.zmag.org that has sections based on voluntary translations (all websites accessed 1 April 2009).

even though transnational events are still viewed through national lenses, they lead to common and simultaneous types of debates within the different national public spheres (cf. Van de Steeg 2006). There is in other words a Europeanization of events (Statham 2007). The same can be said about Joschka Fischer's famous speech in May 2000, which was widely reflected and commented upon by journalists,[8] and which spurred a transnational European debate within the academic community (Joerges et al. 2000). We should also not forget the large demonstrations that took place in all major European cities against the prospect of an American-led invasion of Iraq on 15 February 2003. Habermas and Derrida (2003) suggested this event was the birthday of a European public sphere. However, these demonstrations were worldwide and universalistic principles are not confined to Europe.

With regard to a common language facilitating transnational debate, English has become the dominant language in the EU. More than 200 million EU citizens speak English as either mother tongue or foreign language. This is almost as many as the combined total of German and French, the second and third languages (Rose 2008: 461).[9] The dominance of English as a foreign language is, moreover, likely to increase. A 2006 Eurobarometer survey reveals that 60 per cent of Europeans aged fifteen to twenty-four know English, compared to only 17 per cent of those aged sixty or above (ibid.). This trend will be particularly strong in the former communist countries in Central and Eastern Europe, where Russian, although it has been overtaken by English in schools, is still the dominant foreign language among the older generations. While the diffusion of English in the post-war years was related to American hegemony, language now seems to become increasingly de-nationalized. English 'may be said to have moved beyond being one monolithic "hegemonic" voice, associated with one specific culture' and 'as the use of the language between non-native speakers increases, the explicit link with the native-speaking states will decline, the language being used as a utilitarian tool rather than as a carrier of cultural values' (Longman 2007: 200). If 'international English' is considered as distinct from English as a native language, it is possible to conceive of a European lingua franca while simultaneously preserving the formal equality of the member-state languages, recognizing their importance as carriers of cultural values. There could be a synergy between the growth of Internet accessibility and that of English proficiency—already 33 per cent of the EU's population have both—which could make international English the first lingua franca, which extends from the upper echelon of society to the general public sphere.

Even though there are spaces for the creation of collective meaning and identity through a pan-European media, and English is developing as lingua franca, these still fall short of meeting the criteria of a general public sphere. There is a long way from the kind of debate and information dissemination currently taking place in

[8] An analysis by Trenz (2005b) reveals that the speech was reflected in twelve newspapers of six EU member states under study.

[9] Rose's source is the Special Eurobarometer no. 243, February 2006, 'Europeans and Their Languages', <http://ec.europa.eu/public opinion/archives/ebs/ebs 243 en.pdf> (accessed 23 March 2009).

Europe to the kind of committed public deliberation needed for collective opinion and will formation, namely the requirement of a general debate on identical topics and policy proposals under the same criteria of relevance throughout Europe, rendering collective decision-making possible against the background of a broad mobilization of public support, effectively sluiced into the governmental complex by intermediate organizations and political parties. The general European public sphere required by a fully democratic government remains latent.

TRANSNATIONAL SEGMENTED PUBLICS

Common communicative systems of mass media, facilitating real public debates conducive to collective will formation, are to a large degree lacking at the European level. However, there are transnational public spheres emanating from the policy networks of the Union. Networks are joint problem sites based on common issue orientations and knowledge—so-called epistemic communities (P. M. Haas 1992). Such *issue communities*, constituted on the common interests of actors in certain issue areas, fluctuate, grow, and shrink, sometimes in cycles. In Europe, networks of transnational regulation are, as we will see in the next chapter, conducive to a Europeanization of policies and deliberative governance beyond the nation-state. Networks represent 'the *institutional software* for the reflective treatment of discourses' (Dryzek 1999: 35). They take the form of publics inasmuch as there is a coupling between the collective actors and the audience, in the sense that the actors not only communicate among themselves but are also heard by others. As far as the communication can be heard by an 'undetermined audience'—a public—this takes the shape of *transnational resonance* (Trenz and Eder 2004: 8-9). Scandals and campaigns are pertinent vehicles of such (Ebbinghausen and Neckel 1989).

Philip Schlesinger and Deirdre Kevin (2000: 219) testify to this kind of public sphere formation by pointing to the prevalence of campaigns in the EU, such as the 'Citizens First' campaign on the four freedoms, the 'Building Europe Together' campaign prior to the 1996 IGC, and the 'Euro' campaign. Hans-Jörg Trenz (2002) demonstrates how European security discourses evolve and revolve on a European community of solidarity and are propelling human rights discourses. *Scandals* and *campaigns* are the legitimating and delegitimating functions of the silent and speaking publics respectively. The public-sphere effects of (the criticism of) Schengen, of the European campaigns against racism, of mad cow disease, of the charges of corruption and fraud in the Santer Commission which developed into a scandal in the eyes of the public—resulting in the dismissal of the Commission in 1999—are all examples of events creating transnational segmented public spheres. These cases show that no *one* unifying form of discourse unfolds but rather discourses that vary according to the issue fields that reflect the institutional structure of the EU. The ability to manipulate or homogenize the European public discourse is also rather limited. The bare suspicion of manipulation in fact leads to

a delegitimizing critique and is conducive to the broadening and pluralization of public communication (Trenz 2002: 193). Still, this is a form of elite communication, where experts and the well-educated speak to one another and stage ('*inszeniert*') communicative noise and protest. It falls short of reaching the level of mass communication in a common political public sphere in which the citizens discuss the same issues at the same time under the same criteria of relevance (Habermas 1998a). But segmented publics also fall short of complying with the democratic proviso of openness and equal access.

The European public space is currently fragmented, differentiated, and in flux. In the place of the sovereign people, there is the noise of anarchic and polyphonic communication. The public sphere nevertheless has effects on governance as it subjects the decision-makers to protests and 'communicative noise'—'*kommunikativer Lärm*'. Such 'noise' can be anticipated and thus disciplines decision-makers *ex ante*. 'They compel the check of decisions in that protest to decision-making is being anticipated, or that elitist communicative noise is put before popular communicative noise, thus the elitist public sphere itself takes part in the staging of communicative noise' (Eder 2003: 104).[10] The informal and unruly streams of communication that characterize the European public debate take place in scattered fora and arenas. From a democratic viewpoint, the lingering problem pertains to the lack of ability to form collective opinions on an equal basis in order to facilitate collective decision-making as well as solving the de facto problem of holding the rulers to account. But what about the deliberative and democratic qualities of the *institutional 'hardware'* of the EU?

STRONG PUBLICS IN THE EU

The EU is a highly complex institution with many points of access and sites for deliberation, negotiation and decision-making.[11] It displays a conglomeration of organizational forms geared towards integrating policy fields and establishing consensus, ranging from the hard-core decision-making units such as the Council, the European Parliament, the Commission, and the European Court of Justice, via the nexus of adjacent committees—expert committees, the Committee of Permanent Representatives (COREPER), Comitology, COSAC[12]—to the two Conventions on constitutional matters. The deliberative scope and democratic relevance of these vary, but some of them amount to strong publics, as a brief look at the institutional forms makes clear. Strong publics can be defined as (a) institutionalized deliberative spaces, (b) in which deliberation takes place prior to decision-making, and (c) in which decision-makers are held to account.

[10] Author's translation. See also Eder 2003: 106.

[11] Some of the following has been discussed in Eriksen and Fossum 2004.

[12] Conference of Community and European Affairs Committees of Parliaments of the European Union.

The European Parliament on the rise

Parliaments are quintessential strong publics and essential to democratic legitimacy. They embody the idea of self-determination in that an elected body of responsible citizens is there to legislate in the name of all. Parliaments were from the start set up as deliberative bodies intended to produce cogent results through deliberation: 'legislation is *deliberare*, executive *agere*'. The rationale of parliaments rests on a 'dynamic-dialectic' of argument and counter-argument, of public debate and discussion. Deliberation is intrinsic to the mode of representation that parliaments are based on, and which enables government by discussion. As John Stuart Mill noted, 'When it is necessary, or important to secure hearing and consideration to many conflicting opinions, a deliberative body is indispensable' (1863: 215).[13] The deliberative principle of representation can be stated as follows: 'no proposal can acquire the force of public decision unless it has obtained the consent of the majority after having been subjected to trial by discussion' (Manin 1997: 190). However, '[p]arliamentarism is in any case only "true" as long as public discussion is taken seriously and implemented' (Schmitt 1926: 4). I elaborate on the parliamentary principle in Chapter 10.

Parliamentarism serves the double function of institutionalizing 'the will of the people' and ensuring that the policies enacted by the executive branch of government are grounded in this will. Although the EU is not a fully-fledged parliamentary system, the European Parliament plays an increasingly important role, both as a legislator and as a means of holding the executive European Commission to account. Since 1979, the EP is directly elected by the peoples of the member states, and can, hence, claim to be an institutional expression of the will of the people. Until the Single European Act (1986), the legislative powers of the EP—or the European Parliamentary Assembly as it was initially called—were very weak. Legislation was adopted by the intergovernmental Council of Ministers, which was obliged to consult the Assembly but not to act on its opinions. Only with the introduction of the cooperation procedure in the SEA did the EP begin to play an active role in the legislative process. Although the procedure did not place the EP on a fully equal footing with the Council,[14] and initially it applied only to a limited number of policy areas, it constituted a first step in a process which can be traced through all the subsequent Treaty amendments whereby the EP has been transformed from a 'talking shop' to 'one of the world's most powerful elected chambers' (Hix et al. 2003a: 192). Today, the predominant legislative procedure with regard to first-pillar legislation is co-decision. Under this procedure, a final legislative act requires Parliament's explicit approval in order to pass. The Lisbon Treaty recognizes the right of the EP to exercise legislative functions jointly with the Council through the so-called 'ordinary legislative procedure', which applies

[13] 'I know not how a representative assembly can more usefully employ itself than in talk, when the subject of talk is the great public interests of the country' (Mill 1863: 227).

[14] See Judge and Earnshaw 2003: 207 9.

to the vast majority of legislation within the Common Market as well as in the area of Justice and Home Affairs. Although the EP still lacks the right to initiate ordinary legislation, the Lisbon Treaty grants it the right to propose amendments of the founding Treaties (Art. 48.2 TEU). Following such a proposal, and subject to the approval of the Council, a Convention including representatives from the EP will be convened in order to adopt a recommendation on Treaty changes. However, the Intergovernmental Conference is to make the final decision.

With time, the EP's means of holding the Commission accountable have also been strengthened. In terms of *ex ante* accountability, the Maastricht Treaty established that the Commission as a body is subject to a vote of approval by the Parliament before taking office. The Amsterdam Treaty then confirmed what by then had become practice: that the EP could also vote on the Commission Presidency. The Commissioners are required to present themselves and their respective portfolios to sessions of parliamentary committees, which are also open to journalists and other interested members of the public. This appointment procedure has 'injected an element of parliamentary government' into the EU (Hix 1999: 47). The Lisbon Treaty furthers this development by explicitly tying the investiture of the Commission President to the EP elections:

> Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. (Article 17.7 TEU, as amended by the Lisbon Treaty)

In terms of *ex post* accountability, the EP has the power to dismiss the Commission by adopting a motion of censure. However, this power cannot be compared with that of national parliaments to dissolve governments for political reasons. Rather it is 'designed to sanction cases of mal-administration' (Lord 2004: 144). This is reflected in the demanding requirement of a double majority (two-thirds of voting representatives and an absolute majority of the EP itself). In addition to this, the EP conducts other monitoring functions, which now also include supervising compliance by the member states with the provisions of the Charter of Fundamental Rights. In this capacity, the role of the EP corresponds to that of an *auditor* (Eriksen and Fossum 2002).

The internal organization and *modus operandi* of the EP reflects the powers and constraints that follow from the formal Treaty provisions as well as those challenges that stem from it being one of the world's largest and most linguistically diverse parliaments. In crude numbers, the EP is made up of 736 representatives,[15] divided between the member states more or less according to the principle of regressive proportionality. The number of Members of the EP (MEPs) from each member state ranges from Germany's ninety-nine to Malta's five. Once

[15] The number will be fixed at 750 MEPs (plus the President) if the Lisbon Treaty is ratified (cf. Art. 14 TEU, as amended by the Lisbon Treaty).

in Parliament, the representatives are organized not along national lines, but according to political orientation. At present, the EP consists of seven political groups. National political parties retain important powers over their MEPs, such as deciding who will be nominated for the various committee positions and who will be nominated for re-election. Given the high number of national parties and the sheer size of the EP, the establishment of political groups has been necessary for it to overcome potential collective action problems as this reduces the 'transaction costs' of coalition formation (Hix et al. 2003b: 314). The political groups control the allocation of staff resources and speaking time and are crucial in coordinating committee behaviour and voting in the EP. Recognizing this, the national parties have 'delegated significant organizational and policy leadership to the European party and use their own power to discipline the MEPs to follow the European party line' (Hix et al. 2007: 146). The consequence is that the often quite diverse assemblages of national parties which make up the political groups do in fact not focus first and foremost on defending their particular interests, but on collectively reaching agreement on specific policies. The cohesion of the European political groups has only increased as the Parliament has grown in size and powers (ibid.: 104). As the groups are made up of representatives from different countries, MEPs must actively interact with representatives from different language and cultural backgrounds. Achieving proper understanding and agreement in such arenas requires comprehensive and genuine argumentation.

In addition to challenges following from the size and scope of the EP, the linguistic diversity of the EU means that the EP is a multilingual body. There are twenty-three working languages in the present Parliament, which means that there are 253 possible language combinations.[16] The costs relating to multilingualism—interpretation and translation—are huge, amounting to an estimated one-third of the EP's total budget in 2007.[17] However, as the EP adopts legislation that is binding directly on citizens, the principle of linguistic equality is fundamental. In order to propose changes, full understanding of the meaning of texts is required and MEPs should have the right to suggest amendments in their own language (Corbett et al. 2007: 38). High-quality interpretation services notwithstanding, the multitude of languages and cultural references sometimes constrains the level of spontaneity and liveliness of plenary debates.

Although there may be restrictions on the open debate in plenary sessions, this should not be seen as hampering the EP's legislative work. Most of this takes place within the twenty-two parliamentary standing committees[18] in which

[16] Due to the increasing number of combinations, the EP has put in place a 'relay' system. In cases where a language unit cannot translate directly between two languages, translations can thus be 'routed' via English, French or German.

[17] See the European Parliament: <http://www.europarl.europa.eu/news/public/focus page/008 11817 295 10 43 901 20071017FCS11816 22 10 2007 2007/default p001c005 en.htm> (accessed 19 March 2008).

[18] Including the two subcommittees of the Foreign Affairs Committee (Human Rights and Security and Defence).

deliberation seems to play an important role. These committees are characterized by informality and openness and the development of relations of trust transcending political divisions, 'with members from across the political divide getting to know and sometimes like each other and considering that their interests may be closer than those of colleagues in other committees with different priorities' (Corbett et al. 2007: 151). The absence of a government to which the majority of the Parliament should be loyal entails that the interplay between the positions of different political groups determines the outcome of committee debates, and not the executive (ibid.: 150). This thus facilitates 'real' policy-making, not just rubber-stamping, and allows the committee members a real opportunity to turn their common understandings into legislative acts.[19]

The EP has increased its powers and established itself at the polity centre of the Union. However, in order for the EP to materialize as *the sovereign* of the EU, there must be mechanisms in place that can link the MEPs and the EU citizens. In representative democracies, this linkage is secured through the institutionalization of political party systems. Political competition is structured around the political parties—in parliaments, where they act as more or less coherent units, as well as in the society at large, due to their participation in public debates and general elections. The parties thus act as a *link between strong publics and the general public sphere*. In the EU this link is rather weak. While, as we have seen, day-to-day politics in the EP is dominated by increasingly strong and coherent transnational political groups, the EP elections are contested by the same domestic parties that participate in the national parliamentary elections. The European dimensions of EP elections thus affect voting behaviour only marginally. The turnout at elections has also decreased consistently over time, and only 43.1 per cent of the voters participated in the 2009 EP elections.[20]

Multi-party parliamentary systems are generally consensus-oriented and prone to deliberation, but in the EU there is even more scope for open deliberation as there is no clear-cut division between government and opposition. Majorities can therefore more easily form around a number of dimensions, but in fact positions mainly follow party cleavages. The EP increasingly operates along an ideologically based left-right cleavage (Hix 2008; Noury 2002). Still, with few exceptions, the parties that make up the various transnational groups have failed to present common political programmes before the elections. Some thus argue that Euro-

[19] Furthermore, the committee meetings are characterized by a high degree of openness, both in terms of allowing the media and the public access to sessions and in making documents available to the public. This distinguishes the EP from most national parliaments as well as other EU institutions (Corbett et al. 2007: 151).

[20] At the first EP elections in 1979, 63 per cent of the voters in nine member states participated. The falling turnout, via 58.5 per cent in 1989 (twelve member states), 49.8 per cent in 1999 (fifteen member states) and 45.6 per cent in 2004 (twenty five member states), reached the lowest point thus far with the 2009 elections. It must be noted that the ten new Central and East European member states constitute an important factor in this development, with an unweighted average turnout of 32.2 per cent in the late elections.

pean elections are more accurately characterized as 'a set of different national elections than as coordinated Europe-wide campaigns', as the issues tend to be debated primarily within domestic frames (Corbett et al. 2007: 29). EP elections are held to be 'second-order national contests' (Reif and Schmitt 1980; Kohler-Koch and Rittberger 2006: 35). Hauke Brunkhorst (2008: 222) even claims that 'European parliamentarism is *strong parliamentarism without democracy*' (italics in original). However, I argue with Christopher Lord that the compound nature of representation through the EP does not in itself mean that the system is flawed. Such a conclusion would require further demonstration that 'national and EU issues are neatly separable and that choices made in relation to one cannot in some sense function as proxies for the other' (Lord 2004: 123–4). This is more in line with several MEPs, who characterize the content of EP elections as 'Union issues framed in domestic contexts' (ibid.). Nevertheless, the European-wide political debate, which could mirror the political space developing within the EP, is conspicuously absent. This is of course linked to the weakness of the European general public sphere as discussed above.

Due to these constraints, the EP, to conclude, is hampered as a democratic sovereign both because of deficient popular support, and because it lacks proper law-making power. Although co-decision is an important legislative power, it does not cover all EU legislation, or even all first-pillar legislation. Furthermore, even where there is co-decision, the specifics are often filled in by the Comitology committees, which are discussed below, rather than within the 'formal legislature' of the EP and the Council. Although it has become an important legislator, its role in shaping the constitutional and institutional development of the EU is still more that of an *auditor* than originator or constructor. The 'masters of the Treaties' are still in charge of Treaty amendments. Such changes pertain to the basic structure of the Union—its constitution—and are the ones most in need of popular input and democratic enactment, but are decided upon by intergovernmental IGCs. Can committee deliberation alleviate the democratic problem?

Comitology as a new political order

Literally hundreds of committees in the EU operate within the confines of the delegated authority of the Commission, as vested in it by Council Decision 87/373/EEC. They are vital in the process of shaping and adopting legislative acts.[21] These committees are made up of representatives of the member states and are chaired by Commission officials. This system of committees has strong intergovernmental features. For one, it was designated to constrain supranationalism, as it

[21] Strictly speaking, Comitology pertains to the procedures for the exercise of the implementing powers conferred on the Commission (Council Decision 1999/468/EC of 17 July 1999). However, on a broader reading Comitology 'covers the entire universe of Union Committees. Comitology is not a discreet phenomenon which occurs at the end of the decision making process' (Weiler 1999b: 340).

has been a vehicle for the member states to exercise control and oversight. Further, the committee members are experts, representatives from affected interest groups, and national civil servants (who are usually selected by their respective national governments).[22] Its field of remit has expanded. Comitology initially covered such areas as agriculture, trade, and customs policies, but now also comprises research and development, environmental affairs and telecommunications, to mention just a few.

Comitology is, according to many analysts, *network governance* rather than hierarchical government. But what is peculiar to Comitology—contrary to other international committees—is that these committees are involved in decision-making with regard to implementation, which is directly binding on domestic governments. This trait, combined with its deliberative style and the inclusion of many of the potentially affected parties, has prompted suggestions that Comitology may mark the inception of a new political order, akin to *deliberative supranationalism*, and which may also, potentially, 'repair' the democratic deficit.

> Committees do not just have the so called 'implementation' function of Com munity framework provisions to deal with ('comitology' proper), they also operate much more comprehensively as fora for political processes and as co ordinating bodies between supranational and national, and governmental and social actors. (Joerges 2002: 141)

Competing scientific schools of thought, risk management strategies, and public concerns raised by public bodies and societal actors need to be, and are in fact, addressed. The Commission, which equips the EU with a High Authority, and an administrative capacity not found in international organizations, and the Community method of legislation, which confers the exclusive right of initiative on the Commission, both give the system a strong *supranational* structure. The powers in the Union are not neatly divided, but the non-majoritarian features—the unusual number and range of decision-making procedures together with critical scrutiny and judicial review—contribute to institutional balance.

> The unusual nature of the EU's institutions and policy making process reflects the tradeoffs being made between the need for the representation of national power, the demand that electorates have a voice through the European Parlia ment, and the necessity of providing administrative capacity without a tradi tional executive. (Sbragia 2002: 396)

It may well be that Comitology, when viewed in isolation, comes down to *administration without government* (Wessels 1999) or *technocratic deliberation* (Schmalz-Bruns 1999). Open access and participation are limited, as is the scope for transparency and public accountability. However, in some respects Comitology can be

[22] The committees are of many kinds, but in functional terms there are scientific, interest, and policy making/implementing committees, which are composed of independent experts, and repre sentatives of interest groups and member states. 'These committees thus operate both in the prepara tory and in the implementing phase' (Vos 1999: 22).

seen to contribute to legitimate rule. Well-informed problem-solving and efficient decision-making are vital parts of modern government. Expert-based decision-making is not in itself illegitimate and a threat to democracy. The knowledge base of political decisions—their epistemic quality—is of utmost importance to legitimacy. If the decisions are not good or correct, it does not matter how democratic the process has been. This is also the reason why *delegation* and discretion-based decision-making in modern complex societies are integral parts of the law-making process. Not everybody can participate, not everybody has the knowledge required to handle intricate matters. Hence, experts are needed and the problem-solving capacity needs to be delegated and institutionalized. Experts are needed to handle complexity; technically and scientifically demanding issues on the public agenda.

Committees may be seen as a solution to the problem of overloaded political decision-making agencies, and as a solution to the problem of finding *correct answers* to risk decisions. Expert discourses increase the epistemic quality of decision-making. Answers to complex cognitive and normative questions cannot be found by mere voting or by bargaining over contested issues. Nor can such questions be solved in a valid manner by subsuming them under legal statutes. Neither extended participation, nor increased publicity, provides much help in reaching correct decisions in cognitively demanding cases. It is as nonsensical to hold a vote on the existence of mad cow disease as it is to bargain over the levels of dioxin in foodstuffs. This may actually happen, but bargaining is not the proper procedure for reaching decisions in these matters, because we cannot know whether the bargains struck are right, as they depend upon the resources of the decision-makers and not on arguments. Only truth-seeking and scientific inquiry can ensure correct decisions in such cases.

The problem with regard to the EU is that the agenda of Comitology (and of bureaucracies in general) consists of morally and ethically salient issues as well. This has to do with the increasing degree of *risk regulation*. Comitology does not merely represent apolitical, functional administration dealing with pragmatic questions. It also has to find viable answers to politically sensitive and normatively salient questions. Hence, the allegation of technocracy, which I will address in Chapter 8, prevails.

In the shadow of the law

Comitology establishes a framework for cooperative problem-solving by granting relative *decisional autonomy*, and by enabling thorough discussion on different aspects of the cases at hand (Gehring 1999). Within this institutional architecture, innovation, rational problem-solving, and ability to form agreements become the indicators of success. Analysts have revealed that participants undergo learning, explore rather than merely assert preferences, and complement their loyalties—all of which are conducive to the formation of supranational identities and joint problem-solving (Neyer 1999; Joerges and Vos 1999; Egeberg 1999). Hence, committees are epistemic communities, but are they also conducive to democracy?

The committees are subject to vociferous criticisms, due to the fact that they are not properly authorized and/or subject to public control. The EP has been opposed to the Council decision introducing Comitology,[23] due to the lack of transparency and procedures for recalling Comitology decisions. When assessed by means of a simple majoritarian model of democracy, Comitology is undemocratic, as it is neither subjected to strict national control nor to the control of the proper EU authorities. The problem is more complex when assessed by means of the deliberative model of democracy. This model considers equal access and public debate—or autonomy and accountability—as the basic principles of popular sovereignty. The requirement is that, in a public debate, all political actions should be seen as emanating from the laws, which for their part must be consented to in a free debate in order to be legitimate.

The committees are legal subjects and are constitutionally significant, and their legal competence is not to be understood in terms of a *delegation model* in which the actors merely act as agents of their constituencies. Authority is often not conferred upon decision-makers according to any strict mandate. They must be seen as *trustees* with decisional autonomy and deliberative competence. However, it is not only the structure and composition of the committees—the members and their competences, the level of discretion, the role of scientific reasons—that contradict the delegation model. As is manifested in the treaties, 'The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties [. . .] They shall neither seek nor take instructions from any government or from any other body' (Art. 213 TEC). Comitology echoes this as the members in the Committees deliberate in the shadow of the law as 'any criticism of divergent views must use arguments which are compatible with European law' (Joerges 1999: 317).

To some extent this system does comply with the criteria of democratic rule, as it decides on the basis of a legal order, and there is the participation of the representatives of affected parties, although the pattern of participation is weakly developed in terms of accountability. Since 1985, however, all the major interest groups are present in Brussels, and the context of negotiations in the Comitology nexus has become quite pluralistic, with many 'legitimate' participants. The Commission has also adopted a 'Code of Good Administrative Behaviour',[24] which is intended to secure equal treatment, objectivity, transparency, and the duty to justify decisions. A similar commitment, framed as 'the right to good administration' is included in the Charter of Fundamental Rights (Art. 41)—as 'the obligation of the Administration to give reasons for its decisions', and is also

[23] It was introduced by Council Decision 87/373/EEC, which was later repealed by the 'Comitology Decision' 1999/468/EC of 17 July 1999. On the two decisions, see Annex 1 and 3 in Joerges and Vos 1999. The latter 'expressly mentions the European Parliament without defining its institutional role' (Joerges and Vos 1999: 386).

[24] See <http://ec.europa.eu/civil society/code/index en.htm> (accessed 23 March 2009).

asserted in the White Paper on European Governance (European Commission 2001), which underscores the need for close contact with civil society and for accountability.

According to *fusion thesis I*, Comitology is a system in which 'national and Community actors pool their respective sources of legitimacy—including their functional and technocratic reputation—to make the system acceptable to both the involved and concerned groups and to the population at large' (Wessels 1999: 267). Comitology is conducive to parties acting according to guidelines (and open mandates) rather than according to delegation and bound mandates—informed by opinions and expertise rather than fixed interests and preferences. The dialogical structure of communication and the forging of solidarity between diverse actors point towards transnational, deliberative proceedings in which the cooperative process and the manner in which it is conducted bear the burden of legitimation. On the one hand, Comitology, then, is an intrinsic part of a modern system of governance and one equipped to handle complex issues in a rational manner. It is efficient in its ability to adapt to new problems and exigencies in pluralist settings where clear-cut control and sanctioning mechanisms are lacking, as are pre-established solutions and self-evident rational answers. In such complex settings, preferences cannot only be stated but must also be justified by arguments—and arguments that can be supported by scientific evidence have the best chance of convincing the parties. On the other hand, the legal basis of the committee system speaks to the government model of democracy. Comitology is constitutional in so far as one can speak of a constitution in the EU. But it is unconstitutional in the sense that it does not respect the division of competences as it is entrenched in the nation-state. Comitology is not subjected to properly authorized, external control. It is weak in terms of accountability and representativeness. However, the latter is also due to the inadequate entrenchment of an authoritative democratic system of rule in the EU in general, an important part of which is courts.

