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Why Europe?

Possibilities and Limits of European Integration

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FOREWORD

The failure to ratify the Constitutional Treaty has prompted a renewed debate on the legitimacy of European integration and democracy in the European Union. Are democracy and the Constitutional Treaty prerequisites for a legitimate and functioning polity or would democratisation and explicit constitutionalisation of the EU, on the contrary, risk spelling the end of the Union?

The second annual conference of the Swedish Institute for European Policy Studies (SIEPS) was held in Stockholm 16 November 2006 on the theme *Why Europe? Possibilities and limits of European integration.* The purpose of the conference was to provide scholarly perspectives on the sources of legitimacy, the democratic credentials and the constitutional alternatives for the EU.

This volume is made up by the contributions of the participants of SIEPS' annual conference 2006. Professors Føllesdal and Shaw have submitted written contributions based on their presentations while Professor Moravcsik's contribution is a transcript of his speech. The contribution by Langdal and von Sydow was written after the conference in order to introduce the key concepts and the general debate concerning constitutionalism, democracy and legitimacy in the European Union. The contributions have also been published in a forum section of *Scandinavian Studies in Law*, vol. 52.

SIEPS conducts and promotes research and analysis of European policy issues within the disciplines of political science, law and economics. SIEPS strives to act as a link between the academic world and policy-makers at various levels.

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Fredrik Langdal and Göran von Sydow

1 INTRODUCTION

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

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

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

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

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

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

* We would like to thank Andreas Føllesdal and Karl-Magnus Johansson for their constructive comments on an earlier version of this text.

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

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

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

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

2 CONSTITUTIONALISM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 LEGITIMACY

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

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

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

A composite view of legitimacy is found in the analytical framework developed by Fritz Scharpf. First, input legitimacy concerns "government *by the people*" and is closely related to traditional notions of representative democracy.[15] However, he sees a 'thick' collective identity as a precondition for input-oriented legitimation. Shared history, culture and language makes redistribution and (enforced) solidarity acceptable, while Føllesdal in his contribution argues that 'contingent compliance' can be promoted through institutions and institutional design.[16] The concept contingent compliers in this context means that citizens will follow the rules as long as they consider them fair and as long as they believe that others also will follow the rules.[17] In Scharpf's view, input-oriented legitimation is not possible within the European Union but he takes a more positive view on the possibilities for output-oriented legitimation, which does not necessitate a collective identity – only common interests,[18] where results and not procedures is the decisive point, i.e., a political order is legitimate because the citizens accept the *results* of public decisions and the effectiveness of the system (government *for the people*).[19]

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

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

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

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

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

[16] *ibid.*, p. 8f .

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

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

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

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

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

Finally, having introduced 'legitimacy' and 'legitimation' we should also try to make sense of the notion of a deficit. Such a deficit could either be identified through comparison with an ideal state or through empirical comparison with existing political systems. However, neither point of reference is necessarily appropriate for evaluating legitimacy in the European Union. Føllesdal lists four different symptoms commonly invoked when discussing the legitimacy deficit; falling popular support, noncompliant behaviour; challenges to the legality of European integration; and shortcomings from a normative perspective. Moravcsik in his works uses some of these measures, in particular support and trust, when addressing, in his view, the misconception of a legitimacy deficit in the Union.[23]

Unsurprisingly, this brief discussion leaves us without a consensus regarding legitimacy and how it is to be measured. Without any intention of solving this gargantuan challenge we will only refer the reader to some suggested operationalisations of legitimacy. Support, trust, loyalty and acceptance are all integral to the concept of legitimacy and one can follow Easton in

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

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

[22] But see also *ibid*.

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

emphasising the importance of diffuse systemic support, which is indeed possible to measure.[24] Seen this way, the question of legitimacy of the European Union is an empirical rather than a normative question but there is also the important question of 'support for what, precisely'? Is it for democracy, institutions, constitutions or the political system?[25] Furthermore, as indicated above, there are a number of interesting measures outlined in the contributions.

4 THE DEMOCRATIC DEFICIT

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

Numerous scholarly efforts have resulted in a multitude of definitions, diagnoses, remedies and prescriptions concerning the nature of the EU and its political system. According to what is commonly used a *standard definition* of the democratic deficit[26] the central democratic problem is that control over the political agenda as well as decisions and political outputs has shifted from being under parliamentary control (through the national, parliamentary chains of delegation) to a executive-dominated system at the European level. According to this view, the supranational Commission and the representatives of national governments in the Council of Ministers are the key actors while the parliamentary control exercised by both national and the European Parliament is deemed inefficient. The central institutional problem is therefore associated with an asymmetry of power and accountability. The expansion of the degree of decision-making beyond the control of national parliaments has grown substantially and, thus, brings more salience to issues concerned with the democratisation of the EU.

The assessment of the democratic deficit often depends on some basic conceptual differences among which the definition of democracy and how the EU is perceived in terms of the logic of

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

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

[26] Weiler, J.H.H with Haltern, U.R & F.C. Mayer (1995) 'European Democracy and Its Critique'. *West European Politics,* Vol. 18, No. 3, pp. 4–39. Føllesdal and Hix argue that the debate around the democratic deficit has become even more diverse and contribute with an upgraded version of the democratic deficit that involves five claims: 1) European integration means an increase in executive power, 2) the European parliament is too weak, 3) there are no 'European' elections, 4) the EU is too distant from voters, 5) European integration produces a 'policy drift' from voters' ideal preferences. Føllesdal, A. and Hix, S. (2006) 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik'. *Journal of Common Market Studies,* Vol. 44, No. 3, pp. 533–62.