The ECJ—constitutional court or transnational regulator?

Courts are quintessential ingredients of every system of democratic rule. They institutionalize will formation through interpretation, rule application, rule adoption and sanction. Thus, they uphold rule and control. It is widely held that much of the impetus for the European integration process is provided by the Courts and the legal system (Weiler 1999a; Stein 1981; Stone Sweet 2004). The initial legal system was derived from Treaty-based law. With time, this has emerged into a quasi-constitutional legal system based on a set of fundamental principles.

Not only is the Community a creature of the law, it also pursues its aims exclusively through a new body of law—Community law. This law is uniform in all the member states of the Community, separate from, yet superior to, national law, and many of the provisions are directly applicable in all the member states.

Like any true legal system, the Community legal system needs an effective system of *judicial safeguards* when Community law is challenged or must be applied. The Court of Justice, as the judicial institution of the Community, is the backbone of this system of safeguards. Its judges must ensure that Community law is not interpreted and applied differently in each member state, that, as a shared legal system, it remains a Community system, and that it is always identical for everyone in all circumstances. In order to fulfil this role, the Court of Justice has jurisdiction to hear disputes to which the member states, the Community institutions, undertakings, and individuals may be parties.[25]

The Court of Justice is made up of twenty-seven judges, assisted by eight Advocates General. They are appointed 'by common accord of the governments of the Member States'. Their tenure in office is six years and is renewable. Their independence is to be beyond doubt and they must be of recognized competence. The President of the Court is selected by the jurors for a renewable term of three years. The President directs the Court's work and presides over the hearings and deliberations. Their task is to deliver, in open court and with complete impartiality and independence, opinions on the cases brought before the Court. They are not prosecutors or similar types of officials.

The ECJ is a recognized adjudicator of legal disputes. This is due to the mentioned *doctrine of direct effect*, which positions laws made in Brussels on a par with those enacted by national parliaments, and to the *doctrine of supremacy*. The former means that European law is binding on every citizen regardless of national citizenship, while the latter still remains a contentious issue.

However, the legal system of the EU is far less hierarchical than is generally the case with nationally based orders. In institutional terms, one of the peculiar features of the EU is that the 'national courts and the European Court are integrated [. . .] into a unitary system of judicial review' (Weiler 1994: 515). The system that has emerged is one in which courts at national level—in particular those at lower levels—have become parts of the sources of law that European judges draw on. The constitutionalization of the Union has come about as a 'fusion' of established constitutional traditions, an ongoing process of constitution-making that continues over generations, hence *fusion thesis II* (Menéndez 2004: 121; Habermas 2001b: 768). One source of this convergence has been the role of the legal language itself; 'the language of reasoned interpretation, logical deduction, systemic and temporal coherence—the artefacts that national courts would partly rely on to enlist obedience within their own national orders' (Weiler 1994: 521). Albeit less hierarchical, there is nothing in the logic of legal reasoning or in the application and adoption of rules that sets this system apart from what we associate with democratic government based on the separation of powers. But what does this relation of legal reasoning and government consist of, in more specific terms?

[25] See the ECJ website at <http://www.curia.europa.eu/en/instit/presentationfr/index cje.htm> (accessed 30 March 2009).

Courts are vital embodiments of procedurally regulated deliberation, in the sense of giving reasons and justifications. In institutional terms, the judicial procedures regulate the topics and the questions that may be brought up, the use of time, who the participants are, the distribution of roles, etc., and the judge—as a presumed neutral third party . . . makes sure that the norms are interpreted correctly and complied with (cf. Dworkin 1986). These procedures delimit the access of premises, they ensure unambiguous and binding results, and connect argumentation to decision-making and adjudication. Thus, the judicial procedures compensate for the fallibility of communicative processes, and improve their incomplete or quasi-pure fairness of procedure (Alexy 1978: 179).

Courts establish rationales, as well as assess norms and rules, in terms of their legal and normative validity. There is a tension here between legality and legitimacy, as judges decide according to the code of legal/illegal, but cannot set the criteria for the code themselves. The structure of legal reasoning relieves the judges of certain concerns and opens the way for inputs from other spheres of action (Luhmann 1995: 338). Whilst the public reason-giving provided by Courts does provide those affected with a feedback mechanism and an intake through which to challenge the Court's rulings as well as the norms and justifications involved, the terms may be largely self-referential. The reasons provided by Courts in their rulings alert the public to what the Courts consider to be operative legal standards, but the structure of the legal system confines discourses to a rather limited constituency.

The problem of the ECJ is that many of the laws upon which it rules are not made by democratically authorized bodies. It is structurally limited in the sense that the norms that the judges are to act upon are not made by proper legislative authorities: 'Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers and the mass media, the Court of Justice of the European communities has fashioned a constitutional framework for a federal-type Europe' (Stein 1981: 1). The power of the ECJ is imposing, and together with the Commission and the European Central Bank, it constitutes a supranational-hierarchical mode of decision-making; but it can exercise power only in cases that come before it. The ECJ has played a central role in fostering rights in the EU.

> In the seminal case of 1969 Stauder, the Court hinted at the unwritten general principle of fundamental rights protection as a basic foundation of Community law. [Over time] the Court has developed an incomplete but substantial bill of rights, although most of the time limited in its scope to economic actors. Its jurisprudence is clearly and openly founded on the European Convention of Human Rights, further refined and adapted by reference to the comparative analysis of national constitutional traditions. (Menéndez 2001: 7, 10)

Through the increased emphasis on the promotion and entrenchment of *human rights*, the ECJ has fostered democratization in the sense that the interests of the individual have been promoted both with regard to their private and public autonomies (although the rights offered to EU citizens do not ensure their formal status as the authors of the laws by which they are bound). This is consistent with

the general orientation of the EU. Alston and Weiler (1999: 6) note that 'a strong commitment to human rights is one of the principal characteristics of the European Union [. . .] The European Court of Justice has long required the Community to respect fundamental rights.'

Article 7.2 of the TEU stipulates that a member state that violates human rights in a 'serious and persistent' way can have certain of its rights suspended. This thrust is driven partly by the convergence of legal systems at different levels of governance. The Charter of Fundamental Rights—if it becomes binding—would be an example of such convergence of national constitutional traditions, ECJ law and ECHR law.[26] But much of the law is made by the contracting partners, not by the people. The people do have rights but they have not decided upon them themselves.

Finally, the ECJ has contributed to strengthen the role of the EP within the institutional system of the EU. Its contribution to the strengthening of the supranational bodies of the EU is part of its larger role in constitutionalizing the EU through securing political agreements, entrenching both procedural norms and citizens' rights, and strengthening the supranational dimension of the EU. It allegedly also has legislative power or *Kompetenz-Kompetenz*: it has established the dual character of the supremacy and the direct effect of EC law, which implies that not only the 'primary law' of the Treaties but also the 'secondary law' of European regulations and directives are posited over all national law. As Fritz W. Scharpf argues:

> To become effective, these doctrines depended on the willingness of national courts to accept the decisions and preliminary rulings of the European Court as the authoritative interpretation of European Law. Once this condition was secured, the power to interpret became a power to legislate that was sanctioned by the respect for the rule of law engrained in the political cultures of member states. (Scharpf 2006: 852)

Judicial activism and Court-made law on the basis of rule of law are conspicuous features of the EU. The rule of law principle evoking the image of impartiality, stability, and lack of arbitrariness, has been 'Europeanized'. This principle is often seen as 'a bulwark for the market as well as a control of the excesses of government' (Komesar 2001:156). The Court has both been seen as a heroic architect of the European *Rechtgemeinschaft* and as usurping the powers allocated to the political branches of the Union or to the member states. It has repeatedly transgressed the bounds of legal interpretation (Somek 2008). Further, many scholars and observers see the EU as constitutionalizing economic rights and that the Court in many rulings has assigned supremacy to the economic laws of the market and has given a neoliberal interpretation of the treaties. Juridification, negative integration, and unfettered marketization

[26] The ECJ and national courts have contributed to spur a more fundamental academic and politico legal debate on the role of the EU. One of the most prominent examples is the German Constitutional Court's Maastricht Treaty ruling. The principles of polity formation that this ruling presented have been widely debated and the ruling has been important in spurring debate on the democratic deficit and legitimacy of the EU. This is addressed in Chapter 10.

are well known characterizations of the system. However, like the EP, the ECJ is presently less directly included in Pillars II and III, something that weakens their individual and joint role as governmental bodies. Two recent inventions have sought to change this. The first such development was the Charter of Fundamental Rights of the European Union (2000) and the second was the Convention on the Future of Europe (2002–03). Since the substantial inventions in these two developments have already been addressed in Chapters 4 and 5, the succeeding analysis is confined to their democratic-deliberative character.

Conventions as strong publics

The Cologne European Council (1999) decided that a Charter of Fundamental Rights of the European Union should be drafted by a 'body' composed of representatives from national governments, national parliaments, the European Parliament, and the Commission. The body, which renamed itself 'Convention'—a name with constitutional overtones—is a progressive innovation. A convention opens for communicative interaction beyond the simple aggregation of preferences (Elster 1998: 105). Conventions are communicative sites where citizens' representatives assemble to propose the basic principles of a legal community and they conduct their affairs through an open deliberative process. They are strong publics that due to conversational constraints may reach cogent outcomes. However, the legitimacy of the ensuing proposal depends on whether it endures scrutiny in the general public sphere where every citizen has access. The Charter Convention was set up as a deliberative body with a number of meetings. Participants' accounts and analyses testify to open debate, especially in the beginning of the process (Schönlau 2003). As the process went on, the need to strike deals to ensure agreement became more imminent, as the Charter had to be pronounced at the Nice Summit in December 2000. The Convention held open hearings and received written submissions from NGOs. It tried much harder to foster public debate than have IGCs. This process contributed to the sparking of a European-wide debate among the institutions of civil society (De Schutter 2003; Kværk 2007).[27] The Convention, that was intended to produce a draft Charter which could be accepted by all states and citizens of Europe, concluded its work in less than one year, and adopted the Charter almost unanimously.[28] The resulting text is composed of fifty-four articles that spell out the civic, political, and social rights of European citizens under Union law. Before the Nice Summit of December 2000, the 'masters of the Treaties' agreed that the final status of the Charter would not be clarified until the next IGC, scheduled for 2004 (European Council 2001a: 85ff). The three main European

[27] See also the analysis in Chapter 5 on this.

[28] No final vote was held, but participants' accounts reveal that only two members of the Convention were against its adoption.

institutions (the EP, the Commission, and the Council) confined themselves to the solemn proclamation of the Charter on 7 December 2000.

The Charter Convention, which was deemed a success, established a procedural precedent for constitution-making. As mentioned, it became a model for the Convention on the Future of Europe that managed to agree upon a Draft Treaty establishing a Constitution for Europe in June 2003. This Convention's composition largely duplicated that of the Charter Convention. It was made up of a majority of parliamentarians and its deliberations, which were conducted in an open and transparent manner, ran over seventeen months. Participants portrayed the draft as the best that could be achieved under the given circumstances, and analysts underline that this was a result that had been forged through a lengthy argumentative process. The Draft Constitutional Treaty, which included the Charter of Fundamental Rights as Part II was used as the starting point of, and accepted with minor amendments by IGC 2004. Its substance was also kept in the Lisbon Treaty, although a number of controversial references to symbols of statehood were taken out.

The results are however rather mixed with regard to the Constitutional Convention. On the one hand, as we have seen in Chapter 4 actors learned and preferences changed; there was an open questioning of standpoints and justifications, and one managed to remove deadlocks in many areas. This took place mainly in the working groups, while there was less deliberation in the plenary sessions, which consisted of up to 220 participants[29] and were too large and heterogeneous, and also did not last long enough to establish the requisite conditions for rational argumentation (Göler 2006: 112). On the other hand, the success of the Convention has been attributed to the control exercised by the Praesidium and in particular its president. In limiting amendments, in rejecting voting as a general decision-making procedure, in creating an 'iterated agenda-setting process in order to modify amendments' and through concluding sessions by summarizing points, that according to his view were consensual, the president acted as an *agenda-setter* (Tsebelis and Proksch 2007: 157, 177).

On balance, it may be hard to decide the deliberative quality of the Constitutional Convention, and I have, in Chapter 4, characterized the Constitutional Treaty as a working agreement. The Convention may not have caused basic changes in popular attitudes or contributed much to a European public sphere, but it has changed the mode of making treaty changes (Göler 2006: 316). The chosen procedure in itself has, moreover, normative force, as the process can no longer be accused of being executive-driven and technocratic. The outcome cannot merely be seen as a bargain struck in closed-door IGC meetings. It was the result of an open process between representatives of the people. By this move, the EU has definitely entered the constitutional terrain. It has assigned rights to

[29] Including substitute members, the Praesidium and thirteen observers.

the citizens and has established an authority structure singling out accountability lines and areas of competence. It has established a binding legal procedure for how to resolve conflicts—even the clause on voluntary withdrawal from the Union is procedurally circumscribed.[30] This means that there now is a legal structure in place that structures all communication and which establishes the code for all positions, and one which corroborates itself by every new round of basic change. While the IGCs will continue to have the final word on Treaty amendments, the Lisbon Treaty introduces the provision (Article 48.3 TEU) that 'the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission . . . [which] . . . shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the member states . . . '

However, the conventions have hitherto not triggered a pan-European political debate on the constitutional essentials, even though the debates in many member states were rather intense. They did not spur *a constitutional moment* in the sense that a broad spectrum of the population 'took to the streets', but they contributed to more reflexivity in the European integration process (cf. Curtin et al. 2006; Eldholm 2007). The process taken as a whole fell well short of meeting the ideal standards for democratic constitution-making (Fossum and Menéndez 2005; Menéndez 2009). The manner in which the Lisbon Treaty—a text that patched together bits of the defunct EU constitution in a very intricate manner—was forged is even more in breach with constitution-making standards. It was designed to omit new rounds of referenda after the lost ones in France and the Netherlands (2005), and reverted back to Treaty-making through ordinary IGC closed-door negotiations.

THE MISSING LINK

For the EU to have a fully developed public sphere, what is missing in institutional terms is the link between institutionalized debates and the general public debate. It requires that the NGOs and social movements rooted in civil society, link in with issue communities and strong publics through common communicative spaces and mass media. In fact, the problem is not the lack of European public spaces that are in principle capable of putting decision-makers to account. What is lacking is the ability to link, filter, and synthesize themes and topics in a general European public sphere, so that the citizens can form positions and express opinions about problems and solutions aired in the civil society. A single

[30] The Lisbon Treaty states that '*the Union* shall negotiate and conclude an agreement with that State' (Art. 50 TEU, italics added).

overarching communicative space accessible to all, in which proponents and opponents can verbalize and justify opinions and claims, and mobilize support in order to sluice them into the decision-making units via social movements and political parties, is lacking. We find transnational public spaces made up by networks from the politico-administrative complex, from media and research, from civil society and corporate business. These segmented publics, which are multilingual, composite, and highly differentiated, are organized around functional problem-solving. The public discourse is issue-oriented and dominated by the elites, rendering its putative democratic merit an unintended by-product.

There is, however, a Europeanization of public debate nationally (Sifft et al. 2007) as well as a transnational communicative structure with identity-forming consequences that we did not see, say thirty years ago. Habermas (1998a) speaks of reconciliation of disparate identities and the healing of wounds through the public use of reasons. Publics are the vehicles of democratization, also in the sense of making cognizant earlier wrongdoings and coming to grips with the past through '*Bewusstmachung*' and '*Vergangenheitsbewältigung*' as it is termed in the German debate. Such a debate may be fostering a general public sphere based on a collective self-understanding of Europeans. In opposition to the heroic revolutionary tradition of modernity, there is a new European culture of apologies, mourning and collective guilt for national crimes (even though it is unevenly rooted in the member states). Such an identity, which is formed through the distancing of oneself from the past, is however thin and 'negative', and cannot form the basis for collective action. The requisite common self-understanding could emerge from a European-wide debate on the European Constitutional Treaty, but this was a much-misspent opportunity. Some have hinted to the war/peace debate as conducive to the identification of *significant others*, such as Islam or the Bush regime in the United States, which could have identity-forming effects of the sort needed for a general public sphere (Habermas and Derrida 2003).

Access to *one* common public—one single European public space—is necessary to enable citizens to address the same political issues and be exposed to the same information, arguments, and counter-arguments. To develop common opinions and wills requires common themes, shared interpretative frames, and inclusive fora, which symbolize equal citizenship and a well-developed civic infrastructure. Only such can establish the preconditions necessary for legitimate and effective opinion—and will formation process—in the sense that all affected are included. In particular, this is required for the proper justification of the basic ruling principles of society. However, the plethora of transnational deliberative publics that mutually observe each other have normative value in themselves. They do not suffice to constitute a democratic sovereign, but public deliberation generally increases the information level, reduces the problem of bounded rationality, and forces the participants to justify their claims. The open contestation of different viewpoints legitimizes and delegitimizes political orders and enhances the possibilities for qualitatively better choices.

That the public debate takes the shape of a democratic sovereign is, however, an unavoidable standard in constitutional politics. It is through such a standard that the basic structure of society and the higher principles, such as equality, freedom, democracy, and solidarity, to which the constitutional essentials subscribe, can be rationally approved. To be a recognized member of a communicative community requires the notion of a law-based society, that is, the symbolic notion of an order based on equal rights.

CONCLUSION

The public sphere is the place where civil society is linked to the power structure of the state. Analysing the democratic potentials of the post-national configuration in Europe requires a differentiated theoretical scheme. Drawing on a threefold conceptualization of publics, I found that even though there are few traits of a *general public sphere* in which all the citizens of the EU can take part, more salient are *segmented publics* evolving around policy networks as well as legally institutionalized discourses—*strong publics*—specialized in collective will formation. The assessment of the EU in a democratic perspective should take heed of different kinds of publics and be aware of their different functions and spheres of justification. Generally, many publics have democratic merits as they enhance the possibilities for popular participation in opinion formation and for the public scrutiny of decisions. Even though the problem of fragmentation and communication distortions prevails, which makes democratic opinion and collective will formation difficult, it is fair to say that the more publics, the more debate and critique. Fewer voices are excluded and more questions are asked. More publics provide more possibilities for testing the legitimacy of power. They contribute to criticize and deconstruct hegemonic 'truths' and prevailing consensuses, and force the decision-makers to provide more general justifications. Hence, they *reduce domination* and increase the possibilities of the citizens to be offered justifications for the laws they are to live by.

When deliberative governance in communicative networks is seen as exhaustive of the democratic tenet, there is a renouncing of the principle of popular sovereignty. In modern states, it is the law that establishes democratic possibilities and unity. Participation in law-making constitutes the collective identity. What hampers democracy at the European level today is the lack of a common, law-based identification and the possibility for a pan-European discourse—*a single European space*—in which Antonio in Sicily, Judith in Germany and Bosse in Sweden can take part in a discussion with Jaime in Spain and Triin in Estonia on the same topics at the same time.

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Part III

What Kind of Legitimate Order?

The EU is now often described as a system of transnational governance, beyond intergovernmentalism and more complex than the somewhat simplistic version of supranationalism espoused by neo-functionalism. Recent scholarship conceives of the EU as a *system of multi-level governance*, which consists of multi-tiered, geographically overlapping structures of governmental and non-governmental elites. To depict the EU as a system of multi-level governance does not amount to advocating a coherent and uniform alternative theoretical position on the EU and the integration process. What has come to be known as the 'new governance agenda' is unified only in its rejection of the nation-state bias, and in its conception of the EU as a polity *sui generis*.

The EU constitutes a new type of political order which does not fit into the traditional dichotomy of intergovernmental organization versus nation-state. It is a polity without a nation and a state. Its supranationality is non-hierarchical and is a consequence of its peculiar separation of powers, due to the role of the Commission and the European Council, which combine representative and executive functions. This structure ensures the member states a strong and consistent say in collective decision-making processes. In Chapter 8, I address the suggestion of the EU as a transnational system of governance, which I find indefensible, and in Chapter 9, I conceive of the EU as an emerging rights-based state-less government. A rights-based order founded on universal principles, which are not confined to Europe and whose meaning, in practice, will be disputed, may at the outset look pretty thin and impotent. But there is no reason why the universality of an ideal cannot also be rooted in a life-world and be the ideal for a specific community; and disagreement over the meaning of principles does not mean that they cannot constitute the principal focus of a common identity (Kumm 2005b: 11–14). And such an identity—although it is focused on thin, abstract principles—is not necessarily feeble when contextualized and infused with values.

The defining characteristic of the EU is not the impotence of a universalistic rights-based order but that of an embedded state-less polity able to undertake certain governmental functions. In the political theory of the multi-level constellation presented here, the EU amounts to more than a system of transnational governance. It posits that it is a post-national entity that mirrors the core normative and institutional configuration of the democratic constitutional state and is thus not an entity *sui generis*. In the concluding Chapter 10, I address why democratization could take the form of support for the parliamentarian model of representative democracy when a demos presumably is lacking.

8

Government or Transnational Governance?

INTRODUCTION

In the *White Paper on European Governance* issued by the European Commission in 2001, there was awareness of the challenges posed by citizens' increasing mistrust of, and dissatisfaction with, the EU. Different proposals for improving the functioning of the EU's systems of decision-making and implementation were outlined. By better involvement of the citizens and through more efficient decision-making and enforcement policies, the authors hoped to increase the information and knowledge of the system and the loyalty and responsibility of the actors. The White Paper (WP) aimed at more relevant and effective policies and introduced the term *good governance*, by which is meant the structure of rules and processes that affect the exercise of power with regard to openness, participation, accountability, effectiveness, and coherence. The proposals outlined in the WP for change in the EU are an example of what, in theoretical terms, is named *transnational governance* (European Commission 2001).

It is widely held that states are no longer the sole preserve for conflict resolution and problem-solving. Many claim that states are increasingly supplanted, by networks, epistemic communities, and other arrangements, to a degree that transnational governance complements and competes in importance with the international system of states. The relationship between state and non-state actors in such networks is non-hierarchical, and decisions are reached through the participation of experts and affected parties—through *deliberation* rather than through intergovernmental haggling. *Governance* is not political rule through responsible institutions such as parliament and bureaucracy—which amounts to *government*—but innovative practices of networks horizontally dealing with common affairs. Governance denotes a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by way of deliberating and negotiating with each other. It is based on a variety of different processes with different authority bases, and highlights the role of voluntary and non-profit organizations—of social partners, civil society organizations and citizens' movements—in joint decision-making and implementation, and thus the semi-public character of the modern political enterprise.

There are competing modes of governance in the European reform process. Some processes indicate that the EU is more or less an intergovernmental, *problem-solving organization* in the hands of the member states. Here, the onus is on *efficiency and pragmatic concerns*: common affairs are conducted by the experts and executives of national governments, as we saw in Chapter 4. Other processes, of which the WP is one, speak to the EU as a regulatory entity that can be seen *as a multi-level system of governance* with no real political authority and little, if any, scope for macroeconomic stabilization and redistribution.[1] Do such cooperative patterns represent an alternative to collective decision-making through representative government? Can governance based on soft law and voluntary cooperation alleviate the legitimacy problems of the Union; what may its putative merit be? Many proponents of deliberative theory see this as a new and inventive mode of problem-solving that is more effective, less hierarchical, and more democratic compared to the one associated with government and bureaucracy. However, deliberation is no substitute for democracy!

In the EU, the Convention method, the Open Method of Coordination (OMC) as well as the system of Comitology are held to have made positive sum decisions possible. The question is whether transnational governance as theorized by proponents of 'direct-deliberative polyarchy' (DiDeP) can bear the burden of democratic legitimation or whether it is the political process based on government structures (of representative democracy) that is the main container of democratic legitimacy. The purpose of this chapter is twofold: on the one hand, to assess the putative democratic value of transnational governance in a deliberative perspective; and on the other hand, to contribute to the discussion of the nature of the multi-level constellation that makes up the EU. I claim that the democratic requirements of equal access, transparency, and openness can hardly be met in transnational structures of governance. Deliberation has both epistemic and transformative value at the European level, but it falls short of testifying to the moral value, that is, *democracy*, as justification only takes place within a confined setting and with regard to a segment of all affected.

In the second section of the chapter, I assess the White Paper's remedies. Are they the right kind of medicine to enhance legitimacy and reduce distrust and opposition? Then, in the third section, I examine the strengths and weaknesses of transnational governance in a deliberative and democratic perspective. It cannot rule out *epistocracy* as it is based on expert reasoning, and there is no chance for the affected citizens to say yes or no to the terms under which decisions are made. In the fourth section, I analyse and reconceptualize government as opposed to both governance and state-based perspectives on post-national democracy. I find that the EU is more than a system of transnational governance, as it undertakes

[1] A 'system of continuous negotiation among nested governments at several tiers' (Marks 1993: 392). See further Jachtenfuchs 2003; Marks et al. 1996; Schmitter 2001; for an overview, see Benz 2004; Kohler Koch and Rittberger 2007.

governmental functions, but less than a state. This analysis continues in the next chapter. But first of all we should know what is meant by transnational governance.

GOVERNANCE BEYOND THE STATE

Governance 'signifies a change in the meaning of government, referring to a *new* process of governing; or a *changed* condition of ordered rule; or the *new* method by which society is governed' (Rhodes 2003: 65).

Globalization and transnational governance

Globalization depicts the growing interconnectedness of states and of societies. The concept of globalization denotes a spatial phenomenon on a continuum between the local and the global, involving the widening and deepening of social relations across space and time and the interdependence and vulnerabilities of day-to-day activities. In short, the compression of time and space (Giddens 1991).

> [Globalization is] a process (or set of processes) which embodies a transforma tion in the spatial organisation of social relations and transactions assessed in terms of their extensity, intensity, velocity and impact generating transconti nental or interregional flows and networks of activity, interaction and the exercise of power. (Held et al. 1999: 16)

The global structures of finance, production, trade, and communication threaten to undermine the boundaries of the nation-state and the conditions for democratic self-rule. Citizens' interests are affected in ways and by bodies that are difficult to hold responsible through the ballot box. In democratic terms, globalization implies that those who can be kept accountable have little control over the factors affecting people's lives, and those who have the decisive decision-making power are beyond democratic reach. Nation-states lose some of their sovereignty due to globalization and this is wearing away the capacity for citizenship at the domestic level. Increasingly, the nation-states have become 'decision takers' and not 'decision-makers'. Their *sovereignty* is eroded to the degree that the common action norms are decided by other forms of authority; their *autonomy* is reduced when their capability 'to articulate and achieve policy goals independently' is abridged (Held et al. 1999: 52).

Executive power—both private and public—has increased, at the same time that the role of the state as a hierarchical and democratic collective decision-making body, imbued with territorial and social control, has weakened. Hence, liberal democracy is facing problems:

> For if state sovereignty is no longer conceived as indivisible but shared with international agencies; if states no longer have control over their own territories;

> and if territorial and political boundaries are increasingly permeable, the core principles of liberal democracy that is self governance, the demos, consent, representation, and popular sovereignty are made distinctively problematic. (McGrew 1997: 12)

These changes have systemic implications, as they not only signify the spread of the market economy worldwide, but also spur the development of a new international political order. At the international level the establishment of the UN, the Organization for Security and Cooperation in Europe (OSCE), the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), the World Bank, the G8, and the International Monetary Fund (IMF) is important. These bodies indicate that it is in the economic realm and in the area of human rights, that the pattern of institutionalization of international law has proceeded the furthest. In addition to this, to which I return in the next chapter, new governance structures made up of private and public actors, (I)NGOs and social movements, contribute to the establishment of a *transnational civil society* that provides new channels of influence and control. New governing regimes based on various decentralized and cooperative patterns emerge beyond the anarchic international system, which are tailored to efficient problem-solving (Rosenau and Czempiel 1992). Hence, the concept of *governance* (without government), which is used to depict new forms of *transnational* decision-making based on a variety of regulatory and representative processes. Governance entails the formulation and/or implementation of policies by networks involving public and non-public actors.[2]

Today, governance structures span boundaries; the borders are far more porous; the actors are less tied to, as well as less dependent on, territory. Transnational governance is marked by a proliferation of organizations in which no single organizing principle dominates. 'If the absence of an ultimate authority signified the presence of anarchy during the era of hegemonic leadership and superpower competition, such a characterisation of global affairs is all the more pertinent today' (Rosenau 1997: 151). One of the hallmarks of transnational governance is the shifting loci of authority, which may converge, overlap, or diverge. It also entails shifts in the relative salience of political, legal, economic and social factors.

The term governance is used to depict multiple and rapidly growing networks of international communication and transgovernmental regimes, new forms of diplomacy and transnational civil society. These may be regarded as a series of experiments in democracy, as they constitute control mechanisms beyond government. Today, there is a remarkable expansion of collective power to handle new forms of risks and vulnerabilities. Numerous channels of influence help produce a wide range of steering mechanisms. These exist on different levels—some are sponsored by states, and others are not. Such mechanisms range from

[2] 'Networks engage mainstream state, federal, regional, and local governments in interactions with arm's length public bodies including quasi governmental agencies, single purpose boards, public private partnerships and multi organizational collaborations' (Skelcher 2005: 90). See also Slaughter 2004 and the debate on *Lex Mercatoria* (Fischer Lescano and Teubner 2006).

NGOs and social movements, to the Internet, cities, and micro regions (Rosenau 1998). No one possesses absolute power within these structures, and thus, Rosenau maintains, they may be *functional equivalents to democracy* due to the logic of checks and balances. Pluralism and disaggregation are in his perspective seen as conducive to democracy in a multi-centred world of diverse non-governmental actors. They monitor the effectiveness and fairness of agreements: 'These regimes cannot directly control the effects of globalization: they attempt to enable the normative constraints consistent with equality of effective freedom rather than with equal access to agency freedom over the levers of economic processes' (Bohman 1999: 509).

The term *transnational governance* thus describes the emergence of new forms of legal and political collaboration of public and private actors at international and regional levels. Here, the terms governance and transnational are conjoined to create a conceptual apparatus to caption the far more fluid post-Westphalian world, a world where territoriality and functionality do not cohere. However, in addition to the problem of the limited capacity to influence and change actual policies by the citizenry, there is the added problem of biased representation and inequality.

Multi-level governance

Even though integration started with the institutionalization of a 'High Authority' with some regulatory competence outside of member-state control, the legitimacy of the EU was initially derived from the member states; in democratic terms the legitimacy of the EU was indirect, depending on its ability to produce outcomes. Intrinsic to this mode of legitimation have been dense transnational networks and administrative systems of coordination—amounting to transnational constitutionalism based on the private law framework of legal institutions. In line with this, the EU has more recently come to be seen as a *system of multi-level and multi-centric governance*: European decision-making and implementation are diffused to networks, partnerships, and private actors in transnational structures. In this perspective the multi-level constellation that makes up the EU is characterized by plurality, no hierarchy, elite negotiation, decline in national statehood, and in the role of political parties and parliamentary rule, and the weakening of the executive power at the national level. Common problems that require common solutions are coordinated by joint problem-solving in networks, agencies, and committees.[3] The exercise of political authority is no longer exclusively statal—the relationship between state and non-state actors is non-

[3] There is a large body of literature on this; see e.g. Bohman 2005; Eriksen et al. 2003; Egeberg 2006; Jachtenfuchs 2003; Jachtenfuchs and Kohler Koch 2003; Joerges and Vos 1999; Jordan 2001; Kohler Koch and Eising 1999; Ladeur 1999; Majone 1996; Marks 1993; Marks et al. 1996; Neyer 2003, 2004; J. P. Olsen 2004.

hierarchical with no sole apex of authority. With regard to state sovereignty, multi-level governance asserts that:

1. Decision-making competences are shared by actors at different levels rather than monopolized by state executives.
2. Collective decision-making among states involves a significant loss of control for individual state executives (notably, through qualified majority voting in the Council).
3. Political arenas are interconnected rather than nested. Sub-national actors operate in both national and supranational arenas, creating transnational associations in the process. (Hooghe and Marks 2001: 3–4)

In Europe, this debate took off with the Single European Act, as it was seen as the erosion of state sovereignty and the dispersing of authority in a new institutional architecture (Sandholz and Stone Sweet 1998). Multi-level governance, which designates a shift in policy, regime, and geopolitical condition, is defined as flexible power-sharing between levels with no clarification with regard to who is responsible for the final decision. '[V]ariable combinations of governments on multiple layers of authority—European, national, and subnational—form policy networks for collaboration. The relations are characterized by mutual interdependence on each other's resources, not by competition for scarce resources' (Hooghe 1996: 18, cited in Benz 2004: 129).

Multi-level governance designates shared power between different levels of rule-making, between private and public actors, and the major task is not authoritative resource allocation or *redistribution* but *regulation* of social and political risks. The production of norms is seen as the result of a spontaneous coordination process. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other on the basis of 'soft law'. In this view, the EU comes close to a *heterarchy*: political authority is not centralized as in the hierarchical order of the state model, nor is it decentralized as in an anarchical order. Rather the units of the system pool their sovereignties and change from a 'hierarchical substantive orientation' to a 'horizontal heterarchical and procedural' one (Ladeur 1999: 156).

Many proponents of deliberative theory point to participation in epistemic communities as the appropriate cure for solving the ensuing legitimacy problem.[4] Territorially overarching policy networks imply the establishment of *issue-specific constituencies*,[5] and can, as mentioned, be seen as the institutional software for reflexive deliberation. Deliberation establishes an intelligent problem-solving method that can facilitate choice under conditions of risk: it enhances knowledge, pools competences, reduces the information problem, and puts arguments to a critical test to the degree that both the collective action problem and the

[4] See e.g., Bohman 2005, 2007a; Cohen and Sabel 1997, 2003; Gerstenberg 2002; Zeitlin and Trubek 2003.

[5] See Marks 1993; on the latter term see Kohler Koch and Eising 1999, at p. 5.

legitimacy problem are alleviated. In the EU, many boundary-crossing problems are addressed by cross-national regulatory agencies which operate within fixed parameters, and which bar the structure at the EU level from affecting core state interests and preferences. This, together with well-developed systems for accountability and surveillance, are held to suffice in ensuring democratic legitimacy.

GOOD GOVERNANCE WITHOUT DEMOCRACY

New forms of governance and the deliberative practice upon which they are seen to rest are held to have many merits. What might their democratic value be?

Efficiency and flexibility

The White Paper concerned how to strengthen the efficiency of planning and policy-making within the EU institutions and to increase knowledge about the Union under the existing Treaties in the advent of constitutional reforms. The purpose was not to propose Treaty-amending measures or to engage in the post-Nice debate on constitutional reform. Rather, it was to enhance the visibility and knowledge of the present system so as to meet the criticism of it being technocratic, remote and removed from the people. Even though the WP recognizes some of the problems facing the Union, it finds, strangely enough, the EU basically legitimate. There is no need for fundamental reform because:

> The Union is built on the rule of law; it can draw on the Charter of fundamental rights, and it has a *double democratic mandate* through a Parliament representing EU citizens and a Council representing the elected governments of the Member States. (European Commission 2001: 7, italics added)

The authors of the WP also maintain that the Union 'uses the powers given by its citizens' (ibid.: 8) although, for the most part, it in fact works on powers delegated by the governments of the member states. Moreover, they find the *Community method* correct even though it admits only the Commission to initiate legislative and policy proposals.

The *Community method* has evolved over time, and there is no authoritative definition of its operation (Devuyst 1999: 110). It rests on the core principle that underpins the Community architecture, namely that action addressed at common problems entails the adoption of action norms that have been decided in common on the basis of legislative input from the Commission, and that are to be uniformly applied to all the member states. This is the basic principle that has underpinned the whole process of European integration. Under this heading the Union has relied on a wide range of different processes, through which the 'general will' of the Community is to be ascertained. The *classical* version is the one in which the Commission initiates and the Council decides, and where

the EP's role is consultative only. The Commission has political power due to its monopoly of initiative, but is neither elected by, nor accountable to, the EP. It is formally listed as the main institutional articulation of the 'Community public interest', and combines representative and executive-administrative principles. The Commissioners are appointed by the Council (and the Commission President by the European Council) and are expected to refrain from promoting national loyalties and instead articulate a Community interest (cf. Art. 213 TEC). The Commission has multiple roles. It is not merely an 'executive' but a watchdog, a negotiator, and a deliberator. It is held to be the motor, the driving force, and agenda-setter, of integration, but the lack of a clarified constitutional role—its in-between status—greatly undermines its claim to represent any semblance of a common European will. In addition comes the most important legislative body in the EU, the Council, whose secretive mode of operations and increased use of qualified majority voting have weakened the links to the national constituencies. It is held to be a site of inter-state bargaining between executives.

In the White Paper, these constitutional problems were not at all seen as a source of mistrust and dissatisfaction that could be repaired through institutional reforms. To alleviate the legitimation problems the WP rather opted for heightened efficiency and a soft-law approach, and among its proposals were better and more active involvement of the groups and actors of *civil society*: better consultation and dialogue, online information, and a code of conduct setting minimum standards for what to consult on, as well as when, with whom and how. Moreover, it proposed more use of framework directives and co-regulation, which combines regulatory actions with the actions of affected parties. Further, as the EU has limited power and cannot act like national governments, according to the WP, it has to depend on partnerships and co-arrangements with a wide set of actors—governmental and non-governmental. Greater *flexibility* and a more decentralized approach to the future regional policy were also among the suggested instruments. Through such good-governance measures for a more efficient and transparent Union, the aspiration was to connect the EU better to the people.

The domestication of civil society

The White Paper reflects a rather limited conception of democracy. The authors put their trust in extended participation and active involvement of civil society—'with better involvement comes greater responsibility' (European Commission 2001: 15). *Partnership arrangements* entail a commitment to additional consultations with civil society actors. The problem here is, on the one hand, the democratic danger of *co-optation and perverse legitimation*. When the associations have a vested interest in certain results, they are not in a position to take an autonomous stance in the opinion-formation process. They are not 'free' to counteract policies and hence cannot lend legitimacy to the outcome. On the contrary their participation undermines the validity of even rational outcomes.

On the other hand, there is the problem of *domestication of civil society organizations*. Civil society associations are restructured for political or administrative purposes, as they themselves must 'follow the principles of good governance' (ibid.). Civil society, which can be a source of legitimation only as long as it remains undomesticated and unhampered by power motives, is not seen by the WP as an arena for voluntary action and for open, free and critical public debate and contestation. The democratic division of labour between state and civil society is endangered when voluntary associations (NGOs) are used merely as instruments to implement policies more smoothly. Good governance aims at the participation of all affected parties. However: 'Participation is not about institutionalising protest. It is about more effective policy shaping based on early consultation and past experience' (ibid.). As it is *participation by invitation*, the principle of representation is violated (Lord 2007), and the Commission emerges as the sole representative of a European 'common interest' (Kohler-Koch 2007: 18). Hence, governance comes down to *participatory engineering* as participation is mixed up with policy-making and implementation. 'Participatory governance is therefore nothing more than a "private contract" between government, voluntary associations and its respective members.'[6]

Extended participation is a means to rationalize governance in domains heavily exposed to efficiency standards; it favours strong parties and leads to evasion of liability (Luhmann 1981). Extended participation cannot replace the legal protection and rights-based empowerment of the individual. When the subjects are not equipped with the rights and powers needed to sanction the rulers, they are not made into *citizens with equal rights*.

The White Paper presents itself as rather modest. It is about instruments and methods. There is no clear notion of what to do with the basic problems of trust and legitimacy. What is the EU's mission beyond that of creating a free market? Without a clear understanding of the nature of the entity and its peculiar characteristics, there can be no adequate diagnosis. The definition of the situation is deficient. The WP first locates the causes of the mistrust as manifested by the low turnout in EP elections as consisting in the Commission's inability to act where it is most needed and not getting credit for its actions. It complains that the member states do not 'communicate well about the Union' (European Commission 2001: 7). Then, there is the *ignorance* of the people: 'many people do not know the difference between the institutions' (ibid.). By focusing on apathy and ignorance, one not only puts the blame on the people, but also reduces the problem to one of information—it is about lack of knowledge. This represents a rather superficial understanding of the causes of the distrust.[7]

[6] Trenz 2009: 37; see also Greven 2007: 244 5.

[7] This view is similar to the one presented in the White Paper on a European Communication Policy of the European Commission (2006) which set out a list of specific remedies to develop a forward looking agenda for an improved communication with its citizens. See also: 'No News from Brussels: Comment on the Commission's White Paper on a European Communication Policy', by Hans Jörg Trenz and Regina Vetters, available at <http://www.arena.uio.no/cidel/Varia/No%20News%20from%20Brussels.pdf> (accessed 23 March 2009), at p. 1.

Re-regulation and modernization

The White Paper underscores the technocratic view of European cooperation also by accentuating the role of *agencies* in conducting public affairs. A range of regulatory agencies already exists: one may differentiate four forms:

1. *Quasi-regulatory* agencies (e.g. the Office for the Harmonization in the Internal Market, the Community Plant Variety Office, the European Aviation Safety Authority, and the European Medicines Agency);
2. *Monitoring agencies* (e.g. the European Environment Agency, the European Monitoring Centre for Drugs and Drugs Addiction, and the European Monitoring Centre on Racism and Xenophobia);
3. *Social dialogue agencies* (e.g. the European Centre for Vocational Training, the European Foundation for the Improvement of Living and Working Conditions and the European Agency for Safety and Health at Work);
4. *Executive agencies* (e.g. the European Training Foundation and the Translation Centre for Bodies in the EU). (Yatanagas 2001: 24)

The White Paper opts for the establishment of more agencies; they would help the Commission in economizing and in focusing on core tasks. In addition: 'The creation of further autonomous EU regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union' (European Commission 2001: 24). The regulatory state, according to Majone (1996), does not need popular legitimation proper, when politically independent institutions are in place.

According to Giandomenico Majone (1996), the EU performs most of the regulatory functions of an ordinary political system.[8] It produces public policy—in particular related to the abolition of trade barriers, enhancement of trade competition, and compensation for market failures—through hard law. However, as redistribution is low or non-existent the need for democratic legitimation is rather weak. Accountability can be ensured through a wide range of politically independent institutions such as specialist agencies, Central Banks, judicial review, and delegation of policy-making powers to independent regulatory commissions. In depoliticized bodies, the parties can deliberate within fixed parameters, such as judges in courtrooms within the constraints of law and legality, or the Central Bank within its interest-rate policy and exchange-rate policy. Independent administrative agencies are held to facilitate impartial reasoning because the main actors are ideally 'untouched' by the issue on the agenda (cf. Pettit 2004). Non-majoritarian institutions that exercise public functions, are independent as they operate outside of hierarchy and are not directly accountable to voters; they are based on strong professional norms, such as 'expertise, professional discretion, policy consistency, fairness or independence of judgment'

[8] Due to the constitutionalization process, Majone now dispels the concept of 'the regulatory state' based on competition policy (see Majone 1996). On the basis of the firmer establishment of CFSP he proposes a new model: a European Confederation (Majone 2005).

(Majone 2005: 37). The claim is that this ensures more consistent and far-sighted decision-making as well as more justifiable results: 'If the actors have no personal stakes in certain conflicts, it seems plausible, that the results of their reasoning are on average much more in accordance with the principle of reciprocity than adversary negotiations' (Hüller 2007: 14).

The existing institutional complex of the EU may actually produce a more transparent and accountable policy process than the one at the domestic level. The argument is that the intergovernmental structure provides for a constant presence of national officials in the Council and in the Commission, the oversight of national governments, the tradition of publicizing Council decisions, complex and multi-level stages of decision-making, and that the extensive publicity and interest intermediation and the role of NGOs, social partners, citizens' movements, and so forth keep the EU in close contact with the constituencies. From the limited perspective of the EU as a *regulatory problem-solving entity*—dealing with regulation, not redistribution—this will suffice, Majone contends. In so far as the EU merely solves the problems of the member states with respect to their interests and preferences, and does not impinge upon national identities and priorities through redistribution, the established institutional structure is adequate.

Majone's argument depends on the assumption that the EU produces Pareto-efficient outcomes. The EU leaves the preferences of the member states intact and is itself strictly limited to regulatory, not redistributive, politics. This claim is, however, highly contested. Majone has not been able to prove that the EU is not also interfering with the interests and preferences of the states and citizens of Europe, and hence creates winners and losers (Føllesdal and Hix 2006: 549).

In practice, however, it is difficult to distinguish between technical and political issues, and between regulation and redistribution. What we have seen is a regulatory 'race to the top' in some policy fields of the EU, rather than a 'race to the bottom'. In certain areas, such as consumer and environment protection, health and workplace conditions, standards have been raised.[9] The European integration process has sustained a rapid expansion of political regulation in Europe and has over a period of fifty years transformed the political landscape in a profound manner. Integration has deepened as a wide range of new policy fields have been subjected to integrated action and collective decision-making. This has taken place not only with regard to trade, monetary and business regulation, fisheries and agriculture, but also with regard to foodstuff production, gene- and bio-technology, labour rights, environmental protection, culture, tourism, immigration, police and home affairs, and now also with regard to a common foreign and security policy. The pattern is one of *re-regulation and modernization* rather than mere deregulation and the policies corresponding to the lowest common denominator—negative integration, which, nevertheless, is a conspicuous feature of European integration. Market redressing through standard-setting

[9] Egan and Wolf 1999: 253. See Joerges and Neyer 1997a; Neyer 2003; Cohen and Sabel 1997; Gerstenberg 2002; Joerges and Vos 1999; Wessels 1998; cf. Majone 2005: 143ff. See also Stone Sweet 2004 for the role of the ECJ with regard to positive integration.

and re-regulation is actually taking place at EU level with huge impact on both the citizens and the member states. Redistribution takes place through the establishment of a European market as well as through the EU's so-called Cohesion Policy, which is the EU's main redistributive policy, aiming to reduce social and economic inequalities across Europe. The main financial instruments are the Structural Funds, which in 2006 took up 32 per cent of the EU's budget (Allen 2005: 215). They are intended to promote the development of disadvantaged regions and localities in the single European market and now cover a substantial part of the EU's territory. In addition comes the Common Agricultural Policy (CAP). Several member states receive up to 5 per cent of their budgets from the EU, and the Stability and Growth Pact entails that the member states' annual budget deficits cannot exceed 3 per cent of GDP. Hence, the EU creates winners and losers also by constraining national policy-making.

New forms of governance

The inclusion of civil society organizations, social partners and the weight placed on openness and transparency procedures in the White Paper, are intended to increase the public awareness as well as the problem-solving capacity of the Union. These are means to make visible who is participating and who is consulted. This comes in addition to other measures to enhance the ability to integrate and solve problems in a smooth way. Novel instruments are the Open Method of Coordination working with key networks, and the simplification of Community law. The OMC is especially interesting, as it entails a process of mutual adjustment and learning which allows for divergences to be spelled out and for the member states to find their own way. Innovative forms, such as governance by performance and evaluation have been on the agenda since the mid-1990s, and the scheme gathered momentum by the turn of the millennium. The OMC works through *soft law*—through benchmarking, peer review, best practice, cyclical processes, and so forth—with the aim to facilitate the harmonization of standards and policies. It is based on the recognition that traditional Community law-making alone would not be suitable for achieving these goals. As a remedial instrument the European Council set out the procedure of soft law-making, that is the OMC, to be applied to a number of areas within the fields of social and economic policies, which were either outside, or at the periphery of Community competence (Chalmers et al. 2006: 138). This method was formalized as a form of governance at the Lisbon European Council (2000) and has been extended to a range of policy fields. At Lisbon, the EU set itself the goal of becoming, by 2010, 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion' (European Council 2000: par. 5). The OMC emerged through the Broad Economic Policy Guidelines, which were brought about by the Treaty of Maastricht, and the European Employment Strategy installed by the Treaty of Amsterdam. The OMC has become the central tool of the EU's social policy-making, with formal

coordination processes launched—for social inclusion and pensions in 2001–03, and now also for healthcare and care of the elderly. The 2000 European Council extended the OMC and opened for a further extension to other policy areas, 'such as research/innovation, information society/eEurope, enterprise promotion, structural economic reform, and education and training'.[10]

The OMC depicts a process of mutual adjustment and learning, through free discussion and exchange of ideas, in order to establish agreement on common standards. It allows the member states to develop their own responses within a common framework of reference, but without formal sanctions. It is *consensus formation* pertaining to 'common assessment of the economic situation; agreement on the appropriate economic policy responses; and acceptance of peer pressure and, when necessary, adjustment of the policies being pursued' (Hodson and Maher 2001: 723). According to the Council, the OMC ensures consensus through the four following elements:

- fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium, and long terms;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practices;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer review organised as mutual learning processes. (European Council 2000: par. 37)

The White Paper holds the OMC as a complement to ordinary legislation—to the Community method. The OMC is to be used on a case-by-case basis. 'It is a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for Member States, sometimes backed up by national action plans as in the case of employment and social exclusion' (European Commission 2001: 21). In many fields, such a method could add value by reducing the Commission to an information-provider and supervisor of the process, and opening up for the member states to compare their efforts and adjust their aspirations through benchmarking information and peer review. However, the OMC is given a somewhat restricted role—'it should not be used when legislative action under the Community method is possible' and should not 'upset the institutional balance nor dilute the achievement of common objectives'

[10] 'Since then, OMC processes have also been proposed by the Commission and other European bodies as mechanisms for monitoring and supplementing existing EU legislative instruments and authority in fields such as immigration and asylum, environmental protection, disability, occupational health and safety, and even fundamental rights, as well as in areas like youth policy where the Union has few if any legal powers. In addition, following recommendations from the Commission's High Level Group on Industrial Relations, the European social partner organizations have drawn inspira tion from the OMC for the monitoring and follow up of non binding framework agreements and guidelines at both cross industry and sectoral levels' (Sabel and Zeitlin 2007: 23).

(ibid.: 22). The Secretariat at the Convention on the Future of Europe, moreover, identified three circumstances where binding legislation is unlikely to be adopted and soft law should be preferred:

- where the area of work is closely connected with national identity or culture [. . .];
- where the instruments for implementing policies are so diverse and/or complex that harmonisation seems disproportionate in relation to the objectives to be achieved [. . .];
- when member states do not yet warrant common legislation in a given sphere but nevertheless have the political will to make progress together. (European Convention 2002: 15–16)

DELIBERATIVE EPISTOCRACY

Proponents of direct-deliberative polyarchy point to the merits of transnational structures of governance, in particular the OMC, as they foster deliberation and reason-giving. Here, deliberation is seen as an error-reducing tool, a fact- and justice-finding device that increases the possibilities for rational problem-solving. But can it also be democratic?

The accountability problem

The EU committees that coordinate the OMC may not be fully democratic but they 'can act as institutionalized intermediaries that facilitate interaction, communication, and the exchange of information across sites and levels in a complex and iterated process of decision-making' (Bohman 2007a: 44). Research has shown that OMC entails both strengths and weaknesses. Regarding the weaknesses, there is 'a selective involvement of private actors' and, '[u]sually there are elements of bargaining over targets and indicators, taking place in the shadow of government, hierarchy and legislation' (J. P. Olsen 2007: 125; cf. Héritier 2002).

The OMC does not meet with the criterion of *accountability* which, in addition to autonomy, is required for a system of dominance to be deemed democratic. As discussed in Chapter 2, this criterion states that the decision-makers should be held responsible by the citizenry and that, in the last resort, it is possible to dismiss incompetent rulers. Accountability includes control instruments and responsibility relationships, but is something else and more. It requires transparency and openness as well as activity on the part of the accountant. It refers to a relationship that is multilateral rather than unilateral, dialogical rather than monological. It is a relation between an actor and a body or a forum. Decision-makers are answerable to *someone*—who can hold them to account—for

something that can be rendered account of. This 'something' may be right or wrong, good or bad, hence it can be assessed according to inter-subjective standards—be they professional-ethical standards or political-legal ones. Accountability points to a process in which obligatory questions are asked and qualified answers required—to a justificatory process that rests on a reason-giving practice. It designates 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences' (Bovens 2007: 467).

There is no chance of the OMC meeting this criterion, as it is informal and outside of formal systems of control in which proper questions can be posed and malpractice sanctioned. Among the many criticisms of soft law are the following:

- it lacks the clarity and precision needed to provide predictability and a reliable framework of action;
- soft law cannot really have any effect, but is a covert tactic to enlarge the European Union's legislative hard law competence;
- soft law bypasses normal systems of accountability;
- soft law undermines EU legitimacy because it creates expectations, but cannot bring about change. (Chalmers et al. 2006: 139)

The OMC was envisaged as *a third way* for the EU between regulatory harmonization and fragmentation, and some analysts point to *democratizing effects* of this new architecture. In fact, the OMC system of peer review may *destabilize entrenched forms of authority* (Sabel and Zeitlin 2007: 46). Deliberation in dispersed decision-making bodies discourages legal domination. It represents the institutionalization of *contestation* (cf. Pettit 1997: 183ff; 2000). The rationale of soft law may be found in the fact that hard law is not fit to treat many current issues, either because of the nature of the material to be regulated or because EU policy-making is new and outside the competence of the Community method. Under such conditions, flexibility, tolerance and diversity are required, not uniformity. Further, new forms of governance can foster trust and, through learning, socializing and internalizing, prepare the way for collective problem-solving in new areas, and hence for hard-law measures at a later stage.[11] Even though the OMC is marked by exclusiveness, self-selection, and opacity, it has fostered learning, trust, and a *Europeanization* of outlooks. It has promoted an immense amount of interaction, both within and outside EU organizations. It has changed discourses and labels and also created new policy areas and symbolic constructions, such as, for example, the European Research Area, and a European Higher Education Area 'with the intention to make the University an instrument in the transition to the "knowledge economy", a "knowledge society", and a "learning society"' (Gornitzka et al. 2007: 182). Soft law can increase *rational inquiry and trust* because it institutionalizes a process of reason-giving and reflexive problem-solving.

[11] See e.g., De la Porte and Nanz 2004; Kjaer 2008; Jacobsson and Vifell 2005; Rosén 2007.

Problem-solving through deliberation

Problem-solving seen as an interaction mode—as an action-coordination principle—differs from bargaining and voting in that it does not contain a clear-cut external sanction mechanism, such as threats and majorities (Eriksen 2005: 14ff). It does not work through the adding of preferences or wills. The actors have to engage cooperatively to identify and define the nature of the problem as well as being able to provide an adequate response, that is, with the help of reasoning. Actors cannot merely vote over whether something is true or not, or whether something is a problem or not. Neither can rational answers be found in complex rounds of bargaining over contested issues. Something is lost when one subjects problem-solving to the logic of voting and bargaining. It would lead to inefficient, suboptimal or incorrect results. Counting is not reasoning and bargaining is not arguing. Rational problem-solving requires inquiry and reason-giving. It is inherently linked to reflection and arguing in reaching the requisite common understanding. Actors first have to identify the issue and agree upon what is at stake—what is the problem? Then they have to agree upon what to do—should it be solved, and if so, what are the appropriate means for solving it? The medium for this is *deliberation*, as it compels actors to verbalize and justify their plans of action when there is doubt or ambiguity; when there are preferences linked to outcomes or conflicts of interests. Deliberative inquiry may enlighten the actors, shed new light on the issues at stake, and even change actors' attitudes or beliefs when it is proven that they are mistaken about the 'fact' of the case or the 'principle' in question. Deliberation is thus an error-detecting and a truth-finding as well as justificatory device.