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

However, this is naturally not the full story of the democratic credentials of the EU's political system. Schmitter argues that the EU lacks many preconditions necessary to the creation of a democratic system in the traditional meaning that it needs to look for alternative avenues. There is a lack of democratic infrastructure in that the EU lack a clearly defined superior authority, a defined centre and territory, a common identity and common elections and party system.[31] Furthermore, many observers argue, as we saw above, that some sort of common identity is necessary for making majority-decisions acceptable for the minority. It has also been argued that there is a lack of a common European public space.[32]

Due to the hybrid between supranational and intergovernmental modes of integration, there are also different interpretations of which chain of delegation between citizens and public decision-making that matters the most. From an intergovernmental perspective the legitimacy of European level decision-making derives from the national parliamentary chains of delegation. According to this view, the ministers in the Council of Ministers are held accountable in their parliament back home and voters are making judgements on the government's European policies in national elections. From such perspective the lack of citizen control at the European level is of

[27] Dahl, R.A. (1989) *Democracy and Its Critics,* New Haven: Yale University Press.
[28] However, votes are weighted differently depending on the size of the country.
[29] Mair, P. (2005) *Popular democracy and the European Union polity*. European Governance Papers (EUROGOV) No. C-05-03, 2005.
[30] Mair, P. (2000) 'The Limited Impact of Europe on National Party Systems'. *West European Politics,* Vol. 23, No. 4, pp. 27–51.
[31] Schmitter, P. C. (1997) 'Is it Really Possible to Democratize the Euro-Polity?' in Føllesdal, A. and Koslowski, P. (eds.) *Democracy and the European Union,* Berlin: Springer.
[32] Habermas, J. (2001) 'Why Europe Needs a Constitution'. *New Left Review*, No. 11, pp. 5–26

limited concern. However, with the expansion of majority voting in the Council the control of national parliaments is challenged. The theory of liberal intergovernmentalism argues that the integration process proceeds as a result of consensual outcomes between national government representatives.[33] Those representatives are elected nationally (where elections and representation function more efficiently than in European parliament elections) and have good information about voter preferences (so they can pursue policies close to these) and can exert control over supranational agents.

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

5 DEMOCRATISATION AND LEGITIMACY

As argued above, the perception of the integration process, as such, has bearing on how the democratic credentials of the EU are evaluated. If one understands the EU mainly as an intergovernmental organisation to which sovereign states have delegated some authority that can be re-nationalised if necessary, the democratic deficit becomes less problematic than if the EU is assigned state-like properties. In the former understanding the expansion of EU-level decision making is legitimised through the national chains of delegation and mechanisms of accountability remain with the national political systems. This mainly intergovernmental perspective can be criticised for having a too static and formalistic view on integration. Even though the national channels of representation may be central to the overall legitimacy of the system and even if expansion of community action is advanced by national leaders, the drift of competence to the European level leads to increasing asymmetries between power and accountability, according to the critics. One key element is associated with the issue of *kompetenz-kompetenz.* The main question is whether or not the EU can expand its own competences and therefore touches upon the issue of which level of the system that has *final control over the agenda.* The link between sovereignty and what construes the demos in a democracy is addressed by this criterion. No other level or agent within the system should have the capacity to overrule the

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

[34] Bartolini has a different view on these issues. He argues that since decisions are not collectivised issues of legitimacy becomes irrelevant "To the extent that the EU is based on the voluntary agreement of all member states to participate, it leaves a constant option to exit open for all members, it allows partial exits, opt outs, variable geometries and the like, it resorts on many issues to unanimity voting and /or to mechanism of disproportionate weights, so legitimacy is immaterial within the EU and there is little need to discuss it. The EU does not lack legitimacy; it is not insufficiently legitimate. It is simply *aligitimate* in the sense that the problem is irrelevant to it decision-making." Bartolini (2005) p. 166.

demos in what issues should be on the agenda and not.[35] Still, in an abstract sense, the demos can delegate authority to agents taking actions outside the direct influence of the demos. However, the crucial criterion is that the demos can retrieve any delegation. If it can do so it qualifies as *delegation* and when this mechanism of restoration does not function we are dealing with *alienation*.[36] Alienation in this sense means a delegation of powers that cannot be brought back to the original political arena.

Regardless of which approach one takes to the process of European integration, there is no denying that both the scope and depth of the Union's competencies has increased considerably during the last decades, in particular in the area of joint decision-making. How much of the annual bulk of legislation emanates from the European level is however a matter of contention and estimates vary between 15 and above 80 percent.[37] One study of Swedish laws and regulations between 1995 and 2004 found that only six percent were implementing or complementing directives or regulations stemming from the European level. Naturally, such variation in perceptions of reality results in vastly different diagnoses of – and prescriptions for – the constitutional and democratic reforms of the Union. That is to say, if the policy-making on the European level is best characterized as 'marginal' and confined to technocratic regulation, rather than encompassing, political and re-distributional, then the case for comprehensive legitimizing reforms is not as strong as if the 'true' state of affairs is the other way round. As we will see in the contributions, apart from normative differences, this characterization of reality shapes the conclusions of the authors.

6 REFORM STRATEGIES

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

6.1 Politicisation

A recent strand in reform strategies of the EU is to propose an increased politicisation of the European level political system.[38] The politicisation-thesis makes reference to the democratic breakthrough in the nation-state and argues that political conflicts are essential for the introduction of a representative democracy with real electoral choices. Research on party behaviour in the European parliament has shown that party groups are increasingly cohesive and that there

[35] Dahl, R.A. (1989) *Democracy and Its Critics,* New Haven: Yale University Press, p. 113.
[36] Karlsson, C. (2001), *Democracy, Legitimacy and the European Union,* Uppsala: Statsvetenskapliga föreningen, p. 46ff.
[37] This type of estimates are naturally riddled with definitional problems which makes comparison between different studies difficult, but see for example Johannesson, C. (2005) 'EU:s inflytande över lagstiftning i Sveriges riksdag'. *Statsvetenskaplig Tidskrift*, Vol. 107, No. 1, pp. 70–84, Hegeland, H. (2005) 'EG-rättens genomslag i svenska lagar och förordningar'. *Europarättslig tidskrift*, Vol 8, No. 2, pp. 398–399. See also Nugent, N. (2006) *The Government and Politics of the European Union*, 6th edition, Basingstoke: Palgrave Macmillan, p. 388 and McKay, D. (2001) *Designing Europe: Comparative Lessons from the federalist Experience*, Oxford: OUP, p. 12.
[38] Hix, S. (2006), *op. cit.*

is an embryonic European level party system. Conflicts within this party system nowadays resemble those of most national party system and are concentrated around the traditional left-right axis. This provides a good basis for making politics more contested within the polity and to provide a real electoral offer in EP-elections. The argument is based on a competitive model of representative democracy in which the mechanism of accountability functions primarily because there is a choice between altering elites aspiring at controlling the executive.[39] From this perspective, making a European executive accountable before a directly elected parliament would transform the EU-level political system into a more democratic one. The European level executive should by its composition reflect the electoral outcomes in EP-elections. These proposals put emphasis on the importance of political conflicts and alternatives that may foster political awareness and attachment of citizens. Research has often described EU-level policy-making style as consensual. The decision-making rules are organised in such way that political outcomes often are the result of compromises. This leads to mainstream political outcomes that are acceptable to all (or most) actors. Those who favour more politicisation argue that the choices for the EU now are more concerned with issues that are market-making or market-correcting and that this division could provide the basis for alternative visions of future integration.[40]

6.2 Deliberation

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

6.3 Participatory democracy

Treaty revisions as well as issues of membership have increasingly been decided by modes of direct democracy through the use of referenda. While some member states have constitutional provisions stipulating that the people has to be consulted when signing international agreements, most cases of popular consultation have been initiated on a non-required basis by national parliaments or executives. The expected effect is that the legitimacy of those decisions, for instance delegation of more powers to the EU, will increase. While most referendum-out-

[39] Schumpeter, J. (1943), *Capitalism, Socialism and Democracy,* London: Unwin.
[40] Hix, S. *op. cit*., p. 23
[41] Eriksen, E.O and Fossum, J.E. (2002) *Europe in Search of its Legitimacy: Assessing strategies of legitimation,* ARENA Working papers, p. 38.
[42] This strategy can be found in the Commission's White Paper on European Governance, COM(2001) 428 final.

comes have been affirming, the cases of no-votes have given more resonance (Denmark 1992, Ireland 2001, France 2005 and the Netherlands 2005). The troubles in ratifying the Maastricht Treaty urged some analysts to proclaim the end of the so-called 'permissive consensus'.[43] The logic behind the 'permissive consensus' was that national leaders were entrusted by citizens to pursue policies at the European level despite the asymmetry between power and accountability at the European level.

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

6.4 Decentralisation

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

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

[44] See for instance the think-tank Initiative and Referendum Institute Europe, http://www.iri-europe.org

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

[46] See for example Langdal, F. (2003) *Nationella parlament och beslutsfattande på europeisk nivå*, Sieps 2003:12 and Raunio, T. (2005) 'Much Ado About Nothing? National Legislatures in the EU Constitutional Treaty'. *European Integration Online Papers*, Vol. 9, No. 9.

More parliamentary control – or influence – may help to alleviate some aspects of the Union's legitimacy problems, through stimulating public debate, through putting European affairs at the heart of the domestic political arena and through strengthening the representative element in European decision-making.[47] National parliaments are in this context seen as 'better' representatives of the national constituencies (holding preferences closer to the voters) and are seen as the appropriate institutions to control the delegated powers. The *constitutional* rationale underlying the idea of national parliaments as a solution to the democratic deficit is to ensure that parliamentary control capacity is as efficient when dealing with European affairs as with purely domestic legislation. This applies in particular to intergovernmental decision-making but is for the reasons given above never going to be able to fully counteract the actual transfer of resources to the executive, or to other EU institutions. If such tight control were to be implemented across the Member States it would most likely paralyse the decision-making of the Union through substantially increasing the number of veto players. However, while there are a number of benefits from active parliamentary involvement from a democratic perspective it cannot on its own solve the democratic deficiencies of the Union.

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

[47] For empirical research on national parliaments and European affairs see for example Smith, G. (ed.) (1996) *National Parliaments as Cornerstones of European Integration*, The Hague: Kluwer and Bergman, T. and Damgaard, E. (eds.) (2000) *Delegation and Accountability in European Integration: The Nordic Parliamentary Democracies and the European Union*, London: Frank Cass.

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

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

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

6.5 Don't rock the boat

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

7 CONCLUSION

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

First, the expanding scope and blurred boundaries of EU competence is as we have indicated above a cause for concern from a democratic perspective considering the adverse effects on

[49] Majone, G. (1996) *Regulating Europe,* London: Routledge.
[50] Majone, G. (2000) 'The Credibility Crisis of Community Regulation'. *Journal of Common Market Studies,* Vol. 38, No. 2, pp. 273–302.

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

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

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

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WOULD THE CONSTITUTIONAL TREATY HELP ALLEVIATE THE UNION'S LEGITIMACY CRISIS?