Until recently, developments have expanded the size of—and the scope for—problem-solving through deliberation within the institutional nexus of the EU. Students of European governance underscore the salience of deliberation within the EU and its conduciveness to trust, learning and collective decision-making (Gerstenberg 2002; Zeitlin and Trubek 2003). These observations support the notion of the EU as a *non-coercive deliberative system*, but one that has re-regulative and market-redressing effects. Transnational networks have increased the ability to coordinate rule development and implementation (Dehousse 1997). As we learned in Chapter 7, the system of Comitology has managed to combine market integration with social measures, such as the protection of health and safety; has raised the standards of environmental protection; and has fostered consent and integration. Solutions have been found that are more than the politics of the lowest common denominator. Deliberation in committees has, thus, made positive-sum solutions possible—it has demonstrated both *epistemic and transformative value*; that is, it has led to improvements in knowledge and information and has changed preferences. Such institutions make for the pooling of competences and knowledge to the degree that there is no basis for collective decisions other than an outcome that leaves all better or at least as well off as before.[12] Hence the possibility for Pareto improve-

[12] See Joerges and Neyer 1997a, 1997b.

ments. In knowledge-based systems there is an incentive to exploit asymmetrical information to identify positive-sum solutions (E. B. Haas 1998). One may also add that transgovernmental actors who have no formal authority to 'initiate, pass or strike down legislation' work through informal mechanisms to 'shape agendas, mediate disputes and mobilise support'. These actors possess a *wealth of first-hand experience* that is of interest for policy-making bodies, and may use this to 'frame issues to overcome objections to proposals' (Newman 2008: 120, 121). The deliberative mode, which transnational governance structures foster, entails the cooperative use of competences and expertise in identifying and solving problems under conversational constraints and may explain the move of European integration beyond intergovernmentalism.[13]

Epistocratic deliberation

The proponents of deliberative democracy have made their case both descriptively and normatively in order to make sense of the multi-level constellation that makes up the European Union.[14] Deliberation rather than voting is the currency of democracy and is the medium for the political execution of power. The infrequent use of majority vote—most decisions in the Council are unanimous—makes the EU into a kind of *consensus democracy*.[15] Consensus-seeking recompenses the lack of 'non-majoritarian' sources of legitimacy, and as the bargaining resources are rather slim the implementation of EU policies and further integration work efficiently only if the enforcement mechanisms resonate with a readiness on the part of the member states to accept its disciplining role. The many veto points, the lack of forceful compliance mechanisms, soft law and problem-solving through committees, working groups and networks underscore the deliberative mode of governance. Reason-giving in general is promoted through such mechanisms as public debate, institutionalized meeting places, peer and judicial review, and complaint procedures. In the EU, the *justificatory logic* is entrenched also in the manner that, as mentioned, 'any criticism of divergent views must use arguments which are compatible with European Law' (Joerges 1999: 317). This has been enshrined as a principle of Community law since the very inception of the Communities.

Governance structures may constitute a distinct mode of legitimation as they raise the information level and contribute to rational problem-solving. They include different parties and adhere to arguing as a decision-making procedure rather than voting and bargaining. Deliberation in such bodies has merits, as

[13] Eriksen 2005, see also Joerges and Neyer 1997a; Joerges and Vos 1999; Marks et al. 1996; Neyer 2003; Wessels 1998.

[14] The cynical mind may however contend: 'Deliberative models are often favoured by the deliberative class primarily professors who are, naturally, empowered by any process which privi leges that which they have and which legitimates, even aggrandises, their status and actual or pretended modus operandi, and in which the model for ideal government is a well conducted seminar' (Weiler 1999b: 348).

[15] I return to this point in Chapter 10.

was made clear in Chapter 3, even if the demanding requirements of a rational discourse have not been met, because the participants have to justify their standpoints and decisions in an impartial manner in order to obtain agreement. Concurringly, *neo-Madisonians*, such as proponents of *directly-deliberative polyarchy* (DiDeP), conceive of the EU as a polycentric system of transnational governance with no apex of authority but with inter-institutional checks and balances.[16] Deliberation in spontaneous and horizontally dispersed polyarchies deters legal domination and solves problems rationally.[17]

Proponents of DiDeP see deliberation primarily as a cooperative activity for intelligent problem-solving in relation to *a cognitive standard* (rationality or analytical correctness); they are not conceiving of it as a vehicle to argue over what is correct in the sense that it can be accepted by all those potentially affected. They rally for the normative validity of a multi-level and polycentric system of governance.

> Consider now a world in which sovereignty legitimate political authorship is neither unitary nor personified, and politics is about addressing practical pro blems and not simply about principles, much less performance or identity. In this world, a public is simply an open group of actors, nominally private or public, that constitutes itself as such in coming to address a common problem, and reconstitutes itself as efforts at problem solving redefine the task at hand. The polity is the public formed of these publics: this encompassing public is not limited to a list of functional tasks (police powers) enumerated in advance, but understands its role as empowering members to address such issues as need their combined attention. (Cohen and Sabel 2003: 721)

This entails a model of direct participation and public deliberation in structures of governance wherein the decision-makers—through 'soft law', benchmarking, shaming, blaming, and so on—are connected to larger strata of civil society. The claim is that transnational civil society, networks and committees, NGOs and public forums, all serve as arenas in which EU actors and EU citizens from different contexts—national, organizational, and professional—come together to solve various types of issues and in which different points of access and open deliberation can ensure democratic legitimacy. Local problem-solving, the institutionalization of links between units, and agencies to monitor decision-making both within and between units, make this structure conducive to democratic governance. In this perspective, publicity is needed for detecting and solving social problems. The problem is to establish the conditions under which an outcome of a deliberation process is correct. When the conditions of a rational agreement are not fulfilled, deliberation may merely contribute to establish agreement among experts in order to facilitate problem-solving.

[16] 'Deliberative, polyarchical constitutionalism might be called neo Madisonian in that it uses the polyarchical competition of purpose built and re configurable problem solving units to the same end' (Cohen and Sabel 2003: 370).

[17] See also Cohen and Sabel 1997; Gerstenberg 2002, Bohman 2005, 2007a.

The epistemic interpretation of deliberative democracy generally holds that deliberation is a cognitive process for the assessment of reasons in order to reach just decisions and establish conceptions of the common good. According to adherents to DiDeP, democratic legitimacy is not simply a matter of congruence between the addressees and the authors of the law, but rather that *the reasons* for political decisions are of a certain quality. Decisions that have been made and critically examined by qualified and entrusted members of the community through a reason-giving practice can claim to be legitimate. 'An outcome of an actual decision is acceptable when the reasons behind it are sufficient to motivate the cooperation of all those deliberating' (Bohman 1996: 33). Procedurally regulated deliberation makes sure that viewpoints and interests receive due consideration. It is the *throughput procedures of the political system* subjected to certain filtering conditions such as equality and publicity—filtering out undue influence and 'unreasonable' reasons—which warrant the presumption of acceptable results. Thus, the standard according to which the question of correctness is settled are the entrenched legal standards and non-proceduralist standards of justice. It is substantial, not procedural. This variant of the principle of *reciprocal justification*, which was discussed in Chapter 2, represents a limitation of practical reasoning—of the public use of reason—as it is the conversational constraints of an institutionalized discourse that undertake the filtering out of the divisive or non-rational issues.

Technocratic legitimation

The problem with regard to deliberation in working groups, Comitology or the COREPER and other bodies with decisional autonomy and de facto political power, is that decision-makers may maintain that their solutions are correct or fair as far as they have managed to talk themselves into a consensus and agree upon the 'epistemic quality of the justification for political decisions' (Bohman 1996: 27). This amounts merely to deliberation without democracy—to *technocratic deliberation*—as it is not required that the affected citizens say yes or no to the terms under which decisions are made. Problem-solving in the committee system of the EU, which is endowed with discretionary power and no proper institutionalization of accountability lines, cannot rule out the dangers of *epistocracy* and of *governance without democracy*. Such arrangements do not meet the criteria of autonomy and accountability through institutionalized and non-institutionalized public deliberation. Rather, experts, private actors and public officials make decisions without much popular input.

Increased deliberative quality need not go together with democratic authorization as representatives that obey by the force of the better argument may well betray the mandate of their constituencies (Scheuerman 2006). When the unstinted discussion is the method for solving cross-border problems one risks undermining the institutionalized conditions of parliamentary and public debate. In a modern state, the people do not rule directly but exercise sovereignty

and power through specific legislative, executive and judicial bodies. The principle of legality and the separation of powers ensure the democratic programming of administration—and not self-programming by experts or special interests—and bar against executive dominance and the self-acquisition of power by bureaucratic bodies. In a democratic perspective, governance is conditional on government as it is only in the 'shadow' of the law that governance bodies can, on the basis of delegation or audit democracy, legitimately operate.

Problem-solving by governance structures should therefore be reserved for pragmatic issues and technical questions as these require merely epistemic (or scientific) knowledge to be solved properly: they do not raise moral or ethical questions of a political salient nature. For example, regulations of industries, the establishment of common standards (for education and professional work), and measures against catastrophes are matters that demand knowledge about what the facts of the matters are; what the legal status in the area is; and which means are best suited for resolving the problems at hand. These are different from measures with regard to (re-)distribution, monetary and financial policies, energy, ecological policies and the like, which raise questions about justice and about the standards of a good society, and which are also connected to deep-seated conflicts of interest (Habermas 2005a: 336).

Findings from committee research testify to the fact that deliberations are expert-driven and that consensuses are achieved more easily when scientific criteria are made to apply. Christine Landfried (1999) argues, however, that in the case of bio-technology, politically thorny and normative controversial issues are 'redefined' and presented as purely technical questions in the politico-administrative complex of the EU. Political or normative salient issues are being reinterpreted and thereby ethically neutralized, and hence made fit for expert treatment and political bargaining. The EU may fall prey to the technocratic fallacy by delegating political, normative decisions to expert bodies. In an analysis of the Council's working groups it is found that they 'do not operate solely on a "technical level"' and that technical specifications would be politicized due to contestation of stakeholders only if they become part of a more general political conflict (Fouilleux et al. 2005: 609). The EU is in general held to be technocratic as many political decisions are taken by experts (Radaelli 1999). However, a problem is never merely 'technical'.

Epistemologically speaking, a problem is rarely given as a merely technical issue—to be settled autonomously through scientific or administrative proceedings. It has had to be identified, interpreted, and specified in prior social processes. It has had to be established through a 'logic of discovery' that depends on a *perspective* and hence is normatively charged. In addition, application gives rise to normative concerns of its own. Scientific knowledge cannot be transformed directly into problem-solving as it has to be charged with values and normative interpretations—with practical reason—in order to be actionable. It is practical reason that tells what practical implications, if any, empirical findings have. The link between knowledge and action does not stem from the nature of things. It has to be added.

> Knowledge does not 'apply itself,' no matter how advantageous to the society the results, to our Western mind, appear. It gets applied only through the mechan isms of institutionalization of roles within which the requisite combinations of motivational and cultural elements can develop. (Parsons 1951: 348)

The relationship between knowledge and action, between is and ought, must be established by actors. In modern societies—in which God(s) is (are) no longer the sole normative authority and in which there is a political separation of powers—it is the task of the people themselves through their political institutions—or their authorized representatives—to settle normative questions that are publicly relevant. There can thus be no democracy without democratic institutions. But what is then the value of DiDeP?

Deliberation is not enough

According to DiDeP, the EU is seen as an example of deliberative governance. Policy-making in committees and networks supplemented with civil society associations, (I)NGOs, and social movements have created transnational communicative spaces. As no one possesses absolute power within these structures, they represent functional equivalents to democracy. The plurality of access points, disaggregation and deliberation in criss-crossing publics are seen as facilitating democracy in a multi-centred world of diverse, non-governmental actors. Deliberation substitutes, so to speak, government. In this perspective, government is not needed because network is available and is an appropriate 'institutional expression of a dispersed capacity to engage in deliberation that helps determine the terms of discourse in the international system' (Dryzek 1999: 48). However, deliberative governance cannot bear the burden of legitimacy as there is no possibility that all can participate on an equal basis, so that the laws that they have to obey could be consented to in a free, open and rational debate by all the affected parties. It compensates for the lack of influence brought about by globalization, but is *no substitute for democracy*. When deliberation is seen as a cooperative activity for intelligent problem-solving in relation to an independently defined cognitive standard, as is the case with DiDeP, it is not an argument about what is correct in the sense that it can be approved by everyone. In my opinion, this cannot be accomplished without egalitarian procedures of law-making in place through which the citizens can influence the laws that affect them, and effectively determine whether the reasons provided are good enough.

DiDeP represents an *unstable solution* as the polity has to rule in the name of all, not merely in the name of a section of the public. It is difficult to ensure justice and legitimacy via networks that bring together officials and experts from different constituencies with the task of harmonizing practices and policies, and who can reach decisions only through consensus. As Thomas Nagel points out:

> It is important to recognize that the traditional model of international organiza tions based on treaties between sovereign states has been transcended. Neverthe

> less, I believe that the newer forms of international governance share with the old a markedly indirect relation to individual citizens and that this is morally significant. All these networks bring together representatives not of individuals, but of state functions and institutions. Those institutions are responsible to their own citizens and may have a significant role to play in the support of social justice for those citizens. But a global or regional network does not have a similar responsibility of social justice for the combined citizenry of all the states involved, a responsibility that if it existed would have to be exercised collectively by the representatives of the member states. (Nagel 2005: 139f)[18]

Proponents of DiDeP, as well as other deliberationists who praise deliberative governance, trim down the criteria of popular sovereignty compared to the way it is conceived of by discourse theory. The latter envisions the establishment of a rational consensus-building on strong idealizations. Here, the question of what is just and the common good are premised on the presupposition that an agreement can be reached in a rational discussion where all limitations on power and resources are suspended. In an ideal situation there are no limitations on the public discourse with regard to themes, time, participants or resources. An idealized public standard, which may remain rather utopian, is necessary for normative and critical purposes: in order to decide whether the outcome of the deliberation is legitimate a *rationally founded identity* is needed. This requires a shift to a higher level of abstraction where the participants take a disinterested perspective and rule with regard to what is in the equal interest of all. The public debate, then, takes the shape of a democratic sovereign. This is an unavoidable standard in constitutional politics. It is through such a standard that the basic structure of society and the higher deontic norms, such as equality, freedom, democracy, and solidarity, to which the constitutional essentials subscribe, can be rationally approved. To be a recognized member of a communicative community requires the notion of a law-based society, that is, the symbolic notion of an order based on equal rights, as was laid out in Chapter 3 as version A of deliberative democracy.

When not all affected have been heard, we cannot know whether the outcome of a deliberation process is legitimate; worthy of recognition. We cannot know whether it represents the common will. Non-ideal conditions result in non-ideal outcomes. As long as *critical thresholds* for deliberation are not identified; for how much and what kind of public deliberation in networks and new governance structures are needed, there is a problem in claiming democratic value for deliberation. When critical thresholds are not established, and when not all can participate in law-making, we need criteria for deciding who are affected parties, who are authorized to make collective decisions, and procedures through which they can be held accountable. In short, there is need for democratic *representative institutions* that, at least numerically, give everybody the chance to have a say through their voting rights. The importance of such structures is underscored by

[18] See comments on Nagel in Cohen and Sabel 2006; Schmalz Bruns 2007: 269ff; Habermas 2007: 447ff.

the common experience that even an optimal decision may be opposed if it has not been made in a procedurally correct manner.[19] Hence, *government* is needed, that is, authorized rule through accountable and popularly elected institutions for policy-making and implementation under the supervision of courts.

Even if the legitimizing force of the democratic procedure first of all draws on the ability to ensure rational and publicly acceptable results, and not on the direct participation of the citizens (cf. Habermas 2001a: 110), deliberation and governance structures cannot replace institutionalized forms of control (including veto positions) and participation equally open to all. Deliberative governance cannot replace authorized rule through democratically accountable institutions, as there is no way of ensuring that common and not private self-interests are being realized. How to guard against lobbying, self-interest representation, informalism and factionalism that are associated with transnational structures of governance? In such sites, actors are heard and may voice criticism, but there is no chance of *equal access and popular control.* The citizens lack the instruments of power to force decision-makers to look after their interests. The inhabitants are merely the subjects (or subordinates—'*Untertanen*') of power, not the holders of power themselves—they are not empowered to authorize or instruct their rulers. The ultimate instruments of control do not rest with the people but with the decision-makers. Only the possibility to block and to revise on the basis of egalitarian structures of law-making, in tandem with opinion formation in a well-developed public sphere, can redeem the claim of the moral value of democratic procedures, that is, that decisions have been justified to all affected parties. Hence the need for *legal formalism* and the coercive means for guaranteeing equality and empowering citizenship.[20] Only with an enforcement capacity in place can the laws of the citizenry be implemented and upheld efficiently and legitimately. This is needed for ensuring equality before the law, making rights effective, protecting the individuals against coercive interference, and hence is a condition for justice.

Consequently, deliberation is not enough. Law is needed as a functional complement. While power is the sole preserve of executive authority and is a means of organizing the efficient realization of goals, the law prevents the power apparatus of the state from programming itself, that is, it prevents a situation in which the power-holders define and uphold what is right. In modern states, power is institutionalized by way of law; it is only through the law that political bodies can claim authority, and it is through legal procedures that the use of power can be justified and checked. When law is not laid down in an authoritative manner—according to the credo that all power stems from the people—and made equally binding on every part, lack of commitment ensues. Thus, law plays a central role in the integration of modern societies and no less so in the European Union.

[19] '[I]f people's preferred option is imposed on them rather than chosen, they may develop a preference for an option that was originally ranked lower' (Elster 2000: 95, fn. 15).

[20] Law not only complements deliberation and politics, it also complements morality as was addressed in Chapter 6.

GOVERNMENT REVISITED

The EU has become a polity which performs functions that affect interests and identities all over Europe. EU decisions impinge on national priorities, influence the domestic allocation of resources, and constrain the sovereignty and autonomy of the member states, without the EU itself being a state.

Beyond intergovernmentalism

The focus on governance, problem-solving, flexibility and reinforced cooperation derives, in legitimacy terms, from an *intergovernmental view* of the EU. In line with this, the proposals of the White Paper presuppose a mode of indirect legitimation in which the EU derives its normative justification from the legality and legitimacy of the governmental system of the member states. The WP conveys the impression that the EU is in the hands of the member states and that basically the member states can provide for democratic legitimation. In this perspective, governance measures for enhancing accountability, visibility, and transparency provide an extra, additional layer of democratic legitimacy. However, the EU is a power-wielding system which establishes *domination relations* that the electoral authorization of ministers at national level, and their accountability to their national parliaments, cannot provide democratic legitimacy for. Neither can this be provided for by the incorporation of interest groups and non-profit organizations in cooperative and consultative bodies. The new structures of governance mystify and confuse authority lines so that the citizens may be left in a baffling wilderness with regard to who exercises control and influence. In legitimacy terms, such an order is clearly deficient, as popular sovereignty is not brought to bear on the processes. It is merely steering without democracy, and governance without government. There is a marked difference between the kind of autonomy and accountability achieved in policy networks consisting of private actors, interest groups, NGOs and governmental actors, constituting a kind of *transnational civil society,* and that provided by the law-based system of rule entrenched in the European institutions.

The EU is clearly something more than an international organization, a club, a '*Zweckbundnis*' ('*Verband*'), regime or a confederation where the member states are the contracting parties. To the latter, democratic criteria do not apply, as it is the states and not the citizens that make up the 'constituencies'; states are the sole sources of legitimacy and they act internationally on indirect and delegated powers. Here, 'constitutions' are *contracts* as the '*pouvoir constituant*' is structured as a juridical relationship between separate parties: a 'gentlemen's agreement' presupposing individual membership and sovereignty and where the signatories represent individual modalities of government, rather than a social pact among the citizens. Contractually based orders do not put up normative criteria of political legitimacy (Frankenberg 2000: 260–1). In contrast to such orders, the EU has become a polity that subscribes to democracy and human rights as

legitimating criteria. It also disposes of an *organized capacity to act*—to make collectively binding decisions.

Increasingly, European integration has developed beyond intergovernmentalism and created a polity which is markedly different from its constituent members. In the EU the role of law, which positions EU law over national law, accountability procedures, institutionally regulated decision-making, and supranational commitments bring about a political structure not only capable of ensuring joint deliberation, but also collective action within an obligatory frame of reference. This is underscored by extended use of qualified majority vote, after the Amsterdam Treaty entered into force, which in most cases, however, goes hand in hand with co-decision with the European Parliament. These procedures are now the standard decision-making procedures, as we have seen in Chapter 7. Co-decision, which requires the consent of the majorities in the Council (amounting to approximately 70 per cent of the votes) and the European Parliament, rules out national vetoes. Both developments weaken the position of member states as masters of European integration. Thus one cannot understand the EU's institutional structure merely as a dependent variable; as a product of member states bargaining at IGCs (Tsebelis and Garrett 2001: 386). In addition, the EU does not, as the governance approach presupposes, merely regulate. It also *re-regulates* and performs some market-redressing functions, through standard-setting and rule-making, as well as redistributes resources, however faintly.

As mentioned above, the EU affects interests and identities; creates losers and winners; deregulates and re-regulates. The European Union has emerged from humble beginnings into an entity whose policies cover virtually all areas of public policy: market regulation, social policy, the environment, agriculture, regional policy, research and development, policing and law and order, citizenship, human rights, international trade, foreign policy, defence, consumer affairs, transport, public health, education and culture. A significant part of the law-making has been transferred from the member states to the EU, which adopts more than 100 legal acts each year. Scholars have estimated that EU legal acts represent a significant portion of member states' total rule production within such areas as production, distribution and exchange of goods, services and capital. Moreover, legal harmonization—standardization—with regard to the production and distribution of goods, services and capital proceeds considerably faster and is more centralized than in the United States.

Further, the EU has supranational political institutions, a Court, a Central Bank, a single currency, a material constitution—a Union citizenship—and is now also aspiring to be a polity with competences in foreign and security policy. So-called battle groups are established and national police corps are applying European law. Thus, as I reiterate in Chapter 9, the Union possesses certain compliance and disciplining mechanisms. However, it is not a state. To Weber the state is 'a human community that (successfully) claims *the monopoly of the legitimate use of physical force* within a given territory' (Weber 1946: 78). A modern state represents a very special kind of government, and has the following characteristics:

1. The state is a recognizably separate institution or set of institutions, so differentiated from the rest of its society as to create identifiable public and private spheres.
2. The state is sovereign, or the supreme power, within its territory, and by definition the ultimate authority for all law, that is, binding rules supported by coercive sanctions. Public law is made by state officials and backed by a formal monopoly of force.
3. The state's sovereignty extends to all individuals within a given territory, and applies equally, even to those in formal positions of government or rule-making. Thus sovereignty is different from the personnel who at any given time occupy a particular role within the state.
4. The modern state's personnel are mostly recruited and trained for management in a bureaucratic manner. The state has the capacity to extract monetary revenues (taxation) to finance its activities from its subject population. (Dunleavy and O'Leary 1987: 2)

The EU has supranational features, but does not fit the customary concept of state. In the multi-level constellation that makes up the Union, the member states and the EU have both shared and independent powers with neither having supreme authority over the other. But, compared to international organizations, the EU has democratic elements as the degree of representativeness, openness, transparency, participation and electoral control testify to. It takes decisions through institutionalized procedures and not through diplomacy. The EU is also an *entity in the making* and the integration process itself is lending legitimacy to the project as such. The fact that Treaty changes are (sometimes) subjected to referenda is an indication of the power of the citizen in the integration process. The system of representation and accountability in the EU gives the citizens at least a minimal input in the process of framing and concretizing the rights to be enacted. Taken together, this implies the adoption of those prescriptions that are associated with *government* rather than with governance. But can a system of popularly authorized rule—government—be constructed in such a way as to be freed of 'nationalistic' and statist presuppositions? The question then is whether government can be theoretically reconfigured and disassociated from nation as well as state.

Government without a nation

According to MacIver (1928: 277) we ought to 'distinguish between the government and the state and regard constitutional law as binding, not for the state, but the government. It binds the legislator in the making of law itself.' Government refers to the political organization of society and to the fact that a state is not merely an Hobbesian coercive order, as Weber's definition alludes to, but also an expression of the common will and public opinion (Hegel 1821; Arendt 1969). Accordingly, a properly constituted state goes beyond a 'mere monopoly of

legitimate force'; it is based on 'mutual recognition of equality' (Wendt 2003: 513). It is conceived of as a specific organizational principle, as the institutional configuration of representative democracy and of bureaucracy. The *state* is a political institution and an organizational form whose basic function is to establish and maintain order and security. It is needed to forge and discipline the unitary will of the people, upon which it can act authoritatively and upon which it can base its legitimacy, as long as rule of law, basic rights, democratic procedures, and international commitments are observed. *Government*, in contrast, depicts the political organization of the polity and its societal legitimacy basis, a non-state conception of a legally constituted community. The characteristic feature of governmental power is not coercion, but the ability to act in concert and to be recognized. Political power emanates from citizens coming together in public forums and reaching agreement on the rules for social coexistence and the collective goals they should realize. Power is collective, communicative, and inter-subjective by nature; it is created in the interaction between agents; it is only in operation and is only strong so long as the people are assembled and agree (Arendt 1958: 200; Habermas 1996a: 149). Not only should we untie government from penalizing connotations of state, we should also disentangle it from nation.

In the wake of the French Revolution, the idea of a *nation* has been fused with the idea of a republic. Patriotism, the willingness to sacrifice even one's life for the fatherland, has been combined with equal rights. Thus, '[t]he nation-state is Janus-faced. Whereas the voluntary nation of citizens is the source of democratic legitimation, it is the inherited or ascribed nation founded on ethnic membership (*die geborene Nation der Volksgenossen*) that secures social integration' (Habermas 1998a: 115, italics in original). The idea of a common history of a quasi-natural people, and of 'a community of fate' has effectively stimulated the patriotic feelings. Intrinsic to this has been the romantic concept of a nation and of native language as the medium of expressing a people's spirit. Over a long period of time the language of primordial values has been used to foster allegiance; 'the language of nationalism was forged in late eighteenth-century Europe to defend or reinforce the cultural, linguistic, and ethnic oneness and homogeneity of a people' (Viroli 1995: 1).

> The nation, as the ideal type of the political unit, has a triple characteristic: the participation of all those governed in the state under the double form of conscription and universal suffrage, the coincidence of this political will and of a community of culture, and the total independence of the national state with regard to the external world. A nation is always a result of history, a work of centuries. It is born through trials, starting from the sentiments of men but not without the action of force, the force of the political unit which destroys the pre existing units, or the force of the state which brings into subjection regions or provinces. (Aron 1966: 295)

The nation-state created a solidaristic union between individuals who were originally strangers to one another: through general conscription, education,

(hi)story-telling, mass communication, and mass mobilization, heterogeneous peoples were 'homogenized'.

Changed loyalties and identities made collective action possible on a whole range of fields. The state could act on the basis of a strong sense of community due to the successful symbolic construction of a people. This construction, founded on a sense of common belonging and sentiment, is held to be a precondition for both democracy and the welfare state. 'A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity' (Schmitt 1926: 9).

On the other hand, the nation-state made a new form of legitimation possible in that the principle of popular sovereignty replaced earlier forms of hierarchical legitimation; that of kings and princes based on 'divine right' or on traditional bases of authority. This kind of legitimation based on the royal sovereignty was supplanted with legitimation from below (cf. Chapter 2). Support was drummed up through the mobilization of enfranchised voters, democratic elections, and public debate. The nation-state has had the main *catalytic function* for the democratization of state power.[21] It contributed to the fostering of love of the political institutions—love of the republic—and the way of life that sustains the freedom of a people.

If government presupposes a common pre-political identity embedded in a clearly defined demos, then the EU does not qualify as such. But if it rather depicts a condition of *ordered governing* including the functions of law-making, the execution and implementation of collective decisions, and the interpretation and application of law, the institutional make-up of the EU to a certain degree fits such a definition, as there are well-developed legislative, juridical, and administrative functions. Modern constitutions are faced with the double task of ensuring *legitimate authority* and *social integration*, and one may therefore disconnect them from the state form and instead link them in with the project of modernity, whose normative telos is to make the addressees of the law also their authors (Frankenberg 1996). The crux of government is not *state* in its collectivistic, nationalistic reading, but *democracy*. A democratic government depicts then not a community of fate that autonomously governs itself, but an association of free and equal citizens that govern themselves through law and politics and which are held together in the mutual recognition of fair structures of law-making. In this sense: 'Democracy is a revolutionary form of government. For its aim is to find a place for continual change within government. Its law exists to foster freedom: its force exists to protect law' (Lindsay 1947: 266). A true republic presupposes democracy, but democracy does not presuppose the state. Constitution and democracy are not legally tied to the state (Brunkhorst 2005: 166). A constitution embodies the concept of the right of the demos, that is, an inclusive communica-

[21] 'Democratic participation, as it slowly became established, generated a new level of legally mediated *solidarity* via the status of citizenship while providing the state with a secular source of *legitimation*' (Habermas 1998a: 112).

tive will and action community of affected parties that mutually give one another rights to participate.

By disentangling the concept of statehood from democratic constitution as well as the *natio-model* of civic solidarity, we arrive at a less demanding device for the integration of modern societies; one that hinges on *the authority of fair procedures*; on the manner in which the institutional arrangements of modern constitutional states—the governmental structure—involve the citizens in comprehensive opinion and will-formation processes and which themselves aspire to bear the burden of legitimation and not pre-political values and fixed identities. The question that the EU raises is rather whether such a structure can be democratic and whether it possesses or can establish a sense of solidarity and we-feeling that is required for collective action. A sense of solidarity and a common identity make up the 'non-majoritarian' sources of legitimacy. They establish the deeper ties of belonging and allegiance and make possible the transformation of a collection of disjunctive individuals and groups into a collective capable of common action. As was made clear in Chapter 3, the deliberative approach posits that allegiances can be created through institution-building and inclusive procedures of opinion formation and decision-making. A demos and a common will are not pre-political conditions and presuppositions of collective self-determinations and democracy, they can be *forged* in inclusive communicative settings.

The concept of government presumes the existence of *a power-wielding association* with enduring social interdependence, with competences of its own and collective decision-making capacity; with no realistic exit options. It requires a *constitution* with a bill of inalienable rights, and provisions that delimit the powers and competences of the various branches of government. The constitution must be upheld by the successful operation of a set of political *institutions*. These must be popularly elected bodies that can translate values into laws, and bodies that reliably implement the laws into decisions—subject to popular oversight and scrutiny.

The EU is different from a state since it is created by deliberate design. It sets the criteria for inclusion and exclusion itself and membership is voluntary and optional. However, due to the growing interdependence and entwinedness—the deep economic and legal integration; the opting-out possibilities are legally circumscribed and largely formal. Hence, the EU does not merely represent an opportunity structure over which actors have preferences and through which they can realize their goals under conditions of uncertainty. It does not only harbour sites for bargaining oriented towards a compromise between different interest groups' and between member states' preferences, but also a structure under which common problem-solving and authoritative conflict resolution take place. The EU has taken the shape of a *political system* for collective decision-making with input, throughput and output structures of its own; with representative mechanisms as well as legally institutionalized procedures of reason-giving. In the working groups and committees, as well as in all authorized decision-making bodies, the members must deliberate in the shadow of the law; they must justify

opposing views with reference to European law. One may therefore compare the constellation that makes up the EU to the standards of a government:

> Even if the Union's institutional settlement has to accommodate a particularly broad array of interests, it still legislates, administers and adjudicates. The legitimacy of these processes also has to be assessed according to the same standards that one would apply to any government. (Chalmers et al. 2006: 87)

The notion of government stripped of nationalistic and coercive elements may fit as a characteristic of the EU as it is a well-developed system of procedurally regulated legislation, judicial control, and administrative decision-making that to some degree mirror the separation of powers' model of the democratic constitutional state. But how can the law be effective and apply to all in the same way without state-like power to unilaterally sanction norm breaches? This is the lingering question, which I will deal with in the next chapter.

CONCLUSION

The EU has transcended an international regime or an international organization and is contributing to the reorganization of political power in Europe as well as to the transformation of national governmental structures. The nature of the process of integration combined with the breadth and scope of competences of the Union make clear that any strategy for increasing the legitimacy of its institutions must consider direct sources of legitimacy. The EU can no longer be based on *indirect legitimation* through the national political processes.

The governance approach suffices neither in depicting the multi-level constellation that makes up the EU, nor in theoretically providing for the required sources of legitimacy. It espouses networking and partnership models of integration, which may help in rationalizing policy-making and implementation, but not in providing for the required democratic legitimacy. The governance path is problematic as it basically comes down to *steering* without democracy. New forms of governance based on networking and informal decision-making, peer review and benchmarking—on naming and shaming—can perhaps destabilize authoritarian power regimes and to some extent help democratize polities, but they do not meet with the democratic criteria of political equality and accountability. Hence, governance does not represent a democratic alternative for the European Union. Moreover, in its Treaties, as well as in its institutional make-up, proclamations and rhetoric, the EU has committed itself to the principles of the democratic law-state. There is a need for clarifying such standards and also for identifying supportive institutional structures. By decoupling government from both nation and state, we are better equipped to tackle the problems that this 'non-indentifiable object' raises for the established disciplines of European thought.

9

A State-less Government

INTRODUCTION

Up to this point it has been clarified that the intergovernmental approach, as well as that of transnational governance, cannot fully account for the EU. Neither can the value-based approach, as discussed in Chapter 3, which represents an extension of the nation-state model to the European level. The EU is also more institutionally diverse than the most diverse federal state. A federation is a composite state constituted by diversity, which, however, exhibits one identifiable apex of authority. The constitutional doctrine of federal states provides a direct legal relationship to the demos, to the citizens of its constituent units (such as *Länder*, states, provinces).

The legitimizing principle of a sovereign authority in the form of a citizenry—a people—or a properly elected assembly symbolizing the people is not in place in the EU. But what may be counted on as a legitimizing principle is a system of rule underlying, as well as emanating from, a constitution-making process. The EU is a rights-based, government-type entity stemming from *the fusion* of European constitutional and democratic traditions. The standards of democratic government are brought to the fore through the principles and values adopted by the EU. Democracy came to the fullest expression through the decision in 1976 to elect the representatives of the European Parliament by direct universal suffrage. The Treaty of Maastricht established a European Union citizenship and mentions democracy in the fifth recital of the Preamble. Through the Amsterdam Treaty, democracy was made a founding principle:

> The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. (TEU Art. 6.1)

This is a doctrine that makes democracy a constitutional principle of the Union (Bogdandy 2007). The Lisbon Treaty states that 'The functioning of the Union shall be founded on representative democracy.'[1] Further there is the right of citizens' initiative which allows at least one million signatories from a significant number of member states to ask the Commission to take a specific initiative (Arts 11 TEU and 24 TFEU). EU citizenship is confirmed and developed. The right of citizens to approach the European Court of Justice is broadened.

[1] Art. 10 TEU, as amended by the Lisbon Treaty.

I conceive of the EU as an emerging authoritative government, which I depict as the political organization of society, or in more narrow terms, as the institutional configuration of the political unit. As laid out in the previous chapter, a non-state entity can make up a system of government in so far as it performs the functions of *authorized* jurisdictions. The institutional complex of the Union, the competences, the rights, the procedures, the policy-making processes, and sites it now harbours for participation, contestation, and representation testify to the fact that the EU has moved in the direction of an autonomous government with democratic features. Even though it does not have sovereign control in a clearly delimited territory, it claims to possess a legitimate authority based on entrenched hierarchical principles of law as well as a set of representative political institutions for collective will formation. The multi-level constellation that makes up the Union is deficient in democratic terms as the citizens are not able to govern themselves via the steering media of politics and law. There is an *unfinished agenda* with regard to institutional reforms as well as with regard to what kind of competences and functions should be 'communitarianized' in Europe. In this chapter I will discuss the EU in a wider cosmopolitan frame of reference, in order to address the character of the entity as well as its legitimacy basis.

In Part II of this book we saw that the democratic aspects of the constitution-making process speak to the criteria of a rights-based government, that is, a polity with power-wielding capacity, a material constitution, and political representative institutions. The EU's cosmopolitan dimension was also highlighted. We should, however, distinguish between a cosmopolitan world order and the EU as *regional cosmopolitan government*. We should also distinguish between whether the self-understandings of the actors of the polity are reflecting cosmopolitan views and whether this is reflected in the structure or policies of the polity. As cosmopolitanism is not held to be part of the EU's self-identity, I am concerned with structural and normative premises. Entities such as the EU equip the global community with *agency*—with an organized capacity to act—at the regional level. Hence, it is a response to the claim that since there is *global interdependence* there are global duties which should be complied with through political organization (Pogge 1994a). The interdependence is rather intense, as unstable financial markets, international crime, environmental crises, and unregulated migratory flows offer a few examples of. There are serious objections against a democratic world state based on universalistic cosmopolitanism, and the question is whether a regionally situated polity such as the EU represents a viable alternative.

In this chapter, I first address the cosmopolitan argument in the context of globalization in order to flesh out what questions cosmopolitanism is an answer to and the form of institutional response that is required. Then, I address Habermas's solution in his outline of the EU constitution as a *federation of nation-states*, which I find inadequate: the EU is committed to overcome nationalism, hence transforming nation-states into member states. Moreover, the reform process that the EU has embarked upon carries forward the process of domesticating international relations in Europe and the commitment to post-

national democracy. This, together with the EU's cosmopolitan dimension, point towards, not a *sui generis* type of polity, but one that *cultivates the governmental aspects of the modern form of authoritative rule*. I conceive of the EU as a rights-based government without a state. Thereafter, I examine the putative democratic legitimacy of such a system of government and how its relative stability can be accounted for. I find that the multi-level constellation that makes up the EU reflects not merely a compromise between stakeholders but a *working agreement* resting on some shared and some not-so-shared reasons. The EU is contested but the European citizenry seems to share a common understanding of and commitment to the basic political structure reflected in substantially similar national constitutional traditions. This, I think, can account for the degree of de facto legitimacy that the EU after all enjoys. However, there is *no stability without validity*, and as the unity of law is not in place, the EU is unstable. It is still in search of its proper *finalité*.

THE COSMOPOLITAN CONDITION

For the rights of the *world citizen—kosmou politês*—to be respected, human rights need to be institutionalized in bodies above the nation-states that actually bind individual governments and international actors.

Juridification beyond the nation-state

In the last decades, we have witnessed a significant development of rights and law enforcement beyond the nation-state that bypasses democratic control. *Juridification* denotes the expansion of legal norms and the accompanying system of adjudication to new domains of social life. It depicts law's expansion and differentiation as well as increased conflict resolution through legal means (Blichner and Molander 2008 see also Goldstein et al. 2001). It implies the imposition of a cooperative scheme upon others who cannot influence or revise the terms (Bohman 2005: 39).

Rule-making, as well as rule interpretation and application, takes place in international and global settings. It pertains to economic regulation but also to security, labour standards, environment, rights, product and food safety standards. The rules may be initiated by states as well as by private or public-private governance bodies, but they are handled in settings and in bodies with de facto decision-making independence from the states. The room for *discretion and manoeuvre* is relatively high and their effects are potentially far-reaching:

> The rules made in those settings are consequential for the conduct and welfare of the individuals, firms, and states, in part because they provide standards for coordinated action and in part (though not only) because national rule making

> itself proceeds subject to rules, standards, and principles established beyond the national level. (Cohen and Sabel 2006: 165)

The development of the European Community is a prime example of juridification beyond the nation-state as citizens are subject to regulations stemming from Community law-making and intergovernmental proceedings. An EU enacted directive commits all the members of the Union to amend the domestic law so that the terms of the directive are given effect. The amended domestic law binds citizens, courts, and officials alike. Also regulatory institutions such as the WTO, the World Bank, and the IMF impose a scheme of global economic cooperation on the basis of inter-state bargaining. Correspondingly, there is an increasing amount of judicial procedure at the international level set up to adjudicate in disputes over breaches of international law. Since 1995, the dispute-settlement mechanism of the WTO has become independent of the contracting parties. The diplomatic dispute-settlement procedures under GATT 'have been replaced by a judicial dispute settlement mechanism under the WTO, which is authorized to convict, and if necessary punish, states that do not fulfil their commitments' (Zangl 2005: 73). We are witnessing an expansion of the rule-of-law principle on the international arena, complementing the domestic one in areas such as international trade, security, labour, and environmental law (Keohane et al. 2002). Similarly, human rights are institutionalized in international courts, in tribunals and, increasingly, also in supranational rule-making bodies over and beyond the state that control resources for enforcing norm compliance.

However positive such a development might be by moral and efficiency standards, it does not harmonize with the democratic idea that the people should be making the laws they are to obey. In the international arena, human rights are not democratically enacted. The new situation is marked by lack of democratic accountability, by juridification, technocratic governance and executive dominance. The latter denotes the net empowerment of the executive branch of states at the expense of parliamentary involvement and popular control. This applies when legislative assemblies do not make the laws and the general public are unable to hold decision-makers to account. The inscrutability of decision-makers at the international level due to lack of transparency exempts the executives of justificatory requirements and gives them an advantage in terms of information, which they can technocratically make use of.

Legislation without democratic input amounts to hegemonic law. According to Hauke Brunkhorst, it is *rule of law without self-legislation*. The principle of democracy can, as we have seen, be pinned down to two basic criteria: *autonomy* and *accountability*. In order for a polity to be democratically legitimate, it must, at a minimum, be organized in such a way that there is free access to the public realm, that governmental positions are open to all, that those who govern are appointed by elections at regular intervals, and their actions subjected to public scrutiny and judicial review.

Decisional exclusion

The main challenge to national democracy does not emanate from European integration, but rather from *decisional exclusion* as a result of denationalization and globalization. Many of the decisions affecting national citizens are made elsewhere, or are not made at all. Indeed, these processes reveal decreasing steering capacities on the part of the nation-state (cf. Nielsen 2004; Marchetti 2006: 287). Today, citizens' interests are affected in ways and by bodies that are difficult to hold responsible via the ballot box.[2] There is no longer overlap between decision-making participants and affected parties. Denationalization shatters the two symmetries necessary for effective participation: first between the citizens and the decision-makers that 'they are to hold to account, and secondly between the "output" (decisions, policies and so on) of decision-makers and their constituents' (Held 1995: 16). Without *input congruence,* participation in making the decisions that affect one, there can be no self-determination; and without *output congruence*, without overlap between the polity and the territory it controls, there can be no effective participation.

Every system of collective decision-making has to respond to both efficiency and legitimacy requirements. It has to achieve results, and to achieve them in a correct manner. In normative terms, these are very different sets of requirements, but they are, ultimately, co-dependent. Capability bereft of legitimacy is unstable and inefficient. Legitimacy without capability is futile.

The modern democratic nation-state envisages a system that has been held to meet these two criteria. It envisages a governmental structure of political authority based on supreme jurisdiction over a demarcated territory, underpinned by the monopoly of the use of force, that depends on the allegiance and loyalty of the ruled, which in turn had to be won by the governments. Due to the rights assigned to them, the subjects of power were empowered and could be turned into active *citizens*. Legitimacy is conferred by so-called liberal democratic institutions through which citizens elect their representatives, form common opinions, and voice criticism. In this model, state sovereignty becomes synonymous with democracy, as it enables constitutional government, which in turn justifies democracy and hence the protection of citizens' rights.

This model has been challenged due to several causes captured by the term 'globalization' that have all served to undermine and transform it. In a 'globalized', denationalized world, the requirements of legitimacy and efficiency, of input and output congruence, no longer coincide. Those who can be held accountable have little control over the factors affecting people's lives, and

[2] Some have disputed that we inhabit a globalized world (e.g. Hirst and Thompson 1996), but I think it is hard to deny the existence of globalization even though it need not be unprecedented (see Held et al. 1999). Modernity itself is globalizing and the modern nation state never existed in total isolation. However, one may prefer the term denationalization, which is a less demanding concept, and one which denotes the relative increase of cross national transactions (compared to national exchanges) and the extension of social spaces beyond national control (Zürn 1999: 7).

those who have the decisive power are beyond democratic reach. Internationalization, globalization, functional differentiation, deregulation, and privatization put constraints on this correlation of legal-political order and societal order. Sovereignty has become multi-dimensional and *disaggregated* (Slaughter 2004). In the twenty-first century, the persisting national constellation of societies can no longer be equated with political order. The most serious challenges and threats to the structure of the nation-state stem from the dissolution of the congruence between the social space in which societal transactions occur and the political space to which statal regulations apply. As a consequence, the steering capacities of the nation-state with regard to Keynesian counter-cyclical policy—macroeconomic regulation—and redistribution have decreased with far-reaching effects on the notion of what constitutes legitimate government. The nation-state will no longer be able to realize the freedom and well-being of the citizens on the exclusive basis of its own resources. Hence, a post-national order becomes necessary in order to reclaim the scope for *agency* that contemporary developments have undermined. Such an order must be provided with the resources that make sanctions credible. This is needed for ensuring norm compliance as well as consistent and impartial norm enforcement. It requires the constitutionalization of international law so that power comes to serve as an instrument of law and not the other way round, which is often the case with the present state of affairs.

The quest for post-national democracy is due to the problem of handling *juridification beyond the nation-state*. This quest stems from the problem of institutionalizing human rights correctly. As it is impossible to be fully democratic within a non-democratic world order, what is needed at the global level is not merely an intergovernmental organization—under an international law regime—that ensures observance of peace and human rights, but rather a supranational body able to adjudicate in the name of all: *an authoritative third party* that acts as a mediator, arbitrator, and judge (Bobbio 1995). The cosmopolitan condition requires a union of states bound by a constitution and not just a 'permanent congress of states', such as the *League of Nations*, which amounts to a voluntary federation of nation-states that, for Kant (1795)—in the essay 'Toward Perpetual Peace'—is the 'negative surrogate' for a 'universal state'. The point is then barely that peace is feasible only among democratic states, but moreover that *the union of states must itself be democratic* in one form or another. This is the background for the need of democratic orders over and above the nation-state; the need for a *legislative power with Kompetenz-Kompetenz*, which can give and change norms.

In this perspective, the UN needs to be made into an organization equipped with executive power for law enforcement because law should be made equally binding on each of the member states. Five issues have been central in the debate on UN reform: the Security Council prerogatives, the creation of an Assembly of the Peoples, the expansion of the jurisdiction of the International Court of Justice, the limited financial endowment, and the reformation of the peace mandate. Regarding democratization, one option is to supplement the existing order with territorial representation: a World Parliament based on a transforma-

tion of the General Assembly into an upper house sharing its competences with a second chamber and the introduction of qualified majority rule. This goes together with a new Charter of Rights and Duties specified on different spheres of power, compulsory jurisdiction before the International Court, and 'permanent "secondment" of a growing proportion to a nation-state's coercive capability to regional and global institutions'.[3]

David Held (1995), Daniele Archibugi (2003), and Andrew Linklater (1998) draw on the democratic right of the citizens to be able to exercise control over the social, economic and political conditions that affect the options available to them. In their perspective, the world is one as humankind belongs to a single moral domain: each person is regarded as equally worthy of respect and concern; all persons of the globe are rights-bearers. This moral argument—amounting to moral cosmopolitanism—need not be very contentious as for most modern political theories the individual freedoms and rights have priority. However, when it comes to deciding what this implies in institutional terms—political cosmopolitanism—problems arise. According to Held (1995: 192ff), *a world state* is necessary to protect seven clusters of rights: health, social, cultural, civic, economic, pacific, and political rights.[4] Jürgen Habermas (2001a) objects to such a political form of cosmopolitanism. The UN cannot be a polity with the ordinary functions of a state, with far-ranging competences, equipped with executive and enforcement power on a whole range of areas, because the sources of solidarity are lacking. The state form will be overstretched and the basis for common will formation in an ethical-political sense—*civic solidarity*—is not available at this level. Why is that so when this is actually what the nation-state provided at the national level?

COSMOPOLITAN DEMOCRACY?

The modern nation-state solved the dual problem of social integration and democratic legitimation because it managed to keep together 'the idea of a community of fate' (based on the fiction of a common (ethnic) descent, language and history) and the idea of a voluntary union based on citizenship rights.

[3] See Held 1992: 36. Further: 'And equipping the world organization with the right to demand that member states carry out referendums on important issues at any time is also an interesting suggestion under discourse theoretical premises' (Habermas 2001a: 111). See Marchetti 2006 for an overview of the democratizing reforms of the UN.

[4] In addition one may include compulsory jurisdiction before the International Court, new coordination of economic agencies, and the establishment of an effective accountable, international military force in the short term objectives of cosmopolitan democracy (Held 1995: 279).

Solidarity and legitimation

The nation-state premised on a collective identity upholds the diverse functions of the sovereign territorial state in a democratic manner, that is, the functions of the administrative and tax-based state, on the one hand, and those of the constitutional and modern welfare state on the other hand. As was made clear in the previous chapter, nations can be seen to rest on politically homogenized identities, which are symbolic constructions of an artificial collective *we*, and not on essentialistic, pre-political categories as communitarians tend to see them.

While the communitarians run the risk of seeing the nation-state as the only possible form for a people's union based on a collective identity, and thus of conceiving of the nation-state as an end in itself, the cosmopolitans run the opposite danger of glossing over all distinctions and differences. In a moral perspective, borders have only a derived status, and thus have no independent value: assignment of responsibilities follows from *the institutional division of labour*. Lower-level communities and administrations—local, national, and regional—are hence merely needed for prudential reasons. In this perspective the freedom and welfare of human beings will best be secured by organizing the human population into different societies each with its own political institutions specialized for taking care of the interests and rights of the citizens. For liberals, borders have no intrinsic value. Cosmopolitans second this position: patriotism does not trump *the love of humanity* (Nussbaum 1996: 17).[5] In a rights-based (as well as in an instrumental) perspective, cosmopolitanism is seen as providing 'support for a multi-level system of governance in which supra-state authorities monitor the conduct of states (and powerful economic and social institutions) and seek to ensure their compliance with cosmopolitan ideals of justice' (Caney 2005: 182).

Creating a political order based on universality, on the status of world citizens who are represented in a world government through direct elections, is problematic. A cosmopolitan order is based on complete inclusion—it cannot exclude anyone—but a community is based on a *distinction between members and non-members*. There is also a tension between universal principles—human rights—and particularistic identities based on a common culture and descent as constitutive for democratic legitimacy. The 'Janus face' of the modern nation-state points, according to Habermas, exactly to this fact: it is an organizational form based on universalistic principles which are also embedded in specific communities which shape a collective identity that is historically and territorially situated. The citizens conceive and appropriate universalistic principles in light of their own history and tradition. They are realized in a particular context, in a

[5] Further, '*Justice* is realised *in multiple relations*, in that responsibilities for promoting human capabilities are assigned to a wide range of distinct global and domestic structures' (Nussbaum 2006: 323).

particular form of ethical life—a lifeworld—founded on shared traditions and collective memories and commitments.

It is this cultural and ethical dimension that is lacking at the world level. The requisite *sameness*; the substantial equality needed for citizens to be able to see themselves as equals is not available. There is no particular context of values and obligations that makes rights shrewd. We have *special obligations* to fellow members of our society and to the specific persons that are close to us. They stem from belonging to a society and are socially ascribed and substantively underpinned. Obligations to strangers, on the other hand, do not usually arise from membership in a community but from legal duties bolstered by human rights (Habermas 1996a: 510f). Moral cosmopolitanism does not recognize special obligations, that is, obligations that arise out of membership in a concrete community. One may also say that national sovereignty has 'moral importance' as the modern principle of autonomy entails the right for people to live under laws given by themselves, and 'one very important part of this autonomy was the right to do things differently from one's neighbours' (Nussbaum 2006: 314).

> Cosmopolitanism misunderstands people's local affiliations that is, attach ments to various communities that are typically experienced as imposing re sponsibilities different in kind and degree from those imposed on us by our common humanity. (Beitz 1999: 290 1)

Serious objections can thus be raised against political cosmopolitanism in the form of a rights-based world state.

Cosmopolitanism restrained

First of all, there is the argument that rights must 'find their home'—they must be embedded in a culture and in concrete relationships in order to be meaningful and able to protect interests (Habermas 1999b: 270). Rights have to be rooted in practical social relationships where they can be interpreted and operationalized in relation to the concrete needs and interests of human beings in order to have bearing on actual problems and conflicts. It is with regard to experiences of injustice, disrespect, and humiliation that claims to rectification and compensation can legitimately be made. This requires contextualization.[6]

With regard to the problem of *legal protection*, the principle of the constitutional state requires the state to act on legal norms that are general, clear, public, prospective and stable in order to safeguard against states' infringement of individual liberties and rights. Hence the laws, in a law-state, take the form of rational general principles that accord with certain logical attributes, that is, a law that is

[6] These concerns are often informed by Hegel's criticism of Kant's idea of a cosmopolitan right. However, Hegel's critique was not of cosmopolitanism as such, but of the propensity of turning it into a fixed order: 'It is defective only when it is crystallized, e.g. as a cosmopolitanism in opposition to the concrete life of the state' (Hegel 1821: 134, §209).

universally binding without exception (Schmitt 1926: 42, 43). Further, rights are contested and require argumentation and interpretation with regard to concrete interests and values in order to be explained and justified, and they need to be firmly institutionalized and operationalized to have a bearing on actions. They require legal regulation and constraint. Individuals' rights are limited by others' rights and other concerns, and the abstract law enforcement by a world state runs the danger of glossing over relevant distinctions and differences, that is the danger of *soulless despotism* and peaceful slavery that was addressed in Chapter 6. How can the *freedom* be protected in a world state that requires an immense concentration of power in the executive? 'The larger the state [. . .] the more efficient the executive must be, until finally a point is reached beyond which the executive either breaks down or can no longer be controlled by the legislature and the social base' (Maus 2006: 472). Further, when a nation-state treats its citizens in an unjust manner it can be subjected to external pressure: 'If the world state should become unjust, there would be no corresponding recourse' (Nussbaum 2006: 312). Moreover, there will be no right to exit and nowhere to go for asylum-seekers. Hence, proponents of a world state with far-reaching competencies—with an executive government—are facing severe difficulties from the point of view of the *Rechtsstaat*.

Third, the shared values of the global culture are too weak to provide stability and *motivation* for collective action and solidarity in general. This is the sphere of *universalistic claims* and responsibilities that arise from general duties. Here human rights can be justified according to their status as moral rights; that is with reference to duties that bind the will of autonomous persons. Human rights designate what is universally valid but not what is valid for a particular group of people. They do not generate obligations of the kind required for *solidarity* and common will formation in a strong sense, that is, the kind of solidarity that makes possible collective action in general and redistributive and welfare state measures in particular.[7]

The nation-state is held to be the largest possible container of solidarity (Offe 2003b). Redistribution and social care provided by the state require a kind of civic solidarity where the members actively take responsibility for each other as fellow citizens. The solidarity of world citizens, on its part, is *reactive*, it is moral not civic. It is based on reactions to violations and humiliations of individuals in their capacity as human beings. Such solidarity is not based on a collective identity, which for its part revolves on the distinction of 'us and them'. To have things in common requires that other things are excluded. What is dear to us, what we share with one another and not with all the others, is what makes us special; something that arouses feelings and emotions that we are committed to and that can motivate us to collective action. The latter stems from membership in a community of fellow compatriots while the former stems from the rather weak form of an all-inclusive society. The world citizens do not have much in common

[7] '[A] world wide consensus on human rights could not serve as the basis for a strong equivalent to the civic solidarity that emerged in the framework of the nation state. Civic solidarity is rooted in particular collective identities; cosmopolitan solidarity has to support itself on the moral universalism of human rights alone' (Habermas 2001a: 108).

apart from the shared 'humanity'. The world order lacks the ethical-political component necessary for common will formation and cannot be the basis for a world government. A world state could not be constructed because there is no corresponding *world society* (Maus 2006). Due also to the problem of size and state overstretch, the plea for cosmopolitan democracy has therefore to take another route, that of 'a global domestic policy [. . .] without world government', according to Habermas (2001a: 104).