Andreas Føllesdal

1 INTRODUCTION

During the five years that is the life span of SIEPS we have witnessed increased attention to what is sometimes referred to as the 'democratic deficit' of the EU. Or perhaps better: an alleged 'legitimacy deficit'.[1]

The Convention on the Future of Europe was in part a response to such worries, and at least three features of the Constitutional Treaty seem to have been introduced to quell these concerns: Increased democratic accountability, increased visibility of human rights, and a new mechanism for the principle of subsidiarity.

What are we to make of these suggestions? My talk focuses of this question, for four reasons related to the host institution and our host country.

Firstly, the attention to this deficit is perhaps partly due to Sweden's membership in the EU, and partly fuelled by SIEPS own publications over the five years it has existed.[2] Secondly, there are tensions between these three mechanisms, very visible from a Swedish point of view, where majoritarian democratic accountability stands out as a central condition of normative legitimacy. From that perspective it is not at all obvious that subsidiarity and human rights constraints are legitimate: both of these arrangements explicitly limit the scope of centralised democratic rule in the form cherished in Sweden and other unitary states that celebrate parliamentary sovereignty, and that are characterized by very high levels of political trust in the authorities. Thirdly, our judgment on this topic may affect other urgent issues: Our assessment of the Constitutional Treaty and its plight, what if any innovations should be kept, the current limbo of the EU, and where the EU should go from here. Fourthly, I will suggest that the *federal* tradition of political thought makes it easier to assess these three mechanisms, applaud them, but also improve on them. With *federal* I here simply mean that legal competences/ authority is constitutionally divided between sub units of a political order and the centre bodies of that order. But the federal terminology may challenge deep rooted Swedish conceptions of state sovereignty, democracy, and legitimacy.

I first remind you of the bewildering literature of alleged symptoms, diagnoses and cures for this 'legitimacy deficit'; then offer one unified account that combines normative political

[1] The research for this article was partly funded by the NEWGOV project on New Modes of Governance, financed by the European Commission. The Edmond J. Safra Center for Ethics, and Currier House, both at Harvard University, kindly offered optimal conditions to complete these reflections.

[2] Including *inter alia* Fredrik Langdal, 2003:12 *Nationella parlament och beslutsfattande på europeisk nivå*; Jörgen Hettne, 2003:4 *Subsidiaritetsprincipen - politisk granskning eller juridisk kontroll?* ; 2004:3-7 *En konstitution för Europa? Reflektioner*.

theory and elements of game theory, before I turn to comment on the three recommendations of the Constitutional Treaty. I shall argue that they jointly provide some normative improvement on the current European Union political order.

2 LEGITIMACY DEFICIT?

Scholars disagree strongly about the symptoms, diagnoses and prognosis of whatever legitimacy deficit there might be. We even have different notions of legitimacy in mind: social, legal or normative.

Symptoms would tend to depend on the sort of legitimacy of concern. They include

- attitudes of *falling popular support*: Eurobarometer data on support for the existence of the European Community and of one's own country membership in it[3]; World Values Survey data showing mistrust of other Europeans[4]; reported mistrust of EU institutions[5];
- indications of *noncompliant* behaviour: "variable implementation" or non-compliance with Union directives; declining voter turnout for European Parliament elections[6]
- challenges to the *legality* of European integration: warnings from the German Constitutional Court and the Danish Supreme Court;
- and shortfalls measured by *normative standards*, for instance laments about the lack of parliamentary control of executive bodies at the EU level.

Many have challenged such diagnoses of a legitimacy deficit. Some question the symptoms: Support is still high for European integration; Politicians are losing political support – but do so across advanced industrial democracies.[7] And low and falling participation rates at European Parliament elections should not surprise, since national political parties tend to focus on domestic issues and national elections, and perhaps even collude against debates about European level choices of policy and institutions.

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[3] For a perceptive analysis, cf. Karlsson, Christer (2001) *Democracy, Legitimacy and the European Union*. Uppsala: Acta Universitatis Upsaliensis.

[4] Fuchs, D. and Klingemann, H-D. (1999) Table 4: Trust in others – from article "National community, political culture and support for democracy in Central and Eastern Europe", Amato, Guiliano and Batt, Judy *The Long-Term Implications of EU Enlargement: the Nature of the New Border*. San Domenico di Fiesole: European University Institute. http://www.iue.it/RSC/pdf/FinalReport.pdf,
Nicolaidis, Kalypso (2001) "Conclusion: The federal vision beyond the nation state", Nicolaidis, Kalypso and Howse, Robert *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, 439–481. Oxford: Oxford University Press.

[5] Again, such findings must consider that reduced confidence in parliaments, parties and the legal systems seems to be a general trend across established democracies – cf. Norris, Pippa ed (1999) *Critical Citizens: Global Support for Democratic Government*. Oxford: Oxford University Press.

[6] Jacobs, Francis, Corbett, Richard, and Shackleton, Michael (1995) *The European Parliament*. London: Cartermill, discussed in Sbragia, Alberta M. (1999) "Politics in the European Union", Almond, Gabriel A., Dalton, Russell J., and Bingham Powell, Jr. G. *European Politics Today*, 469–520. New York: Longman.

[7] Dalton, Russell J. (1999) "Political support in advanced industrial democracies", Norris, Pippa *Critical Citizens: Global Support for Democratic Government*, 57–77. Oxford: Oxford University Press.

The disagreement is deeper: it goes beyond symptoms to diagnoses. Some scholars argue that the EU does not suffer from a legitimacy deficit, democratic or otherwise.[8] Even those who think there is a crisis disagree about the diagnoses. Some point to the lack of procedural 'input' legitimation due to citizens' lack of influence and control. Others lament the lack of 'output' legitimation: the mismatch between citizens' preferences and politicians' delivery.[9] Others again believe that the main problem is the creation of legitimacy deficits within Member States who are no longer permitted or able to meet popular demands.[10]

So reflective scholars, politicians and civil servants disagree about which medications to prescribe: ranging from not to fix 'something that ain't broken', to a wide range of solutions; more arenas of normatively salient deliberation, a written Constitution that simplify structures of decision-making, enhanced legal standing for the Charter on Fundamental Rights, to expand Member State discretion through the Open Method of Coordination, or a more efficient Commission that can better secure the European interest over the conflicting national interests. Some suggest strengthening the European Parliament. Others instead seek a stronger role for national parliaments.[11]

Unfortunately, it is impossible to implement all the suggestions. There are trade-offs between efficiency, transparency, decentralisation, democratic accountability and judicial review of human rights. Efficiency, democracy and constitutionalism may obviously conflict, even in principle.[12] Mechanisms of veto and other arrangements that require actual consent may hinder efficient problem-solving,[13] as may accountability,[14] and increased democratisation and politicization of the EU Commission.[15] The authority to tax and redistribute may increase the problem-solving ability of the EU, but at the expense of participation and democratic accountability.[16]

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[8] Moravcsik, Andrew (2002) "In defence of the 'Democratic Deficit': Reassessing legitimacy in the European Union", *Journal of Common Market Studies* 40, 4: 603-24, Majone, Giandomenico (1998) "Europe's 'Democratic Deficit': the question of standards", *European Law Journal* 4, 1: 5-28; but cf. Follesdal, Andreas and Hix, Simon (2006) "Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik", *Journal of Common Market Studies* 44, 3: 533–62.

[9] Van der Eijk, Cees and Franklin, Mark (1996) eds. Choosing Europe? The European Electorate and National Politics in the Face of the Union, Ann Arbor: Michigan University Press; Follesdal, Andreas and Hix, Simon (2006) *op. cit*.

[10] Scharpf, Fritz W. (1999) *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.

[11] Neunreither, Karlheinz (1994) "The democratic deficit of the European Union: Towards closer cooperation between the European Parliament and the National Parliaments.", *Government and opposition* 29: 299–314, but cf. Falkner and Nentwich (1995).

[12] Elster, Jon and Slagstad, Rune editors (1988) *Constitutionalism and Democracy*. Cambridge: Cambridge University Press.

[13] Tsebelis, George (1990) *Nested Games: Rational Choice in Comparative Politics*. Berkeley: University of California Press, Scharpf, Fritz W. (1999), *op. cit*.

[14] Scharpf, Fritz W. (1999) *op. cit*., Naurin, Daniel (2004) "Transparency and legitimacy", Dobson, Lynn and Follesdal, Andreas *Political Theory and the European Constitution*, 139-150. London: Routledge.

[15] Lindberg, Leon N. and Scheingold, S. A. (1970) *Europe's Would-Be Polity: Patterns of Change in the European Community.* Englewood Cliffs, NJ: Prentice-Hall, 269 as cited in Banchoff, Thomas and Smith, Mitchell P (1999) "Introduction: Conceptualizing legitimacy in a contested polity", Banchoff, Thomas and Smith, Mitchell P. *Legitimacy and the European Union*. London: Routledge, 5; Majone, Giandomenico (2001) "Regulatory legitimacy in the United States and the European Union", Nicolaidis, Kalypso and Howse, Robert *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, 252-274. Oxford: Oxford University Press, 261-62; Craig 2003, 3.

[16] Börzel, Tanja A. and Hosli, Madeleine O. (2003) "Brussels between Bern and Berlin: Comparative federalism meets the European Union", *Governance* 16, 2: 179–202.

These disagreements notwithstanding, the Constitutional Treaty lays out at least three changes. I here want to focus on these apparently conflicting suggestions: Increase democratic majoritarian accountability; increase human rights constraints; and increase subsidiarity – protection against majoritarian decisions.

How are we to assess them? I approach this question as a political philosopher concerned with normative legitimacy.

3 NORMATIVE LEGITIMACY

Normative political theorists tend to focus on the normative assessment of regimes or particular institutions, asking whether they are justifiable to all those living under these arrangements, as political equals. If so, those subject to the arrangements – for instance citizens – have a 'political obligation' to obey these institutions or officials.

Some philosophers may dismiss other forms of legitimacy – general support or actual compliance, or legality – as irrelevant for the normative issue. However, I submit that a more satisfactory account of normative legitimacy should include considerations of general compliance. This is especially important when we assess the proposals of the Constitutional Treaty.

I suggest that we should focus on the conditions for when citizens have a political obligation to abide by rules and commands by the authorities. It is not enough that the rules are normatively legitimate. Instead, I submit that citizens have a political obligation only if such rules are also actually generally complied with. On this account, a normative duty to obey political commands requires firstly, that the commands, rulers and regime are seen to be normatively legitimate, and secondly, that citizens also have reason to trust in the future compliance of other citizens and authorities with such commands and regimes.

Institutions can bolster trustworthiness on both counts. Such trustworthiness in institutions and fellow citizens seems necessary for the long term support for the multi-level political order, and for authorities' ability to govern. This is especially important in an EU that has developed to make citizens increasingly interdependent – without having institutions in place to secure trust. The EU and the member state governments must become more trustworthy in the eyes of all Union citizens – and in the eyes of domestic supreme courts.

The three features – democracy, human rights and subsidiarity – contribute in several ways to make the EU more trustworthy. To explain this claim, I draw on insights from game theory.