The cosmopolitan community of world citizens, with the UN or the like as a government executing a common will, would have to be based on negative duties, that is, not to undertake war of aggression and not to commit crimes against humanity. It would be a rather constrained entity confined to maintaining order, that is, security, human rights protection, and risk prevention. On this, Habermas is in line with Kant in seeing the *world organization* merely as a *security state*, but he goes beyond Kant's idea of a pacific federation of independent states—a confederation or a voluntary federation. In 'Toward Perpetual Peace' (1795) Kant feared that a world government would lead to global despotism or else be a fragile and impotent empire. On the other hand, *a permanent congress of states* without a constitution, as Kant opts for, is futile because a world organization requires mechanisms for authoritative decision-making and adjudication: 'Just how the permanence of this union, on which a "civilized" resolution of international conflict depends, can be guaranteed without the legally binding character of an institution analogous to a state constitution Kant never explains' (Habermas 1998a: 169).

While one may find a world state neither necessary nor desirable or feasible, the EU is a different matter: it is the prime example of a global domestic polity at the regional level. Here the requisite third party for adjudicating conflicts is already in place. According to federalists, in order to combat the negative effects of economic globalization it is necessary to expand national forms of solidarity and welfare-state measures to a post-national federation at the regional level: *a European sovereign* that can overcome the problematic aspects of nationalism and particularism, and that can solve common, trans-border problems. In this model the EU is an instrument to alleviate the negative effects of economic globalization and to regain at the European level some of the lost capabilities at the national level. It is a way to politically catch up with economic globalization and also to rescue the welfare state.[8] A republican Europe can restore the conditions for collective self-determination and collective goal attainment threatened by globalization. In this way the EU in fact enhances democracy by establishing a capacity to act politically at the European level. Now, Habermas's own model of the Union is less than that of a federation.

[8] 'Welfare state functions, obviously, can only be maintained on the previous scale if they are transferred from the nation state to larger political units growing to catch up, so to speak, with a transnationalized economy' (Habermas 2000: 33).

FEDERATION OR STATE-LESS GOVERNMENT?

But what is the EU, then, and what can it possibly develop into? A federation or something less? A multi-polar, multi-level post-national Union? In case of the latter, how does it hang together?

A federation of nation-states?

The EU is a power-wielding system that requires democratic legitimation and thus a constitution that establishes the principle of legitimacy of political rule and the basic normative conditions for its exercise. By laying down the fundamental rights that free and equal founders mutually grant each other, a constitution establishes *a horizontal association of citizens*. The legitimacy of the law stems from the presumption that it is made by the citizens or their representatives—the *pouvoir constituant*—and is made binding on every part of the polity to the same degree and amount. This is so to speak inherent in the legal medium itself, as it cannot be used at will, but has to comply with principles of due process and equal respect for all. A legally integrated community can only claim to be justified when the laws are enacted correctly; when the rights are allocated on an equal basis.

Constitutions assign competences, positions and powers. They specify fundamental procedural conditions for democratic legislation. As a rule, a written constitution, which cannot be amended by simple majority vote, contains checks and balances, horizontal and vertical separation of powers, over-representation of small jurisdictions, judicial review and delegation clauses. It contains rules for creating norms, for making statutory law as well as for amending the constitution. A constitution is enabling; it is not merely prohibitive. A proper constitution has to include, in addition to a Charter of inalienable rights, a competence catalogue delimiting the powers of the various branches and levels of government. Compared to the presidential system of the United States, a European Union of Nation-states would according to Habermas have to display the following general features:

- a Parliament that would resemble the Congress in *some* respects (a similar division of powers and, compared with the European parliamentary systems, relatively weak political parties);
- a legislative 'chamber of nations' that would have more competences than the American Senate, and a Commission that would be much less powerful than the White House (thus splitting the classical functions of a strong Presidency between the two);
- a European Court that would be as influential as the Supreme Court for similar reasons (the regulatory complexity of an enlarged and socially diversified Union would require detailed interpretation of a principled constitution, cutting short the jungle of existing treaties). (Habermas 2004: 31–2, italics added)

Habermas does not foresee a European Federation based on hierarchy and the unity of law directly emanating from an empowered Parliament, because of the position and legitimacy of the nation-states. The second chamber of government representatives—*the chamber of nations*—'would have to hold a stronger position than the directly elected parliament of popular representatives, because the elements of negotiations and multilateral agreements between member states that are decisive today cannot disappear without a trace even for a union under a political constitution' (Habermas 2001a: 99; see further 2004: 32). To him, the EU can at most become a *Federation of Nation-states* rather than of citizens, resembling a mere confederation—a voluntary federation.[9]

As was discussed in Chapters 4 and 8, the EU has developed beyond a functional problem-solving regime, which is confined to a set of rules that regulate the operation of government and its interactions with the economy and society and which, in legitimacy terms, operates on powers delegated from the member states. The EU has moved beyond intergovernmentalism and is more than a confederation, and an international law regime. Through establishing autonomous powerful institutions the states of the conflict-ridden European continent have domesticated international relations among themselves. Nationalism is constrained, sovereignty is pooled, and power is shared. The effects of the EU's policies on states and citizens all over Europe, its institutional and constitutional structure, its agenda and competence catalogue—which taken together in practice foreclose the exit option for the members—as well as its self-understanding, testify to the fact that a supranational polity in its own right has emerged. The EU has established a vital authority structure and rule-making system, which, however, due to lack of democratic input, is prone to juridification and executive dominance.

A clear federal model based on the unity of law would, on its part, in principle, be able to solve the democratic problem. It would make clear the demos, the division of competences and powers, and would found the emerging political community on political rights and representative institutions.

Unitas in pluralitate

A federal EU would imply that it is institutionally equipped to meet the claim of *direct legitimation*, and that this be entrenched in legally binding form.[10] A federation is *a union of citizens* under coercive laws; it is based on an institutional arrangement like that of a sovereign unitary state albeit more complex.

[9] It should be noted that Habermas is mainly known as a champion of European federalism. In his later writings, the quest for post national democracy has been remarkably watered down as is reflected in a plea for a liberal rule of law regime beyond the nation state. I will return to this.

[10] This section draws on Eriksen and Fossum 2008.

> [T]he institutions of a federal state are situated in a constitutional framework which presupposes the existence of a 'constitutional demos.' A single *pouvoir constituent* made up of citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangements (is justified) [*sic*]. (Weiler 2001b: 56)

The conventional shape of such a community is the democratic constitutional state, based on territorial and functional control, in possession of its own coercive means, a single 'pouvoir constituant' and proper chains of representation. According to this standard, a power-wielding entity such as the EU needs democratic reform—it requires a formal constitution with rights, with clauses for the separation of powers and for representative and accountable institutions. This would make possible the direct inclusion of the citizens or their representatives in the decision-making process of the EU. For such an order to be authoritative and legitimate, a *constitution-making subject* premised on a symbolic collective 'we'—a demos—would be required.

With regard to identity, one critical question pertains to whether Europe really possesses the requisite collective resources and political will to replicate the state model of representative democracy at the European level. The EU has a significantly weaker socializing ability than any state. Although the EU is by now affecting most policy areas, it is nevertheless true that the member states still retain the most important traditional mechanisms for socializing their citizens, such as school systems, a national vernacular, public broadcasting, and conscription (as far as the latter still exist). The EU, while increasingly affecting these issue areas, has far from overtaken them. The post-Maastricht politicization of the integration process has, if anything, been driven by resistance to Brussels-driven 'homogenization', a fear that draws some of its impetus from the experience with national nation-building processes. Europe's recognition of diversity is reflected in a subtle shift in the Union's credo: from the 'ever closer union' of the Rome and Maastricht Treaties to Laeken's *unitas in diversitas*—'united in diversity'.[11]

The EU has, in contrast to the state, inordinately weak coercive measures. It depends on the national governments for resources, legislative approvals, compliance, and also for the requested update of Treaty authorizations. This is not to say that the EU lacks power. The EU's effects are quite substantial. National and EU administrative orders have become integrated and have been 'layered around existing orders so that the result is an increasingly compound and accumulated executive order'.[12] Also administrative levels are fused, hence *fusion thesis III* (cf. Chapter 7). The EU is, above all, a political system that extensively utilizes law to create order and purpose. Law-making and law enforcement take place within a structure that combines hierarchical and horizontal procedures. Whereas a central body with superior resources is clearly absent, the system has developed a

[11] This latter term entered the Union's vocabulary around 2000 and is the motto of the EU, see <http://europa.eu/abc/symbols/motto/index en.htm> (accessed 1 April 2009). The aim of reaching an ever closer union is, however, retained in the Treaties. See also Trenz 2007.

[12] Curtin and Egeberg 2008: 639. See also Egeberg 2006 and J. P. Olsen 2007.

well-established legal hierarchy and consented authority relations. The EU is an authoritative system which has the legal competence to perform state functions in certain areas, which works without having to wield the threat of violence. It does utilize mechanisms of horizontal enforcement, which depend for their effectiveness on the nationally established shadows of brute force. The EU's own institutions for territorial control are at their weakest in the core state functions: military security, taxation, and police.[13] If the EU, thus, resembles a non-state-based quasi federation, it is with the important caveat that its 'federalism' is organized around other issues and methods of territorial control than is the case with every state-based federation. In the EU it is more 'low politics' than 'high politics', more 'soft law' than 'hard law'.

Further, and again in considerable deviation from the state model, the EU is based on an incoherent system of functionally variegated control of territory. With regard to border control, the UK and Ireland are associate members, not full members of the Schengen-based system, whereas the non-member states Norway Iceland and Switzerland are. And far from all member states have adopted the euro. These are some examples of functional differentiation. Further there are *mixed forms of representation*, as both elected and non-elected, both governments and functional groups, are included. With regard to decision-making, there are two institutionalized modes: the Community method and the Intergovernmental method, and there are informal ones. The upshot is that the EU is a compound polity—a multi-level constellation—characterized by:

1. Huge discrepancies in the *size* of the member states (from Germany to Malta);
2. Various levels (community, member states, sub-national units) as well as various dimensions (territorial and 'functional') of policy-making;
3. Significant *vertical institutional incongruence*, through federal (Germany, Belgium, and Austria), quasi-federal (Spain and the UK) and various forms of unitary arrangements at the member-state level;
4. A great amount of horizontal institutional heterogeneity, highly complex formal (institutionalized) ways of decision-making; at the Union level through different systems of representation and accountability (entrenched in supra-national and international structures), and far more so at the member-state level (various forms of presidential systems and parliamentary systems);
5. Complex informal ways of decision-making among actors of various degrees of institutionalization, acting in policy areas of different degrees of Europeanization and with different numbers of participants, agreeing policies under different decision-making rules.

[13] The EU is still first and foremost a civilian type power, as its own military capabilities are almost non existent, although the member states possess very significant military capabilities (Sjursen 2007b).

The asymmetrical size and powers of the constituent member states make it difficult to entrench the formal equality between the states as one representative principle (in addition to that of citizens). The Euro-polity is unique in the sense that it is a complex entity containing several federations within its own organization. However, even though it is distinctly different from a state, it has, over time, gradually moved towards statehood.

Regional cosmopolitanism

How close to statehood the EU will come, requires attention also with regard to the character and future of the states system. In the Westphalian order states are sovereign with fixed territorial boundaries and are entitled to conduct their internal and external affairs autonomously, hence without any possibilities for external actors to control the protection of human rights. But, as seen, legal developments over the last century have been remarkable, and one of their main thrusts has been to protect human rights. Both persons and groups have become recognized as subjects of international law. The Westphalian condition of organized anarchy is replaced by *conditional* state sovereignty; conditional on compliance with *citizens' sovereignty*. The very concept of sovereignty has changed, from denoting the state's supreme legal authority to uphold the law within a certain territory and being independent from any external authority (Morgenthau 1993: 321), to one that subjects state power to higher-order principles. In principle, states enjoy the rights of political sovereignty and territorial integrity only as long as they are governed in a morally tolerable way, but the duty to intervene or to help cannot fall on the international community as a whole as it does not possess *agency*. Hence, there is 'a general moral argument for international government—at a minimum, for establishing and developing political institutions to prevent violence not only between but within states' (Nardin 2006: 458, 463).

Organizations at the intermediate level—between the state level and the world organization—provide the 'international community' with some agency. They come to the fore as policy instruments following the institutional division of labour requested by cosmopolitanism. The EU is the most prominent example of such regional organizations—and is the only political organization beyond the nation-state equipped with a democratic mandate and some capacity to act collectively. It performs some state functions and contains some representative structures. One may thus conceive of the EU as a *regional subset* of an emerging larger cosmopolitan order. In such a perspective the borders of the EU could be drawn both with regard to what is required for the Union itself in order to be a self-sustainable and well-functioning democratic entity and with regard to the support and further development of similar regional associations in the rest of the world—that is, with regard to the viability of regional cooperation such as the African Union, Mercosur, the Association of South East Asian Nations (ASEAN), and the North American Free Trade Agreement (NAFTA). The borders of the EU

could thus be drawn with regard to functional requirements both for itself and for other regions, all within the framework of a reformed global system.

This notion implies that the Union would be a political order whose internal standards are projected to its external affairs; and further, that it would be a polity that subjects its actions to higher-ranking principles—to 'the cosmopolitan law of the people'. The law-enforcement capacity, as well as the democratic mandate, is weak although the moral salience of such an order is high. In other words, such a regional subset of the cosmopolitan order may be strong in terms of legitimacy as it can draw on a far-reaching consensus on moral individualism and human rights protection. Such an entity would be an answer to the claim that one should *not replicate the state model* at the European level as the 'system of states' is what makes necessary international organizations in the first place. The nation-states create problems for each other as well as for the universal protection of human rights and to upload the state model to the European level would replicate the problems at the global level, hence it represents yesterday's answers to yesterday's problems.

The problem with this solution is that it depicts what *all* have in common and not what makes a number of actors a group—a people—with some distinctiveness, a collective identity in marked difference to others, and which hence can be made a basis for motivation and collective action. Without some kind of we-feeling, the ability to act collectively will be rather limited. There will be no basis for solidarity and redistribution. The action capacity would be weak; it would be impotent in external affairs. Civic solidarity has often been in short supply in Europe but this has not prevented the EU from growing in size and competence over time. It has developed into a power-wielding entity, with a material constitution and political-representative institutions. The EU has expanded its realm of competence and has developed into a polity with:

- an institutional arrangement with representative qualities;
- an organization with competences and capabilities of its own;
- a material constitution with basic rights protection;
- transparency provisions and popular consultative mechanisms; and
- an (admittedly weak) intermediary structure of civil and political organizations.

A bounded and transforming order

The EU has a structure similar to that of an authoritative government which, as mentioned, depicts the political organization of society, or in more narrow terms, the institutional configuration of representative democracy and of the political unit. Some see the Union as a *Bund* (covenant) between a *Staatenverbund* and a *Verbundsstaat*. It is not a hierarchical order, but a cooperative venture of conflict resolution and problem-solving coordination within an obligatory frame of reference. The Bund is characterized by a fundamental antinomy, as it is a

legal-political reality on its own at the same time as it is dependent on, and protecting, the legal political reality of the member states (Schönberger 2004: 103).[14] It is based on a *status contract* aiming at changing the identity of the contracting partners—from nation-states to member states.[15] The EU is a particular kind of *Bund*, which originated through treaties, and which not only created a 'distinct political entity [. . .] but which at the same time transformed the political status of the parties to this treaty' (Offe and Preuss 2007: 192).

> The European Union is the first by definition voluntary federation in the history of mankind that recognizes the dissimilarity of its constituent parties. The EU is a political body which is committed to respecting the distinctive national identities of its member states and citizens, yet at the same time subjects them in many significant areas to the jurisdiction of a common government. (ibid.: 194)

The European Communities may not initially have had much power or many competences at its disposal but with the aim of furthering integration and closer cooperation, accompanied with the attainment of requested means, it transformed the constituent parties. The supranational character, the High Authority (later the Commission), and the status contract are what make the European form of cooperation stand out in marked contrast to international cooperation in general.

How can such an order be effective when the *sanctioning*, *organizing*, and *executive powers* of a state are lacking, powers which are held to be needed for ensuring rights enforcement, stabilizing normative and legal expectations, and the implementation of political programmes? As I explain below, the answer is that as European integration takes place among already constitutionalized and politically integrated states where the coercive functions are taken care of, the EU can manage to stabilize behavioural expectations and achieve collective 'bindingness' for its laws with reference to *the legal form* in which they are dressed. Conceiving of the Union as a government based on differentiating state functions, downplaying the coercive elements and upgrading the normative-institutional elements, we arrive at an organization that possesses a limited set of measures for ensuring implementation and compliance. Such an organization can accommodate a higher measure of territorial-functional differentiation than can a state-type entity, as it does not presuppose the kind of 'homogeneity' or thick collective identity that is widely held to be needed for comprehensive resource allocation and goal attainment. It is based on a division of labour between the levels that relieves the central level of certain demanding decisions.

[14] 'Ein Bund ist danach eine auf freier Vereinbarung beruhende, dem gemeinsamen Zweck der politischen Selbsterhaltung aller Bundesmitglieder dienende, dauernde Vereinigung, durch welche der politische Gesamtstatus jedes einzelnen Bundesmitgliedes im Hinblick auf dem gemeinsamen Zweck verändert wird' (Schönberger 2004: 100).

[15] A *status contract is* an oxymoron, designating 'the legal confirmation of a pre legal relationship' an existential relationship 'in which a person with a particular identity enters into a new legal relationship [. . .] for the purpose of changing this identity in a new way' (Offe and Preuss 2007: 192 3).

Table 9.1 Levels and dimensions of integration

Levels of Integration	Function	Type of Rule	Forms of Allegiance
Nation state	Collective goal attainment	Representative government	Shared attachment and we feeling
Regional polities	Regulation and 'redistribution'	Post national democratic government	Rights based collective identity
Transnational governance	Joint problem solving	Networks and soft law coordination	Epistemically founded identity
A world organization	Security and human rights protection	A law based polity without a government	Respect for cosmopolitan law

The EU, which has weak enforcement mechanisms, and has many states under its *hood*, relies mainly on the administrations of the member states to implement its policies. It is especially weak in the classical state-type functions: internal and external control. This reduces both European legislators' and courts' leverage at the supranational level and reveals a democratic problem in so far as it raises questions about their ability to uphold a system of rule in which the law can be made effectively binding on everyone to the same amount and degree. On the other hand, the self-proclaimed democratic system of law-making and norm interpretation at the European level, constrained by the member states, has built-in assurances that the EU cannot become an unchecked entity—a power-usurping Leviathan. The multi-level constellation that makes up the EU represents a unique institutional configuration with a considerable amount of authority and consigned competences.

In Table 9.1 the dimensions of integration from nation-state to world level that have been discussed are summarized. In this account of the post-Westphalian order the nation-state and the world order are conceived of as options on the thick-thin continuum with regard to identity and statehood. While the nation-state form of allegiance is based on a shared sentiment of attachment, its constitutional structure all the same exhibits cognitive-universalist features. We can talk about *a cosmopolitization of nation-states* as far as human rights clauses are included in their constitutions. Transnational forms of governance are necessary to tackle problems beyond the state and to cope with the negative consequences of globalization. Some of these problems may be solved adequately by intergovernmental bargaining complemented by new governance structures such as epistemic communities and a transnational civil society, the merits of which were discussed in the previous chapter. Other kinds of problems and conflicts require more firm forms of coordination in order to be resolved properly. Regional, quasi-federal polities such as the EU offer themselves as candidates for such functions. At the global level a world organization without a state in the shape of a democratized UN is needed for handling risk protection, for sanctioning human rights abuses consistently, and for establishing security measures in general. In this set-up *the state is conceived of as a variable* and not as a fixed category. Instruments of

enforcement range from hierarchical and hard-law prescriptions (prominently at the member-state level), to weaker variants associated with governance and governmental procedures and entrenched configurations of executive power.

JUSTIFYING THE MULTI-LEVEL CONSTELLATION

The question now is what can constitute the legitimacy basis of the European order? What kind of justifying reasons could it possibly draw upon and what would make it stable?

The multi-level constellation

The multi-level constellation that makes up the EU is a complex entity both with regard to project and structure. The term *constellation* depicts a juxtaposed rather than a fixed cluster of changing components, and one with several rather than one common foundation (Delanty and Rumford 2005: 37). A constellation rests on a *working agreement*. Parties concur, but not with identical reasons. A constellation reflects different motives and often competing interests. Nevertheless, it is tied together by agreements with regard to the values and interests it protects and is thus supported by reasonable and mutually acceptable reasons. It is not a firm and stable relationship as many supportive reasons and different legitimating principles coexist. The concept of a working agreement is an intake to the legitimacy basis of the EU—both with regard to the actual supportive reasons and the structural justificatory basis of the Union.

As a *project*, the EU may draw on different legitimating reasons. Traditionally, war is the state-building impetus. The EU may be said to have started in the ruins of the Second World War, not as a direct result of brute force or violence but as a political reaction tantamount to moral learning in the wake of a horrific war and crimes committed against humanity. It was made by design and had to base its foundation, its legitimacy, on other sources than those that established the nation-states. As a project it could draw on different kinds of so-called 'non-majoritarian' sources of integration. Among these are peace, freedom, progress, security, and welfare. Peace may be seen as the prominent motivation for the European integration process as such. A conflict-ridden continent would manage to cope with difference and interdependence through commerce and through the institutionalization of peaceful mechanisms of conflict resolution. With regard to the requisite shared we-feelings, they range from a common spiritual (Christian-Greek-Latin) basis, via the democratic constitutionalism (stemming from Magna Carta, the English Civil War, the French and American Revolutions), and the legacy of the Enlightenment, to the post-war peace motive, the Nuremberg Trials

and the UN, and the idea of a united and prosperous Europe, which all point to a motivational substrate for integration engendering trust and confidence. In Europe there is a widespread consensus on dignity-protecting basic rights, as is evidenced in the prohibition of the death penalty and the ban on torture, as well as in the establishment of the European Convention of Human Rights (1950) and the Council of Europe (1949).[16] The EU thus may draw on different sources of legitimation, from the pursuit of economic growth and welfare, via the protection of European values and identities, to the moral force of universal norms—human rights and cosmopolitanism.

Still, the European integration project is riddled with value conflicts and clashes of interests. For some it constitutes an opportunity structure for maximizing the interests of the members; for others it represents an instrument for solving cross-boundary problems and rescuing the welfare state; while others again see the development of a federal state as an end in itself—for guaranteeing peace and security. For some actors, the EU is the continuation of the Western humanistic development, for others it is that of Christendom. The EU is work in progress and rests on different legitimizing reasons, many of which one may expect reasonable persons to accept. They may all pass the first test of the publicity principle—the test of *discursivity*—as they can be intelligibly expressed and are generally comprehensible. They make sense to Europeans and all could be expected to have an opinion on them and take part in a debate over their desirability and practical implications. Not all of these reasons may, however, pass the second test—the test of *universalization*—that is, that they can be *approved* of by all affected. Glyn Morgan, for example, claims that state-provided welfare is not a European wide value, and that: 'The Anglo-Saxon model of capitalism—which is less regulated, more innovative, and (somewhat paradoxically) more congenial to women and immigrants—provides a better guidance here than the ossified, dirigiste models of Continental Europe' (Morgan 2005: 87).

However, such a view is not generally endorsed. Many (continental and Scandinavian) Europeans find the Anglo-Saxon model of capitalism too 'capitalistic'. In Europe there is disagreement with regard to what prosperity and progress mean and whether it also entails a welfare state—a social Europe—or merely an unfettered market economy. For the left, the EU is often seen as a harbinger of neo-liberal capitalism: socialists often claim that the European integration process sustains a neo-liberal supranational order, an order that undercuts both the systems of risk regulation and the measures of solidarity that were such characteristic traits of the European welfare state.[17] The EU can be seen as a test case for

[16] Founded in 1949, the Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals.

[17] The negative referenda results of the Constitutional Treaty can be construed as voters punishing the Union, as well as their own leaders, for actively taking measures to undermine both democracy and the ability to forge collective action (Nicolaïdis 2005: 14). See also post referendum surveys in France and the Netherlands (Flash Eurobarometer, 'The European Constitution: post referendum

whether the welfare state will survive globalization (Offe 2003b). The question is whether there is a systemic in-built bias in the EU's institutional-constitutional system in favour of market liberalization and regulation (negative integration)—at the behest of redistribution, social protection, and care (positive integration). Environmentalists oppose the value of *economic growth* and denounce the EU as founded on competitive market economies. There is also opposition to the whole project as many eurosceptics and communitarians see European political integration as synonymous with the factors that undermine the essence of nationhood.[18]

Thus, not all *reasonable reasons* pass the universalization test, and thus cannot serve as the stabilizing foundation of a political order. There is need for a more qualified agreement on the core legitimating principles. Morgan suggests *security* as such a core justificatory principle that all could agree with[19] as it is 'a presupposition of individual well being' as well as, according to John Stuart Mill, 'a presupposition of the progress of commerce' (cited in Morgan 2005: 98–9). All have an interest in security. However, to conceive of this as the basic unifying principle is problematic for two reasons: first because it is not clear what this entails in practical terms—what kind of institutional arrangements is needed for ensuring security? For example, when it comes to historical explanations, it is not clear whether it was the EU, the United States (and the Marshall Plan), NATO, or the benign nationalism of the European states that ensured peace and stability in post-war Europe.[20] It may thus be contested whether the EU is needed for security reasons.

Secondly, for Hobbes (1651), security—the right to life—was the prime natural right, but as civil wars in Europe made clear, the case of freedom of religion contradicts this: freedom of belief is valued over one's own life (cf. Höffe 1999: 62). To ensure the stability of a political order, security as the unifying and consensus-forming reason does not reach deep enough, Kantians would say. A person may lose his life without losing his dignity. Hence the importance of peace, which does not merely imply the absence of war but to live under *dignifying conditions*—as members of a (democratic) republic (Kant 1795).

survey in France', available at: <http://ec.europa.eu/public opinion/flash/fl171 en.pdf> and 'The European Constitution: Post Referendum Survey in the Netherlands', available at <http://ec.europa.eu/public opinion/flash/fl172 en.pdf> (both published June 2005 and accessed 23 March 2009). There were different views, 'whether it was fear of foreigners and bureaucracy (both in France and Netherlands), or inflationary currency (Netherlands) or fear of weakening of the welfare state (France), the masses were rejecting the EU Constitutional Treaty not because of a comparison with the alternative (the Nice Treaty)' (Tsebelis and Proksch 2007: 179, 180).

[18] For a communitarian view see Etzioni 2007. For analysis see Greven 2000; Hooghe and Marks 2007; Miller 1995; Offe 2000, 2003a; Scharpf 1999; Streek 2000. Siedentop (2000) gives this argument a special twist. Whilst supporting a European federal state, he argues that the present integration process is an unhappy marriage of French *étatisme* and neo liberal economism. This mixture threatens to undercut the prospect for democracy in Europe.

[19] Even if one does not follow Hobbes to the full extent.

[20] For the first view see Beetham and Lord (1998: 102 3) and for the view that it was NATO under US leadership, see Offe and Preuss (2007: 190). See further Hill 1991; Milward 1992; Moravcsik 1998; Wallace 1994.

Ensuring the global state of peace can itself be seen to be 'a human right of prime importance' (Apel 2001: 33).

The core unifying principles must therefore be based on deontological norms, which refer to the respect for the individual. Modern states and political orders can basically justify themselves only with reference to the protection of the *equal respect for persons*. Under modern conditions human beings are seen to be endowed with moral dignity that demands respect, and political orders can claim to be legitimate only to the extent that their institutions, procedures and actions protect and further the integrity and well-being of their citizens. They are committed to ensure *political equality* and equal respect and concern for everyone (Dworkin 1986: 222). A constitution built on fundamental human rights, rule of law, and democracy is conducive to consensus just because of these qualities. They pass the universalization test.[21] Actors cannot in a self-referential, consistent way oppose these principles as they establish the very conditions for peaceful interaction and cooperation. They constitute the *grammar* of constitutional politics. These principles are presuppositions for the citizens to be able to see one another as compatriots with equal rights and thus be able to regulate interpersonal affairs justly and to give themselves the laws under which they are to live. Lack of firm institutionalization of such principles creates instability.

Complex legitimacy

The multi-level constellation is made up of intergovernmental, supranational as well as transnational governing structures, which differ with regard to the main locus of the democratic unit. Intergovernmental structures point to the national level; supranational to the European level; and transnational to structures of civil society—in and between societies—and to cosmopolitanism. They reflect different legitimating principles and ways of realizing democratic values. While both intergovernmental and supranational structures locate democracy in the formal institutions of a polity, transnational structures locate it in the public sphere rooted in the civil society.

The EU is a compound polity in legitimacy terms, which may find support in different segments of stakeholders and publics for different reasons. In order to handle this complexity of an under-constitutionalized and under-justified order, Christopher Lord and Paul Magnette (2004: 188, 199) have suggested defining the plurality of legitimating principles by four 'vectors': indirect, parliamentary, technocratic and procedural legitimacy. The putative legitimacy of the Union cannot be attributed to one sole factor or vector (or 'comprehensive view'), but taken together they may contribute to account for the overall legitimacy of the

[21] See also the requirement of sufficiency which is the justificatory principle that Morgan lays down: 'An argument yields a specific justification for a policy, law, or institutional arrangement when it appeals to values, interests, or normative principles that are *effectively* and *efficiently* protected by that policy, law, or institutional arrangement' (Morgan 2005: 39).

EU. These 'vectors' point to different sources of democratic representation. The problem is how such a combination would add up to something legitimate, or whether, in particular with regard to technocratic forms of legitimacy, it rather invokes a picture of illegitimate or even corrupt politics? It is rather convenient for power-holders to justify the system in place towards different stakeholders and different constituencies with different reasons, and epistocracy—that is governance without proper democratic authorization—is illegitimate.

On the other hand, unpacking the components of statehood makes it possible to account for the de facto legitimacy of a polity that is less than a state but more than a structure of transnational governance. The EU shares its means of enforcement as well as its means of legitimation with the member states, and can bolster its justification with humanitarian principles, that is, with commitments to higher-ranking law. The citizens of the polity can be addressed as citizens of the world. But how can compliance come about in a polity that lacks the enabling conditions of sovereignty that confers stability on social relations in the form of a 'centralized authority to determine the rules and a centralized monopoly of the power of enforcement' (Nagel 2005: 116)? Constitutions may not presuppose the state; but how can the laws and rights be brought into existence and be made effective without the coercive instruments of a state?

Accountability requires that the assignment of subjective rights is specified with regard to the explicit duties of the power-wielding bodies, that is, legislative, adjudicative and executive power bodies. This implies that democracy requires a state—an accountable and empowered polity that is able to make rights effective. *Sanctioning, organizing* and *executive powers* are needed because:

- rights must be enforced when there is illegitimate opposition or non-compliance;
- the legal community has need of both collective self-maintenance to stabilize expectations and the coherence of the law;
- and of an hierarchically organized judiciary to ensure that higher courts can correct subordinate court rulings regardless of their acceptance; and
- political decision-making issues in programmes, which have to be rationally and authoritatively implemented.[22]

The state represents the organizational structure of an autonomous, self-organized community. It is needed to ensure the freedom, security, and welfare of the citizens, and hence also to explicate the meaning of democracy based on citizens' equal rights. In this manner it ensures *reflexivity and reversibility*—and prevents rulers' self-selection. The core defining characteristic of a state is that it has instruments for mobilizing economic, military, and political resources in order to achieve collective goals. It goes without saying that even if coercion by the state underpins the law, it does not constitute it as a normatively binding order.

[22] Modified list of Habermas 1996a, at p. 134. Schmalz Bruns discusses six propositions for why there is need of statehood, for hierarchical forms of self intervention (2005: 80 1).

When it is the member states that keep the monopoly of violence in reserve, the EU can only be effective to the extent that actors comply on the basis of voluntary consent. Compliance, which is an *autonomous voluntary act* of the member states, nearly always prevails even when they disagree with the rules.[23] The multi-level constellation that makes up the EU can ensure compliance and consent through a series of 'soft' mechanisms, ranging from a worldwide moral consensus on the protection of human rights; via consultancy and deliberation in transnational structures of governance and their concomitant civil society mechanisms of shaming and blaming; to the institutionalized procedures for authoritative decision-making in intergovernmental and supranational institutions, which are similar to the ones that at the national level confer legitimacy upon results. When decisions are properly made, when they follow the authorized procedures of the constitutional state, the likelihood that they be respected is high.[24] The form and quality of the pre-established procedures of a rule-making institution exert a pull towards compliance on those addressed because they hold that the institution 'has come into being and operates in accordance with generally accepted principles of right process' (Franck 1990: 24).

The EU's decisions are implemented through legally authorized and democratically supervised national administrations. Collective decision-making at the European level takes place within a setting of already legally institutionalized and politically integrated orders which enjoy a relatively large measure of de facto and de jure legitimacy. On the basis of fusion thesis I, which states that national and European actors pool their sources of legitimacy and fusion thesis II and III, which state that the constitutional traditions as well as administrative orders in Europe are fused, political decisions can be accepted in virtue of their *pedigree*, without *being accepted as substantively just*. European law-making, which largely lacks popular authorization, vegetates on the trust savings shored up by the practice of the democratic law-state over generations. Hence, the requirement of 'the monopoly of coercion' at the supranational level may not be needed to ensure compliance. But how can a system of domination such as the EU be stable, in the absence of a *European sovereign*, the principles of which are conducive to a rational consensus? There is a problem with stabilizing legitimate expectations that is not plainly ensured by the liberal principle of rule of law. Republicanism requires collective self-determination through citizen-made law.

On the co-originality of rights and democracy

One may distinguish between the liberal *rule-of-law principle* which aims at 'a juridification of political power [. . .] [that is,] the domestication of power through the division and channelling of *existing* power relations', and *republican*

[23] See Zürn and Joerges 2005; Börzel 2001; Tallberg 2002; see further Sverdrup 2008.

[24] Cf. Tyler 1990; and likewise, when the norms or rules are contested, the formal compliance mechanisms fail at the international level (Zürn and Neyer 2005).

constitutionalism 'grounded in the rationally formed will of the united citizenry' (Habermas 2006c: 138). In a republic citizens are subject only to law. Freedom entails, according to Rousseau (1762), not being subject to the will of another as well as not ruling over another. Habermas proposes a rule-of-law regime for the international level. A constitutional order for the protection of peace and freedom already exists:

> In contrast to individuals in the state of nature, citizens of competing states already enjoy a status that guarantees them rights and liberties (however restrict ed). The disanalogy is rooted in the fact that citizens of any state have already undergone a long process of political formation and socialization. They possess the political good of legally secured freedoms which they would jeopardize if they were to accept restrictions on the sovereign power of the state which guarantees this legal condition. The pre social inhabitants of the state of nature had nothing to lose but the fear and terror generated by the clash of their natural, and hence insecure, freedoms. (Habermas 2006c: 129 30)

At the supranational level it is not a question of solving the problem of order in a state of nature, or the containment of authoritarian rule through the constitutionalization of state power, as was the case with the establishment of constitutional democracies. Rather it is about establishing *agency* for realizing already established norms, that is, organized capabilities for handling pressing problems and conflicts which arise within already constitutionalized and politically integrated orders. Because of this a *collective state subject* is not needed. Moreover as the civic solidarity required for democratic procedures of legitimation cannot be extended at will, 'constitutions of the liberal type recommend themselves for political communities beyond states . . .' (Habermas 2006c: 139). There cannot be a *democratic law-state* beyond the nation-state because of the lack of civic solidarity, but there can be regimes complying with the *liberal principle of rule of law*. According to Hayek the rule of law limits the scope of government and 'restricts it to the kind of general rules known as formal law, and excludes legislation either directly aimed at particular people, or at enabling anybody to use the coercive power of the state for the purpose of such discrimination' (Hayek 1944: 62). It thus entails limits on the legislative scope of government, and protects against legislators' interference in the private sphere of the citizens.

International law is not a solution to the problem of order—to overcome the 'state of nature' through the constitutionalization and democratization of an authoritarian system of dominance—but to a coordination problem among already constitutionalized political orders. One may however argue that with this proposal of a *constitutionalized regime*, Habermas reiterates the fear of Kant (in 'Toward Perpetual Peace') in pointing to the second-order problems that 'will arise from superimposing a state form on its constituent units where these units are already internally democratized, and where the normative promise of the idea of the state which resides in fusing statehood, law, constitutionalism, democracy and solidarity into a whole cannot be reproduced' (Schmalz-Bruns 2005: 80).

The problem is how juridified orders can possibly meet the co-originality criterion of rights and democracy according to which the subjects of the laws should also be their creators. Even though the constitutionalization of international law need not satisfy republican standards—as long as it performs clearly delimited functions and works on delegated powers (corresponding to Strategy One in Chapter 4)—the actual supranational power-wielding system in Europe raises a problem for the normative claim that the addressees of the law should also be its authors. Juridified orders under the international law regime require clear areas of competence and effective control with the *delegation of powers* that is not feasible in the very interconnected, trustee- and discretion-based European system of decision-making. One may, however, distinguish between decisions *within* the EU institutions, which are regulated by the Treaties, and decisions *about* the Union's institutions, which remain, through Intergovernmental Conferences, in the hands of the member states (Peterson 1995). This notwithstanding, the governmental system of the EU does not underscore the delegation model for democratic control—through monitoring, revising and recalling the agency—as nation-states agree to restrain their sovereignty in conferring competences to the European level and the 'right of last resort to recall powers by withdrawing from the Union has no Treaty basis' (Lord 2006: 673).[25]

The cosmopolitan condition, which requires the constitutionalization of international law, cannot draw its legitimacy from the international law regime itself or from the putative validity of humanitarian norms. The successive expansion of natural law provisions, which in theoretical terms reach from Locke to Dworkin, may be right from a moral point of view, but nevertheless fails to meet the requirement of democratic legitimacy. The problem of the expanded role of non-consented decision-making at the international level, which has increased the scope for jurist-made law, is a democratic one. The idea that there already exists a constitution at the international level, for example in the form of the UN Charter, is dangerous. It gives the false impression that the power of the state has already become a servant of international law, hence it runs the risk of 'dress[ing] up strategic power-plays [. . .] in a universalistic garb' (J. L. Cohen 2004: 10). Further democratization is required, but in what form?

The rights of rights

For 'the right not to be arbitrarily dominated' and 'for human political rights to be realized', James Bohman (2007a: 150) contends, 'the EU must be a community within a larger political community, a collection of dêmoi integrated as a larger democratic community'. Hence, a set of 'dispersed publics' and a *democratic minimum* consisting of a limited 'material normative power' and the 'shared

[25] A provision on voluntary withdrawal from the Union was, however, introduced with the Convention's draft Constitutional Treaty and is included in the Lisbon Treaty (Art. 50 TEU). See also Chapter 4.

ability to initiate deliberation about the content of some institutional scheme' are required (Bohman 2007b). However, this is not so minimal after all. The right not to be arbitrarily dominated is quite demanding. It requires democracy in 'a strong and comprehensive sense' (Forst 2007: 93). Not to have collective decisions and laws determined by others requires the institutionalization of the right to justification: it requires the institutionalizing of political rights, strong enough to turn human beings into a unified body of citizens capable of making the very laws they are to obey. The political rights to participation are *the rights of rights* as they ground the citizens' possibility of self-reflexively governing themselves via the medium of law. Only the institutionalization and enforcement of political rights furnish a modern polity with a sound legitimacy basis as they establish a self-correcting procedure. (The requirement of a collective identity—a demos—will be addressed in the next chapter.)

The unity of European law is lacking in the sense that the citizens have not been able to jointly have a say in its making. *Law without democratic authorization is hegemonic.* It is not legitimate according to the credo of the modern democratic *law-state*—the *Rechtsstaat*—which requires public legitimation beyond the mere rule-of-law regime. Self-government entails that the citizens have the authority to decide which issues are and which are not to be subjected to collective decision-making (Dahl 1982: 6). Hence the claim to democratic self-rule cannot be redeemed via the assignment and protection of subjective rights, which, as it were, amount to a rule-of-law regime, and can only protect the private autonomy of the citizens—in the court. The legal entrenchment of norms in itself does not suffice. As is well known, 'you could create rights and afford judicial remedies to slaves. The ability to go to court to enjoy a right bestowed on you by the pleasure of others does not emancipate you, does not make you a citizen. Long before women and Jews were made citizens they enjoyed direct effect' (Weiler 1997: 503).

According to the republican idea of freedom, there is also a political right to public autonomy which entails membership in the bodies that make the laws. The problem of instability lingers in juridified orders, that is, political orders based on the rule-of-law principle, because they do not satisfy the requirement of co-originality of rights and democracy. Only democratic republics, which can meet the requirement of political equality, will be able to ensure stability as such orders involve the citizens in making the laws that they are to abide by.

No stability without validity!

The integration process in Europe is haunted by many paradoxes and dilemmas. There is for example the problem of overcoming nationalism without doing away with solidarity and the welfare state; of achieving unity and collective action without glossing over difference and diversity; of preserving identity without neglecting global obligations; of achieving efficiency and productivity without compromising rights and democracy; of ensuring law-based rule without decreasing the role of popular sovereignty. To stay together and ensure legitimacy the EU has to

manage tensions between national and European identities; between economic efficiency and social solidarity; between ensuring unity and respecting diversity; and between sovereign rule and basic rights protection. These tensions and dilemmas cannot easily be solved with reference to one consensual overarching principle.

According to version B of deliberative democracy the laws do not have to meet with the rational assent of all. Rather they can be seen to be legitimate when they are the outcome of an open and fair legally institutionalized process and can be defended against criticism and accepted with reasonable reasons. Parties may agree, but not necessarily with identical reasons, and hence reach a *working agreement*, not a rational consensus. The EU, for its part, is an expression of a compromise as well as a working agreement which can be defended by a set of reasonable reasons, and hence pass the test of discursivity. The members may support the integration project with different but not necessarily conflicting reasons. However, the test of universalizability has not been met. In moral discourses there must be one single correct answer. As the ultimate test of the legitimacy of the law-making procedure, the rational consensus unavoidably provides the standard, because the reasons must be convincing in the same manner for everyone for the order to be stable, and this can be accomplished only by establishing what is in the equal interest of all, what is equally good for all. Hence, the fiction of a rationally founded identity which can test the substantive moral standards of the governmental structure of a polity.

It is a rather thin normative basis for this, as it must be based only on what human beings have in common, viz., their right to freedom, equality, dignity, democracy, and the like. Such a consensus fits with cosmopolitanism and the *cosmopolitization* of modern states. It depicts what the citizens have in common in the moral commonwealth, as world citizens, and not as citizens of a territory with collective responsibilities and with a collective identity as members of the same group. To have things in common requires that other things are excluded. A rational discourse cannot establish the distinguishing characteristics in the capacity of which a bounded set of actors are equal, but can set the minimum criteria which should not be violated, a threshold that should not be transgressed by a legitimate political order.

For an order to achieve stability and legitimacy, agreement on the basic structure is required, as well as on the polity structure that corresponds to it. It is essential for the members to stand ready to support *the existence of the political community* (Easton 1957: 16). Some shared we-feeling and consent on the basic structure are needed to resolve conflicts authoritatively and for being able to keep the range of disagreements manageable; for the continued existence and integrity of the political order. This requires, in addition to fair procedures, an entrenched notion of comradeship which provides good reasons for why a political order deserves obedience even when it makes decisions that citizens disagree with. Only on the basis of such can criteria for how to decide on a range of questions be established; who are affected, whom to consult, how to represent, who should make collective decisions, how should they be held to account, and so on. In short, when not all can participate and have a say, when conflicts thrive with or

without good reason, one needs criteria for representation and formal procedures for decision-making.

The Union's political order will be unstable as long as the core structure is unclarified. The EU is presently under-constitutionalized, and hence unauthorized with regard to demos or demoi. A polity without a well-defined constituency—without agreement on the criteria for inclusion/exclusion—will be unstable. It will be highly vulnerable to pressures both to widen/deepen as well as to narrow/delimit its operational scope. Such an order will be in drift, due to, e.g., the logics of different policy fields, actual political constraints, external crises and shocks, and contingent—economic and security—reasons for enlargement. This spills over into the political deficit as a related source of instability. One consequence of the *democratic deficit* is that opposition and disagreement on policies are not properly included and given an outlet in the decision-making process. The EU is, as we saw in Chapter 8, largely *depoliticized* and classical opposition is, as we know it from the domestic area, quite feeble. The government/opposition dynamic is almost absent and the right of citizens to be represented is incompletely institutionalized. As a consequence, the room for *voice* and integration of opposition within government is limited. This can lead to the 'mobilization of an opposition of principle against the polity—to anti-European opposition and to Euroscepticism' (Mair 2007: 15).

For the EU to be able to repair its democratic deficit a common understanding of the nature and telos of the venture would be required. Who constitutes the political community, what is the project about, whose or which interests does it protect, and according to what principles should the existing order be revamped? For this to take place *civic solidarity* rooted in a particular European identity would be needed. The core unifying principle of respect for persons as basis for constitutional orders, thus, needs to be complemented with the clarification of a common self-understanding on the part of the collectivities that make up the Union. The members of the European community—the European citizens—are not able to see themselves as subordinate to a superior power that they have jointly constituted and are in control of. As long as it is not clear who are the legitimate subjects of the polity, who the people is, observance of the principle of popular sovereignty—according to which all political authority emanates from the law laid down in the name of the people—is not ensured. The EU may therefore have to develop into a state-like order to be stable.

CONCLUSION

Through establishing autonomous powerful institutions, the states of the conflict-ridden European continent have domesticated international relations among themselves. The international law regime has been transformed and so has the system of states with profound significance for the identity and statutes of

European states. The member states have surrendered sovereignty to the European institutions, which are wielding power over the constituent parts—states and citizens—to such a degree that it requires direct, and not merely indirect, delegation-based representation. The peculiar structure of the EU, in which complex rounds of decision-making and implementation involve the constituent parts to such a degree that the actual power of the EU appears rather weak and indecisive, has to be taken into consideration when dealing with the legitimacy problem.

Thus, in order to account for the legitimacy problems of the EU, one should take into consideration the *hybrid nature* of this order, which at the outset might not require the same kind of democratic authorization that constitutional states do. The multi-level organization of European integration lends legitimacy to supranational processes of collective decision-making through shared competences and powers as well as through reflexive mechanisms of deliberation and contestation. The EU's de facto legitimacy may therefore not merely stem from the performance of the system ('output oriented legitimacy' according to Fritz Scharpf), but also from the democratic character of compounded decision-making processes. As a rights-based order, the EU can draw on the fused constitutional-democratic systems of decision-making, norm interpretation and law enforcement. The actual power of the EU is circumscribed and also balanced by the power of the states in Europe. In the multi-level constellation that makes up the EU, power is shared and *statehood is a variable* more than a fixed status—a continuum between national and supranational orders.

The upshot is that the de facto legitimacy of the EU may be seen to be 'free-riding' on the established structures and norms of the democratic *law-state*, as the moral authority and saved up trust of this multi-level structure of law-making, adjudication, and implementation confers legitimacy on the outcomes. Its legitimacy is so to speak parasitic on the common democratic constitutional complex; the values and democratic practices in Europe. This basic normative structure lends legitimacy to the proceedings and collective decision-making of the Union and constitutes a vital part of the common self-understandings of the citizenry. However, according to the normative criterion of democratic legitimacy, the constellation suffers, as the conditions for popular authorization have not been established. As long as the basic structure is not in place, and as long as it is not possible to subject it to approval or rejection by the citizens, the EU will face the allegation of a democratic deficit, and hence the problem of instability.

10

Parliamentary Democracy without a Demos

In this last chapter, I will discuss why the demand for democracy at the European level has taken the form of support for parliamentary democracy as this is expressed in the role of the EP when there is no *union population*. The actors in the European integration process have, in their efforts to come to grips with the Union's democratic deficit, pursued several types of institutional reforms. Dominant among these are reforms that speak to those codes and categories that Europeans are familiar with from their national settings. The most important code for democratic rule is the parliamentary principle. The EP's development reflects a gradual and contested stepwise approximation of the institution to the parliamentary template. This was addressed in Chapter 7. Why has the reform process taken this particular institutional route when central socio-cultural conditions for such are held to be lacking?

As noted above, democracy is a principle that can be embedded in many institutional forms and arrangements. How is it possible to account for the fact that this specific model of democratization has animated the reform process? From a deliberative perspective this may be understood due to *the normative force of the parliamentary principle*. The EP's endeavour to strengthen its role within the EU's institutional system has drawn on the well-established notion of the parliament as the institutional embodiment of popular sovereignty. To this end it has pursued a lengthy and drawn-out struggle for recognition, which includes efforts to strengthen its position vis-à-vis the Commission and the Council, and the member-state governments. Since Maastricht, the EP 'managed to establish a link between a general public discourse about European democracy and a specific programme of institutional reform' (Christiansen 2002: 45). Hence normative pressure was exerted:

> Once integration looms, normative pressure is generated to counter the threat which policy makers in the EU associate with integration, namely that further integration undermines domestic democratic processes and institutions. In turn, policy makers have continued to respond to these challenges by projecting the model of parliamentary democracy to the European level. (Rittberger 2005: 5)

The model power of parliamentary democracy speaks to the deliberative theory's principle that the legitimation of power requires justification according to standards that the citizens understand and can relate to. These standards are the well-known interpretative codes and categories of the modern democratic law-state through

which European citizens can come to identify illegitimate and authoritarian forms of rule as well as agree on remedial action. One issue is the model power of the parliamentary form, another is the conditions for realizing it at the European level. Can there be parliamentary democracy without a people making up a constitution-making subject?

The parliamentarian model of democracy has had the upper hand in the democratization process of the Union even when the so-called non-majoritarian sources of legitimacy are lacking, such as a demos or a collective identity. This is puzzling and may indeed represent a technocratic 'overstretch of democratic resources' even for those who do not agree with the *no-demos thesis*, which for its part overrates democracy's need of homogeneity. First, I address the identity issue, and subsequently discuss the manner in which the EP is embedded in a complex multi-level structure and the normative force of the parliamentary principle. We should however not overestimate the actual status and power of the EP.

A halfway house

It is the parliamentarian form of democracy—at the national and European levels—that has informed but not at all determined the reform process. The Constitutional Convention to a large degree embraced the parliamentary model of democratic legitimacy. The Lisbon Treaty states that 'The functioning of the Union shall be founded on representative democracy', and that 'Citizens are directly represented at Union level in the European Parliament'. Further, 'Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen' . . . [and] . . . 'Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union' (Art. 10 TEU). Moreover, national parliaments are registered as the 'watchdogs of subsidiarity' in the EU's legislative process (Cooper 2006): 'National Parliaments contribute actively to the good functioning of the Union [. . .] by seeing to it that the principle of subsidiarity is respected' (Art. 12 TEU).

To put it bluntly, democratizing the Union means parliamentarization. This is not to say that the EP is a 'full house' as was noted in Chapter 7. The Parliament's powers are designed in such a way that it can only use many of them a) with a high level of consensus of its own membership and b) with an inter-institutional consensus with the Council and the Commission. The 'European people' is represented in 'pseudo elections' or second-order elections—with low turnout and without a proper European-wide party system—to a parliament that is not a sovereign legislator. There are no common elections based on a common electoral law and electoral campaigns in the various member states focus mainly on national issues. The connection between MEPs and the electorate is weak, public knowledge of the MEPs is (if it exists) restricted to their own constituency, and visibility of and contestation over EU decision-making are limited (Crum 2007: 2;

Lord 2004). It is excluded from, or plays a marginal role in important policy areas, such as the CFSP, and especially the ESDP.

Over time, the EP's powers have increased. It now critically surveys the workings of the Commission and the Council, and its role as a co-legislator is growing in importance.[1] The Commission stands accountable to the EP, especially when it comes to annual budgets and the appointment of new Commissioners. Formally, the EP is not an agenda-setter, as it does not have the right to propose legislation. It is however a *conditional agenda-setter* to the extent that it can propose amendments that redefine the choice faced by the other two institutions (Tsebelis and Garrett 2001: 372). Under the increasingly important co-decision procedure, legislation needs to be shored up by the Commission, by qualified majority voting in the Council and by a majority of the MEPs. This development has taken place despite the so-called democratic resources being in short supply; and also in spite of warnings.

Democracy without demos?

The EP is, according to many analysts, not only a quasi parliament, it is also one that cannot come to resemble an ordinary powerful parliament.[2] The conditions for the development of electoral or party democracy government at the EU level are largely missing (Schmitt and Thomassen 1999). Hence, full parliamentarization of the EU is not possible: 'parliament without a demos is conceptually impossible, practically despotic' (Weiler et al. 1995: 4). Communitarians maintain that a constitution would not alleviate the democratic problem because its legitimacy presupposes exactly the congruence between sovereignty and identity that would make it an expression of a pre-existing people (Bellamy and Castiglione 2000). The constitution-making subject is lacking according to the proponents of the 'no-demos thesis'. Either way, the problem is the following:

> Parliamentary majority and parliamentary majority rule work well and provide for the democratic legitimization of government only under the condition that they are based on a collective identity called 'the people' or 'the nation', united by a common language, a common culture, common traditions. (Abromeit 1998: 32)

Parliamentarization is problematic and possibly counter-effective as long as there is no European common identification on the basis of which to create identities, cleavages, coalitions, and government/opposition structures, and which hence could provide the foundation for election and a European-wide party system. By

[1] One should note that the co decision procedure which empowered the EP introduced a cumber some decision making process entailing three readings by both the EP and the Council. In order to counteract this prolongation and speed up the legislative process the three main EU institutions started to engage in informal deliberations before and between the readings, the so called trilouge negotiations.

[2] 'Conventional parliamentary approaches to democracy represent inappropriate attempts to offer legitimate anchorage' (Shaw 1999).

the same token a civic intermediary infrastructure of networks, parties, organizations, and mass media is required. As the European dimension and a civic institutional mediatory structure are weak:

> [f]ull parliamentarization of the European Union on the model of the national constitutional state [. . .] would loosen the Union's ties back to the Member States, since the European Parliament is by its construction not a federal organ but a central one. Strengthening it would be at the expense of the Council and therefore inevitably have centralising effects. On the other hand, the weakened ties back to the Member States would not be compensated by any increased ties back to the Union population.[3] (Grimm 2004: 80)

As was discussed in Chapter 4, according to communitarians, shared, pre-political values are what would constitute a common European identity, which again would provide a sound basis for citizenship, for specifying the rights and duties of its members, and for setting the terms of inclusion/exclusion. It would be a means of drawing bounds, by defining who are Europeans and who are not.

Irrespective of communitarianism, without a collective identity personifying a group, a people, there can be no authority conferred to rule in the name of all. Such constitute the so-called *non-majoritarian sources of legitimacy*—or the socio-cultural substrate—that make collective decision-making possible and legitimate. Majority rule rests upon allegiance, loyalty and a notion of solidarity that is only conceivable in terms of the symbolic establishment of demos founded on a sense of unity; that is, a notion of a collectivity that sets the criteria according to which the subjects of the law are equal. In other words, a collective identity strong enough to ensure that the compatriots not only see themselves as members of a community based on liberty, but also of one based on equality and solidarity, is required.

'Reflexive homogeneity'

According to Carl Schmitt, 'Democracy requires [. . .] first homogeneity and second—if the need arises—elimination or eradication of heterogeneity' (1926: 8). The requirement of a homogenous *Volksgemeinschaft* in the form of an ethnic community based on an insurmountable substance—an existential common ground—is today widely discarded (Takle 2007). Realists from Ernest Renan (1882) to Ernest Gellner (1987) have nevertheless pointed to the need for cultural homogenization (with regard to language and religion) as a functional requirement for the integration of modern complex and diverse states. Likewise Claus Offe (2003a: 157) claims that the stability of the political community rests on the *reflexive homogeneity* through which citizens are integrated.