3.1 Assurance among Contingent Compliers

Game theory and research on social capital shed much needed light on the challenges of trustworthiness. The challenge of political legitimacy is a particular instance of the complex assur-

ance problems that face 'contingent compliers'.[17] For a contingent complier to decide to comply and cooperate with rules and institutions, and otherwise cooperate with officials' decisions, she must

A) perceive the government as trustworthy in making and enforcing normatively legitimate policies; and

B) have confidence that other actors, both officials and citizens, will do their part.

Institutions can promote trust and trustworthiness among such contingent compliers in several ways to boost both conditions.[18]

With regards to the first condition – perception of the government pursuing normatively legitimate policies –

1. Institutions can allow and foster *civil society* that can allow the development and dissemination of a plausible public political theory, which may provide normative legitimacy by laying out and defending the objectives and normative standards of the political order: democracy, subsidiarity, solidarity, and human rights.
2. Institutions must be sufficiently *simple and transparent* to allow assessment.
3. The institutions must be seen to be generally sufficiently *effective and efficient* according to the normative objectives and standards.

Institutions may also help provide public assurance about the second condition – of general compliance

4. Institutions can be seen to *socialize* individuals to be conditional compliers, for instance in the educational system, or in political parties that foster somewhat consistent and responsive policy platforms.

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[17] Sen, Amartya K. (1967) "Isolation, assurance and the social rate of discount", *Quarterly Journal of Economics* 81: 112–124, Taylor, Michael (1987) *The Possibility of Cooperation*. Cambridge: Cambridge University Press; Elster, Jon (1989) *The Cement of Society*. Studies in rationality and social change, Cambridge: Cambridge University Press, 187; Ostrom, Elinor (1991) *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press; Scharpf, Fritz W. (1997) *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*. Boulder, Co: Westview Preses; Rothstein, Bo (1998) *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State*. Theories of institutional design, Cambridge: Cambridge University Press; Levi, Margaret (1998) *Consent, Dissent and Patriotism*. New York: Cambridge University Press. Recent normative contributions addressing the standards of normative legitimacy on the explicit assumption of such contingent compliance include Rawls, John (1971) *A Theory of Justice*. Cambridge, Mass.: Harvard University Press; Goodin, Robert E. (1992) *Motivating Political Morality*. Oxford: Blackwell; Thompson, Dennis F. and Gutmann, Amy (1996) *Democracy and Disagreement*. Cambridge, Mass: Harvard University Press, 72–73; Miller, David (2000) *Citizenship and National Identity*. London: Blackwell. For Social Capital, cf. Loury, Glen (1977) "A dynamic theory of racial income differences", Wallance, Phyllis A. and Mund, Annette Le *Women, Minorities, and Employment Discrimination*. Lexington, MA: Lexington Books; Coleman, James (1990) *Foundations of Social Theory*. Cambridge: Harvard University Press ch 8; Putnam, Robert D. (1993) *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton: Princeton University Press; Putnam, Robert D. (1995) "Bowling Alone: America's Declining Social Capital", *Journal of Democracy*: 65–78; Levi, Margaret (1998) "A state of trust", Braithwaite, Valerie and Levi, Margaret *Trust and Governance*. New York: Russell Sage; Newton, Kenneth (1999) "Social and political trust in established democracies", Norris, Pippa *Critical Citizens: Global Support for Democratic Government*, 169–188.

[18] I here modify Margaret Levi's model of contingent consent (Levi, Margaret (1998) *op. cit.*, ch.2; Levi, Margaret (1998) *op. cit.* Braithwaite, Valerie and Levi, Margaret eds. (1998) *Trust and Governance*. New York: Russell Sage.). See also Goodin 1992.

5. Institutions can include mechanisms that can be trusted to monitor whether the policy or authority actually *solve the problems* aimed for.
6. Institutions can include mechanisms that can be trusted to *monitor the compliance* of citizens and authorities with the legal rules.
7. Finally, institutions can provide *sanctions* that modify or reinforce citizens' incentives, to increase the likelihood that others will also comply.

Let me sketch how the three mechanisms contribute to the requisite trustworthiness.

4 DEMOCRACY

Let us think of democracy as party competition for political authority, on the basis of deliberation and equal votes for all citizens. The best argument for democracy is that these forms of rule are those that can best be trusted to remain responsive to the best interests of citizens over time. Contestation and popular control over leadership and the policy agenda are crucial mechanisms.

4.1 Counting votes – and shaping votes

Democratic rule plays several important roles. One is to aggregate citizens' political preferences into common decisions, by competition among political parties for citizens' vote, by majority rule or some modification.

Party competition and opposition parties also play other important roles for trust building and for preference formation or shaping of citizens' attitudes toward others. Opposition parties question and challenge ill-directed policies, and thus serve to make government more credible in the eyes of voters. Party competition provides a mechanism - imperfect, to be sure – to keep politicians responsive to the interests of citizens by making threats of replacement credible.

Many theorists note the contributions of free media and multiple parties in citizens' character and political preference formation. This is a particular challenge in federal arrangements, where citizens and parties must develop 'dual loyalties': both to citizens of the own sub-unit, and an overarching identity and loyalty to the whole federation. Party competition crystallizes interests and perceived cleavages by giving some conflicts priority, and they make a limited set of policy platforms salient to voters. Parties create competing, somewhat consistent platforms that give citizens a better sense of realistic alternatives and the scope of the practically feasible. Thus they contribute to identifying more sound and well-directed policies, and affect voters' preferences and ultimate values about the objectives of the political order.

Institutions such as the voting structure and the regulations of parties can thus help socialize citizens and otherwise build trust, for instance by fostering the requisite normative sense of justice to consider the impact on others.

4.2 In the Constitutional Treaty

The Constitutional Treaty increases democratic accountability: it increases the power of the European Parliament, and gives national parliaments and media much more information about the decisions, and the parliaments get more influence over decisions at the EU level.

Critics will observe that, in contrast to many domestic democracies, there are few if any vehicles for encouraging a European-wide debate about the best objectives and policies of the EU. The few public arenas for political discussion make it difficult to mobilize political opposition.

But their absence may be temporary. Critics point out that there is presently little in the way of public debate – the good work of SIEPS and similar institutions notwithstanding. But there is reason to believe that the requisite public debates and forums are likely to develop as political contestation among parties increases. Only then can people see the impact of their votes, and that may increase the number of voters. I think we saw this when the European Parliament rejected Commission President Barroso's first slate of commissioners. The grounds for this rejection is surely contestable, but the main point here is simply that party political contestation is important to promote public debate, electoral participation and informed preference formation.

Thus pessimism about European level democracy should not be overstated: there are signs of more party organization and competition in European Parliament, and more policy contestation within the Council of Ministers. There are therefore openings for contestation about the EU's policy agenda, and critical scrutiny of performance.

A more fundamental problem with majoritarian democratic rule in general is that permanent minorities may have good reason to fear that a majority will regularly disregard their interests. Even though party competition tends to make rulers responsive to the best interests of citizens, majority rule by itself is not trustworthy toward minorities: it cannot be trusted to protect and promote their interests.

There are at least two ways to protect against such threats and hence boost trustworthiness. Both are 'counter-democratic' in certain senses: they remove issues from the political agenda: subsidiarity and human rights.

5 SUBSIDIARITY

A principle of subsidiarity regulates authority within a political order, where authority is dispersed between a centre and various sub-units – i.e. federations.[19] The principle as specified in the Union treaties requires that authority or tasks should rest with the sub-units unless the centre will ensure higher comparative efficiency or effectiveness in achieving the specified objectives. And this claim had to be supported by reasons given in public.

[19] Cf Hettne 2003 *op. cit.*

This principle was introduced in the EU to reduce fears of unauthorized centralization. It typically protects sub units – and citizens – against domination, incompetence and tyranny from the centre, be it through majoritarian decisions or otherwise. An effective principle of subsidiarity can thus boost the trustworthiness of central authorities, that they will not abuse their power – democratic or otherwise - over sub-units and citizens.

5.1 In the Constitutional Treaty

The Constitutional Treaty introduces a new mechanism to ensure subsidiarity. The Constitutional Treaty gives more power to national parliaments to monitor proposed EU decisions, and appeal them. National parliaments can give a 'yellow card' if they think the decision violates subsidiarity. This mechanism will increase trustworthiness in the principle of subsidiarity as a guarantor against unwarranted centralization.

However, one may reasonably worry that this is not enough. The procedure only applies to some legislation. And the national parliaments can only appeal to the legislative institutions, and not even to the European Court of Justice. So this version of subsidiarity may not be a sufficient guarantee against central domination. And subsidiarity does not prohibit centralization against the will of subunits, but only places the burden of proof on those who wish to centralize decisions.[20] Indeed subsidiarity arguments may require centralizing authority in multilevel arrangements if this benefits the sub-unit – or other sub-units. The risk of centralization is especially high if the centre has the authority to decide whether the principle applies to a particular problem. This creates problems when sub units – or citizens - disagree whether joint action is required and efficacious, and when they disagree about how to weigh the different objectives – e.g. in the EU.

A weakness of subsidiarity in general is that it does not protect individuals from domination, incompetence and tyranny from their own sub unit – unless this is specified as one objective of the union. So subsidiarity does not provide sufficient safeguards in a (quasi)federation – we must supplement with human rights protection against the sub unit authorities.

6 HUMAN RIGHTS

Human rights are important to promote general trust among citizens that a government will indeed pursue their interests. Human rights requirements achieve this because they restrict the options of governments, and indicate important objectives they must pursue. These safeguards reduce citizens' fears of abuse, particularly minorities who risk losing out in most majoritarian decisions.

Some have thought that the main role of human rights is to constrain the central authorities, since tyranny from central government is clearly a great threat to human flourishing. In poli-

[20] Føllesdal, Andreas (1998) "Subsidiarity", *Journal of Political Philosophy* 6, 2: 231–259.

tical orders with federal elements, human rights must constrain both the centre and the sub-units. An equally live threat is that a sub-unit government – democratic or otherwise – will ignore the basic needs and interests of a minority within the sub unit – especially since one of the reasons for federal structures often is precisely to allow more substantial autonomy for the sub-units than in a unitary state. So such legitimate local autonomy must also be constrained by human rights considerations in order to merit trust by minorities.

6.1 In the Constitutional Treaty

The German constitutional court has insisted that it must be clear that the EU will respect human rights. In response, the Constitutional Treaty adds the long list of fundamental rights of the EU's Charter on Fundamental Rights[21], including nondiscrimination, and respect for cultural, religious and linguistic diversity.[22] It also states that the EU should accede to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[23]

The Constitutional Treaty also improves on a procedure to be used if a member state is suspected of human rights violations.[24] If the violations do not stop after dialogue, the Council of Ministers may ultimately decide to exclude the offending state from the EU.

Some weaknesses of these proposals appear from the point of view that I have laid out. Firstly, the Constitutional Treaty underscores that human rights will be secured by the European Court of Justice. However, this court must weigh the various values and objectives of the EU against each other. This may be normatively or legally problematic from a point of view that grants human rights priority over ordinary legislation and public policies. Consider that, while human rights are included among the Union's values in Art I-2, Article I-3 states the various Union's objectives. It remains to be seen how the European Court of Justice will weigh human rights against other important values and objectives – and whether it will agree the European Court of Human Rights on how to decide such issues. Accession by the EU would entail that the supranational European Court of Justice may be overturned – by another supranational court.