[3] See also Bartolini (2005) for the critique offered, that in the absence of strong ties between the Parliament and the population, the EP can only offer a kind of façade or pseudo representation that disguises how far it is in practice dominated by the political elite actors of the member states via domestic parties, on which MEPs are entirely dependent.

There is, however, no intrinsic reason why reflexivity should be confined to the primordial self-understanding of a particular 'community of fate'. This is so, first, because the discourse on procedures, on citizenship and participation, and not on substantive values, may provide the requisite normative frame for identification:

> In Europe's institutional design the idea of civic participation takes the vanguard which previously had been salvation and education. [. . .] Citizenship provides the frame of a self creation of a community of citizens. The discourse on citizenship has become the transnational master narrative of democratic self organization in Europe. (Eder 2008: 41)

Second, because as far as the political institutions actually involve citizens in more extensive processes of cooperation and deliberation, entrenched cleavage structures will be crossed and fixed identity formations loosened. This could be the case with the European Union, in which collective decision-making takes place through institutionalized procedures. These compel actors to argue their case in front of a larger audience. The institution of Union citizenship may have a similar effect:

> Union citizenship is not so much a relation of the individual vis à vis Commu nity institutions, but rather a particular legal status vis à vis national member states, which have to learn how to cope with the fact that persons who are physically and socially their citizens are acquiring a kind of legal citizenship by means of European citizenship without being their nationals. (Preuss 1998: 147)

Lack of a pre-political collective identity can, thus, be recompensed by public debate and institutionalized processes of justification and decision-making. What then comes to the fore is not the deeper emotional roots of *patriotism*—belonging and shared we-feeling—but allegiance and praise for the political community in the name of fairness.[4] The requisite collective identity is prototypically the result of intellectual and *political activism* made possible by the communicative and institutional infrastructure of the modern public sphere, in which popular opinions are formed out of circular and reflexive processes of contestation and learning, and are politically operationalized and 'locked-in' by the same policies and mechanisms that created them in the first place. A sense of belonging and we-feeling among the participants is created: hence, a 'demos is a group of people the majority of which feels sufficiently attached to each other to be willing to engage in democratic discourse and binding decision-making' (Cederman 2001: 244).

Not prior identification, but the degree of institutionalization of political procedures, is the decisive factor in shaping political identities. However, a minimum of confidence, sympathy and mutual self-understanding must be presupposed. A modicum of non-egoistic commitment is required for actors to dare to let

[4] Hegel tried to modify the concept of patriotism: 'Patriotism is often understood to mean only a readiness for exceptional sacrifices and actions. Essentially, however, it is the sentiment which, in the relationships of our daily life and under ordinary conditions, habitually recognizes that the commu nity is one's substantive groundwork and end' (Hegel 1821: 164). However, patriotism can only be defended on the basis of indirect universalism, as an instrument to realize universal well being or human rights, and not as an intrinsic good, hence the allegation of racism (Gomberg 1990).

themselves be bound by 'the better argument' in the first place. Furthermore, it is a requirement for democracy that there is a shared self-understanding among the members that want to constitute themselves as a political unit. A 'Staatsvolk' is indispensable, because systems of domination require justification with regard to the *relevant characteristics* of the political community to be regulated as well as with regard to the purposes and interests to be realized, that is the characteristics in virtue of which systems 'create obligations of justice and presumptions in favour of equal considerations of all those individuals' (Nagel 2005: 142). The state is not an association of private actors,[5] and the normative demands it makes on its members are set by the nature of the relationship they have come into. This contention does not imply that the politico-legal structure expresses the norms of justice of an ethical community premised on pre-political identifications. It does not articulate a group identity. Rather the constitutive and regulative norms express the *distinctive relations* of the citizens in a state, their shared statehood as equal compatriots in a collectivity. Norms of justice stem from the distinctive relations that people have towards each other in the obligatory and coercive frame of reference of a state, which in this way is *a trigger of equal concern and respect*. It makes sure that each and every one contributes to, and receives their fair share of the cooperative scheme. Such identification with fellow citizens under coercive law is a precondition for a democratic sovereign being capable of collective decision-making; for the outvoted minority to abide by the law, for the willingness of the citizens to pay for the misfortune of their compatriots, for the peaceful resolution of conflicts.

Even though the EU lacks the attributes of a coercive state, it is a power-wielding entity that performs many of its functions. As such it presupposes an identifiable community and allegiance. Every type of political order requires collective identity as the members must, at a minimum, recognize that they belong to the same group. Identity functions as a *boundary constructor*, which identifies who are members and who are not and also in such a way that it is recognized by others. Are there any traces of such a minimum?

Identity in flux

In Europe, the EU citizens still identify far more strongly with their respective nation states than with Europe. In the most recent Eurobarometer survey only 12 per cent report that they feel 'very attached' to the EU, while 55 per cent feel that way about their own country.[6] However, a reasonably large number—41 per cent—feel 'fairly attached' to the Union, compared to 36 per cent who feel that

[5] That is a social contract based on a voluntary agreement between arbitrary wills (Hegel 1821: 58ff), but neither is it a pure ethical or '*sittlich*' order (see also Rawls 1993: 286f)

[6] In using such data we should know that identity may compel human beings to act against their will, and that identification on the basis of citizens' responses in opinion polls or questionnaires are therefore problematic. They presuppose substantialized notions of identity.

way about their own country.[7] This could indicate that European identity is at the same time both *cross-cutting* and *nested*. It is cross-cutting to the extent that 'some, but not all members of one identity group are also members of another identity group' and nested to the extent that it is 'conceived of as concentric circles or Russian Matruska dolls, one inside the next' (Risse 2004: 250). For most of those who feel attached to Europe, this attachment is secondary to that felt towards their countries, which forms the core of their identities. Is there something that could make a collective frame of reference—a narrative—that would be conducive to identity formation?

As discussed in Chapter 7, the disastrous consequences of war and totalitarianism that marred Europe in the twentieth century have formed the basis of *a culture of apologies*, mourning and collective guilt for national crimes and a concomitant distancing from the past. 'Among national memories, sorrows have greater value than victories; for they impose duties and demand common effort' (Renan 1882: 203). Memories do however tend to fade, and it is highly questionable whether the renouncement of certain historical events can sustain a 'thick' European identity in the long run. The community spirit stemming from the world wars experiences seems nowadays exhausted as a means for integration. Moreover, the desirability of infusing a 'thinner' constitutional patriotism with historical particularism is questionable. Jan-Werner Müller (2008: 203–4) argues that as a rule, analogies simply create 'instant legitimacy' which could 'serve to reduce complexity and short-circuit critical reflection'. There is thus 'a real danger that analogy comes to substitute argument and analysis'.

One should address identity as a question of the requisite loyalty and allegiance of a political order. But when dealing with identity in a multi-layered structure, it is not a question of either/or (national or European), but both/and since the institutionalized basic structure warrants *ethical freedom*, that is, the freedom of individuals and communities to realize their conception of the good life, of who they are (or would like to be) within a structure of mutual obligations. In this perspective, there need not be anything contradictory in Europeans feeling that their main emotional attachment is to their respective home countries and at the same time acknowledging that, in order to retain the democratic rights that were once created within the nation states, they now need to engage in political discourse and binding decision-making with 'strangers'. Data from the Eurobarometer survey indicate that there might be something to this. On the one hand, a majority of 58 per cent believes that their country has benefited from its membership in the EU; only 29 per cent believes that it has not. Asked what the EU means to them personally, only 12 per cent report 'loss of our cultural identity', while 52 per cent report 'freedom to travel, study and work anywhere in the EU'.[8] Although people are less attached to the EU than to their home countries, a

[7] Standard Eurobarometer 67, November 2007, QA33. Available at <http://ec.europa.eu/public opinion/archives/eb/eb67/eb67 en.pdf> (accessed 1 April 2009).

[8] Standard Eurobarometer 67, November 2007, QA12. Available at: <http://ec.europa.eu/public opinion/archives/eb/eb67/eb67 en.pdf> (accessed 1 April 2009).

European political identity would not necessarily have to conflict with the 'thick' national identities. This fits well with the already discussed trend of 'international English' increasingly becoming a lingua franca for Europe. If we recognize the possibilities of both a language and a political identity divorced from, but not in conflict with, its 'thicker' national counterparts, the development of a thriving European demos willing and able to engage in democratic discourse and binding decision-making might not be as demanding as if we see this process as a fulfilment of the conditions that laid the ground for the historical European nation-building processes.

A route towards European self-understanding is perhaps found in the politics of enlargement. Even though it was an 'elite decision' one should notice the distinct difference between how the EU addressed the former Communist countries of Eastern Europe in the accession negotiations compared with those involving Turkey. The former groups were held to be 'one of us'—their joining the Union framed as Europe's 'other half' finally 'coming home' while with regard to Turkey the questions were limited to compliance with the criteria of democracy and human rights (Sjursen 2002, 2006). In the debate over Turkish membership in the EU there is perhaps sign of a revival of so-called European traditions. There seems to be a lack of a 'kinship' feeling with Turkey, a feeling that prevailed in the earlier enlargements to former dictatorships in the south as well as in the east.

Even though the culture of apologies as well as the enlargement process revolve around the principles of dignity, democracy, and human rights, the violations of which trigger emotions reflective of a European identity; a collective identity—*a commune bonum*—as basis for democratic rule is weak.[9] With the risk of conflating a European identity with positive identification with the existing regime in place in Brussels one could also note that 69 per cent of EU citizens perceive the EP as 'democratic'.[10] At the same time, 48 per cent would like the Parliament to play a more important role than it currently does, whereas only 12 per cent would like it to become less important and 22 per cent are content with its current importance.[11] Regarding the issue areas around which a political identity could develop, the Eurobarometer survey, which regularly asks the EU citizens in which areas they would like to see decisions made at the EU (as opposed to the national) level, is again indicative. The largest share of respondents favours EU-level decision-making in the areas of fighting terrorism (81 per cent), protecting the environment (73 per cent), scientific and technological research (72 per cent), energy (68 per cent) and defence and foreign affairs (67 per cent).[12] There is thus

[9] Neil Fligstein argues that this not only indicates that people's attachment to Europe is relatively weak, but that it is also 'situational'. He finds that European identity is characterized by a class bias, as it is positively correlated with education, income and professional status (Fligstein 2008).

[10] Special Eurobarometer 288, *The European Parliament*, March 2008, QB12.2. Available at <http://ec.europa.eu/public opinion/archives/ebs/ebs 288 en.pdf> (accessed 23 March 2009).

[11] Ibid., QB15.

[12] Standard Eurobarometer 68, First results, December 2007, QA20. Available at <http://ec.europa.eu/public opinion/archives/eb/eb68/eb68 first en.pdf> (accessed 1 April 2009).

support for an extension of EU competences to core state areas, which in themselves call for legitimation by parliamentary rule (cf. Wagner 2007).

The multi-level parliamentary complex

The strengthened role of national parliamentary involvement in EU activities needs to be highlighted. The EP is embedded in a larger constellation of democratic rule in Europe's multi-level set-up. In this set-up the European and the national level are interwoven. As mentioned, with the amendments introduced the Lisbon Treaty, Art. 12 TEU involves national parliaments as watchdogs of subsidiarity in the EU's law-making process. As early as 1990 the European Council assigned a more active role for national parliaments, and Declaration 13 in the Maastricht Treaty urged more contact between the EP and national parliaments. In the Amsterdam Treaty inter-parliamentary cooperation was given Treaty basis. All national parliaments have established special European Affairs Committees, and the cooperation between these and the EP makes up COSAC, which has met twice a year since 1989. This network of inter-parliamentary cooperation has been analysed as an *intermediary public sphere* oriented towards increasing mutual understanding (Blichner 2000: 142ff).

Based on this institutional set-up for inter-parliamentary cooperation and other forms of informal contacts, Crum and Fossum suggest a *multi-level parliamentary field* in Europe; and one in which it is possible to 'conceive of democratic representation as the result of the *interplay* of a multiplicity of processes that need to be assessed on the basis of their overall effect' (2009: 267). Hence, the providence of the parliamentary principle and of representative democracy as such in Europe does not merely reflect the power and operations of the EP, but also the complex manner in which it is connected and shored up in national parliaments. This complex makes up a discursive field, codes, and categories, interpretative and justificatory frames through which communicative and normative pressures are exerted. Inter-parliamentary interaction must be taken into account in order to understand the role of the EP, its putative democratic significance as well as the requirement for allegiance and collective identity. When the multi-level character of European parliamentarism is adjusted for, the contention of 'a parliament without a demos' does not hold. Also with regard to parliament there is a fusion of orders. This is underscored by the suggested political theory of the multi-level constellation that makes up the EU and which is based on a disaggregated notion of state functions: *a state-less government*, not premised on a group identity, is able to accommodate a high measure of territorial-functional differentiation.

The thrust of the parliamentary principle

The present task is not to determine whether or not parliamentarian rule is a suitable model for post-national democracy. The question is rather why parliamentarism, as

situated in the complex configuration of European political orders, has come to the fore as the remedy for democratic reform within the European Union, when the resources for such a move are shallow. Why has the parliamentary model 'won' also when many analysts and critics, and even some state representatives, have warned against parliamentarization at the European level?[13]

Discourse theory posits that actors can only harmonize their different initiatives with communicative means when agreeing on which social norm to apply; and when they engage reflexively in justificatory processes, they also test the validity of the norm. This may explain why orders come into force, which do not harmonize with the actual preferences and interests of the actors, as they, so to speak, are swayed by the justificatory games they are involved in. Actors are embedded in normative contexts they do not control. In this case, actors have applied the codes and categories of the modern constitutional state—of liberal parliamentary democracy as these are seen as the embodiment of democracy altogether—in order to initiate democratic reforms, as well as to put normative pressure on those members that oppose constitutionalization of the EU (cf. Rittberger and Schimmelfennig 2006). Only parliaments have achieved the competence to speak for the people. Hence, some compelling reasons can be put forward in favour of the parliamentary principle, which may shed light on the question as to why it has achieved such salience and why relatively strong nation states have surrendered some of their sovereignty to a supranational parliament—symbolizing the rule of citizens, not of states.[14]

First of all, equal human rights, enfranchisement, one man one vote, freedom of expression and so forth, which are basic to all modern parliamentary democracies, have left a strong and lasting imprint on the European integration process. They are consensus-conducive principles protecting the internal dignity and external freedom of individuals. The underlying moral standard of *respect for persons* is a higher-ranking principle that does not have the same sort of validity as the constitutional principles we live by; at the same time it is constitutive for the concept of basic individual human rights and for *political equality*. This deontological principle, basic to liberal political orders, constitutes a plain moral principle. But moral standards are also institutionalized and are functional nuts and bolts for modern societies.

Secondly then, moral principles are not only in place because they are correct according to autonomous moral reason. They are not mere 'oughts', which it is a moral duty to comply with as they have been entrenched and infused with values and ethical connotations beyond their rational content. According to Nicklas

[13] The critics' alternative are, as has been spelled out in prior chapters, either intergovernmentalism and hence the EP as an auditor of delegated competences, or deliberative, transnational governance as a substitute for parliamentary rule.

[14] It is worth noticing that governments have consented to some empowerment of the EP since at least some of those governments have reckoned that it would be hard to defend to domestic audiences that so much power should be concentrated on a Council of Ministers that is not checked at the European level.

Luhmann (1965: 13ff), basic legal rights have achieved the status of an *institution* that stabilizes role expectations. He sees them as a necessary requirement for the differentiation of modern societies. Society has grown too complex to be governed by one authority centre only; on the basis of hierarchical principles of political organization. In the modernization process, the individual is out-differentiated from society and released from collective ligatures. It has obtained the status of a legal subject—as an *individual rights-bearer* which is held to be in full possession of faculties, responsible and personally accountable for action. The deep reach of basic rights is a response to functional steering problems. Basic rights designate not merely a set of moral norms, but a complex of actual generalized behavioural expectations; they lay down the constitutional essentials of a modern society ensuring *respect for persons*, the *conditio sine qua non* for the *autonomy and dignity* of the individual (Luhmann 1965: 12, 63).

Thirdly, and more specifically, parliamentary systems contain *moral elements* such as rules for inclusiveness, equal communicative rights and barriers against manipulation and repression (Habermas 2005b: 385). These personify the principles of equal citizenship and membership in a body that inclusively and continuously engages in processes of collective self-determination. Only bodies that tie representatives into a structure of political accountability—of contestation and public deliberation—can claim to have institutionalized political equality. The latter requires more than equal voting rights and fair decision-making procedures. It requires public deliberation within the parliament as a vital condition.

> Even measures that have been agreed to by impeccable democratic procedures are likely to be seen as forms of arbitrary domination, if they are not also accompanied by a public forum that allows those who would have preferred alternative outcomes to see for themselves that their views have been argued and reasons given for setting them aside. (Lord 2007: 147 8)

The parliamentary principle should not merely be seen as reflecting a way of life or customs. Rather it should be seen as the embodiment of the modern legitimation principle of *government by discussion* premised on deliberative norms (Baker 1942). The parliamentary principle satisfies many of the conditions for critical justification of political power when properly institutionalized as a strong public with open channels to the public sphere rooted in the civil society. For large-scale societies representative democracy with a deliberative assembly at its heart offers the possibility of 'government by and of the people' as far as it ties in with free opinion-formation processes in civil society.

In a democracy the legitimating principle of political rule is the citizens' consent, and the institutional nexus through which this is formed, mediated, and executed faces the danger of becoming independent due to an increasingly complex political agenda. The parliamentary principle is a vital means to correct such a development by ensuring the proper mediation between the citizens and the political institutions. It serves the double function of institutionalizing 'the will of the people' and ensuring that the policies enacted by the executive branch of government are grounded in this will. It is a system in which the process of

deliberation is institutionalized and subjected to procedural constraints to such a degree that the citizens do not govern themselves directly. Rather, laws and collective decisions made by a representative body are subjected to the test of public reason—public inquiry and scrutiny—to 'the verdict of the people' (Manin 1997: 192). The parliament amounts to a

> Congress of Opinions; an arena in which not only the general opinion of the nation, but that of every section of it, and as far as possible every eminent individual whom it contains, can produce itself in full light and challenge discussion [. . .] where those whose opinion is overruled, feel satisfied that it is heard, as set aside not by a mere act of will, but for what are thought to be superior reasons.[15] (Mill 1861: 258 9)

The parliamentary principle provides guidelines for the establishment of representative bodies for deliberation and decision-making. It embodies rules for representation, for the election and the composition of decision-making bodies, delegation, hearings as well as rules for rational debate such as norms for speech, reply, and report including specified time limits to avoid filibuster, for exclusion of 'irrelevant' supplements, and so on. The parliamentary principle combines rules for inclusion of those affected with rules for deliberation and voting that aim at ensuring public debate; the judgement and verdict of the people. Parliament is, according to Guizot, 'the place in which particles of reason that are strewn unequally among human beings gather themselves and bring public power under their control' (Schmitt 1926: 35). It combines participatory and epistemic functions, and may thus be seen to warrant the presumption of rational and generally acceptable results. Collective decisions subjected to such procedural constraints may henceforth legitimately claim to be correct. Parliamentarism, thus, operationalizes the basic principles of popular sovereignty and political equality, which it is hard to establish viable alternatives to when forms of representation are needed for democracy to prevail.

Moreover, majority vote, which is intrinsic to party-based parliamentarism, respects, as was noted in Chapter 3, the formal equality of the actors, and thus has value in itself. Political parties, for their part, connect the representatives to the grassroots level. The upshot is that the parliamentary principle can be defended by reference to the fundamental political ideas of freedom, public deliberation, equal rights and right to participation, which constitute the very foundation for a fair organization of social life. It embodies the idea of legitimate decision-making based on norms of equality and symmetry, the right to initiate and to question as well as to reflexively engage in the debate of all topics, including the rules of the

[15] On the rationale of the parliamentary principle, compare the previous discussion in Chapter 7. Mill, who is the author of famously stated fallibilist credo that 'the beliefs that we have most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded' (1859: 232), supported the *trustee*, based on an open mandate, as opposed to the delegate notion of representation (see S. Holmes 1995: 181). 'It is precisely in order to enable meaningful deliberation within Parliament that, in parliamentarism, representatives are not bound by the wishes of their constituents' (Manin 1997: 206).

game itself. Even though parliamentary rule does not exhaust the concept of popular sovereignty and should not be equated with democracy altogether, it is hard to come up with functional and normative equivalents to it. It constitutes a vital common institutional denominator of European democracy; the democratic minimum making up the European political identity.

CONCLUSION

Without taking into account the moral strength of the parliamentary form and the manner in which it is embedded in a multi-level parliamentary complex we cannot make sense of the fact that parliamentarism has carried the day in the EU reform process even though central conditions for it to work have been missing. Many factors and processes have contributed to bring it about, but a full account can be given only by taking the principle's normative force into consideration. The lack of alternatives, coupled with the strong grounds that can be put forward in justifying parliamentarism, makes it a tremendously strong organizational principle of democracy. It has come to symbolize the embodiment of democratic rule altogether. It is a well-tried principle that has endured the test of time and has contributed immensely to the integration of modern societies in Western Europe over the last century.

Finale: An Unaccomplished Post-national Democracy

Today's Europe is marked by *complex interdependence* embedded in a multi-level political constellation. Europe's challenge is that it cannot simply do away with this structure without facing democratic losses. The EU solves many problems for the member states but has also legally circumscribed and contained them. The EU is constructed not only to install a common market but to overcome power politics and nationalism, and to sustain democracy in an increasingly interdependent world. It is there to remedy what went wrong among the nation-states. Dismantling this order would amount to nothing less than a transformation of (counter)-revolutionary proportions. But neither can Europe simply rely on the structure in place to resolve its democratic deficit, as it gives rise to legitimacy problems of its own.

A state-less government

What is new and interesting about the EU in the international system is that the integration process has taken place by entrenching a governmental type of rule without replicating the state form at the European level. The EU amounts to less than a state but more than an international organization and a system of transnational governance. The EU is a political system that legislates, regulates, and adjudicates; whose actions impinge on identities and loyalties and which allocates and reallocates values throughout Europe. It performs many functions of a *full-blown government*. The use of qualified majority voting in the Council has eroded the ability of individual countries to postpone new legislation. The ECJ has been a driving force in the political development of the EU. It has subjected the EP's decisions to substantive judicial review and has thus strengthened and authorized the view of it as an autonomous political body within the Union. Increasingly the Commission is held to account by the EP. In addition, the Union has democratic qualities. In the EU, there is the right to vote, freedom of movement, and a ban on discrimination. The Members of the European Parliament are directly elected by the citizens of the member states.

In the political theory of the multi-level constellation that makes up the EU, it is conceived of as a regional subset of an emerging cosmopolitan order. The EU is a polity in its own right that possesses neither a collective identity nor the coercive instruments of a state. It is amounting to a *state-less government*. The EU is a large-scale experiment searching for binding constitutional principles and legitimate institutional arrangements, and one

in which the idea of democracy is detached from both nationhood and statehood; and one whose normativity consists in the anticipation of a rightful world order. As it is not premised on group identity, the Union is able to accommodate a high measure of variance with regard to territory and function. We are witnessing a polity without a state, but can it be cohesive without a demos?

A working agreement

As the EU is not remotely a nation state, there must be another basis than pre-political agreement on substantial values and a state status for the justification of rights and policy-making. That democratization has taken place even when the socio-cultural resources are shallow is due to the deep-reaching European consensus on the constitutional essentials; on the democratic minimum. The constitutional essentials of the European nation-state have left a strong imprint on the reform processes of the European Union. The EU draws on a common *normative resource base*; and it is only if we take this into account that we can render understandable the steps towards democratization and the reduction of arbitrary domination that have taken place. Hence, the Union is not a *sui generis* kind of entity in legitimacy terms, but one whose mode of legitimation mirrors that of the democratic law-state.

The political theory of the multi-level constellation that makes up the EU posits that it is held together by a working agreement, an essential part of which is trust in the procedures and institutions through which common affairs are dealt with and laws, regulations and directives, are made and implemented. The EU is a compound polity in legitimacy terms, which finds support in different segments of stakeholders and publics for different reasons. It lacks an entrenched notion of citizenship, of who constitutes the Union, which can be generally agreed upon. The political order of Europe is therefore *unfinished and unstable*, but it is one that is also in motion. Short of a nation or an analogous consensus-conducive collective identity that makes clear in what capacity European citizens are equal, identification with common concerns cannot be taken for granted. It has to be created through the political struggle for recognition and justice. But can the EU be democratic?

Democratization constrained

As the aborted constitution-making process shows, the constitutional development of the EU is detached from 'the people'. This development could have become rooted in the citizenry in so far as the Constitutional Treaty triggered a European-wide debate about which common laws Europeans should abide by. In fact, the Laeken process constituted an opportunity for a proper *constitutional moment* with identity- and demos-shaping effect. It was, however, not seized upon by the member states. It represents a lost opportunity for a constitutional learning process, which the EU is highly in need of from a democratic point of view.

The democratic deficiency, the lack of politically authorized rules, grants the ECJ much power and an outsized degree of autonomy in interpreting the Treaties. The structure leaves a strong imprint of *juridification* on the EU, and allegations of technocracy and executive dominance are hard to counter. The rights that the citizens enjoy, and the decisions they are ruled by, are only to a limited extent made by themselves or their representatives. The EU does not live up to democratic standards, but a partial process of democratization has nevertheless taken place, and it is of interest to understand how it has come about and which form of democracy it subscribes to.

The reform processes of the Union accentuate that democratic procedures, human rights, rule of law, popular sovereignty, and citizenship, which reflect the core legitimacy basis of the national law state, also make up the normative resource basis for a supranational political order that decision-makers can and must draw upon. They have come to constitute *the very language codes* for dealing with common affairs. These codes have become so deeply entrenched that they now constitute the very basis for cooperation: they cannot be chosen at will. This grammar of politics refers to the bare bones of the constitutional state's cognitive rational principles in contrast to the pre-political we-feeling and allegiance making up the *existential common ground* of nationhood, of the love of country.

No humanitarization without representation

According to democratic theory, the terms of self-government must be set by the citizens themselves; or, in the words of deliberative theory: citizens must be offered justification for the exercise of political power that has convincing force in light of standards that are accessible to them. The inclusive procedures constituted by the rights of the citizens to participate and hold the power-holders to account are seen to bear the burden of legitimation.

The ability to shape identities increases greatly with the degree of institutionalization of political procedures. In this perspective, lack of civic solidarity as well as of a public sphere is a consequence of the democratic deficit, and not its cause. Extensive deliberation and consensus-seeking compensate for the lack of power at the Union level, but are no substitute for democracy. *Deliberation is not enough.* Only with egalitarian procedures of law-making in place through which the citizens can influence the laws that affect them, and effectively determine whether the reasons provided are good enough, can there be democracy.

The EU is a European construct, which very much reflects the values, institutions, and legal orders of the constituent parties. Even though the EU is committed to democracy, it is not democratic. Its de facto legitimacy is *parasitic* on the fused legal, political, and administrative orders. However, the characteristic of parasitic life forms is that they suck out the lifeblood of their host and tend to destroy it in the end. Today, EU decision-making subverts democratic law-making processes by privileging executive power and technocratic rule. Further, the distributive consequences of deregulation and unfettered marketization—of

negative integration—may hollow out the basis for solidarity in Europe. Another subversive effect may be attributed to the manner in which the negative referenda on the Constitutional Treaty were handled. It ended up as the Lisbon Treaty, an intricate compromise struck by heads of governments, with the obvious aim of omitting new rounds of referenda. Such wears out the saved trust basis of the Union and makes a sham of democratic commitments.

Democracy requires that the citizens can approve or reject the laws they are subjected to. It has not been possible to establish the conditions under which a public justification process would be deemed legitimate. Since the institutional as well as the civic conditions under which a public justification process would be deemed legitimate are not in place, European post-national democracy remains an unaccomplished mission.

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