A second weakness is a tension between democracy, subsidiarity and human rights protection in the EU. Consider the procedure to address suspicions that a member state engages in systematic violations of the Union's values. This procedure is consistent with a certain conception of subsidiarity and democratic principles, but it also highlights the weaknesses of these principles and tensions among them.

Surely, international or Union efforts should firstly seek to enhance domestic mechanisms that will alleviate and prevent human rights violations. Such supportive measures by outsiders may include fact-finding and reporting of facts and legal norms to domestic audiences who may

[21] http://europa.eu.int/comm/justice_home/unit/charte/index_en.html
[22] Art II-82.
[23] Art I-9.
[24] Art I-59.

have few other credible sources.

But who is to decide whether Union action is required? Again, the alleged violator government will surely hold that no outside action is needed – and thus, on one conception of subsidiarity, central action is illegitimate. While if the ultimate focus of concern is on citizens, action may still be required. On the other hand, if it is for Union authorities to decide, subsidiarity will not prevent central action on this issue.

A third striking feature of the procedure is that the Constitutional Treaty does not allow – even as an ultimate recourse – humanitarian intervention into any member state on human rights grounds. This outcome of the intergovernmental bargain is surely not surprising for political scientists. However, I still find the mechanism remarkable from the point of normative political theory. This respect for member states' sovereignty would seem unwarranted: the EU was after all established to prevent wars and massive human rights violations. Should it not be allowed to intervene in abusive member states?

Instead, the ultimate sanction against a member state is exclusion from the EU. Some critics would say that this shows an insufficient commitment to human rights, and an undue respect for member state sovereignty and subsidiarity. Others may question the benefits of a more permissive regime for interventions – even well-intentioned ones. Optimists may think that interventions will be counter productive, and instead that the threat of exclusion from the EU is a powerful enough deterrent.

7 CONCLUSION

I have sought to argue that three mechanisms of the Constitutional Treaty provide some improvement of the 'legitimacy deficit' of the EU. This may be faint praise: Both EU optimists and skeptics may agree that there is an improvement but they may disagree about how bad the situation was and still is.

I have also argued that there are remaining tensions and weaknesses in the current arrangements. Some may well go away. In particular, we might expect more party competition about policies and 'constitutional' issues once citizens learn that who they vote for at European elections may actually make a difference.

Other tensions and sources of mistrust remain. In particular, I have suggested that the 'Yellow Card' arrangement for subsidiarity does not do enough to quell understandable fears of centralization. Furthermore, the much needed boost of human rights protections may be helpful, but may offer insufficient protection for minorities within member states. Tensions remain between these three mechanisms - In particular, from the perspective of Sweden, a well-functioning unitary democracy. Why should democratically accountable parliamentarians ever be constrained by unaccountable bodies, be they human rights courts or constitutional courts who uphold subsidiarity? I have suggested that one way forward may be to consider the need for institutions that provide assurance among contingent compliers. They – perhaps we – are com-

mitted to do their – our - share in fair practices – but only as long as they – we – are assured that the institutions are fair, and that most others comply.

I have also suggested that the tensions may be easier to address and assess from the point of view of federal political thought.

This is both bad news and good news, for Sweden and SIEPS, respectively. The bad news is that the worries about deep mistrust toward government, and concerns about federalism, are two perspectives that are utterly unfamiliar to Swedish political culture. However, I submit that for many purposes, Sweden is already part of a (quasi) federal political order, with widely different levels of political trust.

The good news for SIEPS is that I think these challenges of federal thought and trust merits further academic attention. How best to conceive of democracy, human rights and subsidiarity in this new European political order are issues that will remain high on the research agenda for at least the next five years, until SIEPS celebrates its 10th anniversary.

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ONE OR MANY CONSTITUTIONS? THE CONSTITUTIONAL FUTURE OF THE EUROPEAN UNION IN THE 2000S FROM A LEGAL PERSPECTIVE

Jo Shaw

1 THE RISE AND RISE OF CONSTITUTIONALISM

Almost everyone, it would seem, is a constitutionalist today. One shift in approach that does seem to have come out of the whole sorry mess of the last six years or so of failed endeavour is that many observers of EU law and politics now seem to accept that the language of constitutionalism and constitutionalisation is appropriate and useful for describing the legal structures under which the EU operates. There does now seem to be a widespread consensus that the EU already has – as lawyers have been arguing for decades – a constitutional framework, albeit one which has a composite and limited character, as befits an entity which inhabits an ambiguous and hard-to-define space between the 'conventional' (nation) state and the 'conventional' international organisation. It is against the background of an increasingly permissive consensus about using the general language of constitutionalism to describe the European Union, therefore, that debates have been conducted about the fate of the Constitutional Treaty, and about the extent to which it could be described as truly 'constitutional' in character. This latter question raises in particular the fact that Part III of the Constitutional Treaty contains much material dealing with questions which are matters of 'ordinary' law in most national legal and constitutional orders. An important distinction needs, however, to be drawn between small 'c' and large 'C' constitutionalism. It is the proposition that the Union should be accorded a single documentary Constitution (big 'C') which clearly generates the greatest controversy within many national debates. In contrast, it seems easier, at least for some national political elites as well as many academic and political observers, to acknowledge that the existing treaties already have a limited constitutional (small 'c') character.

It is possible to characterise the Constitutional Treaty, for all its faults, as achieving a rather delicate (and potentially quite effective) compromise amongst the countervailing interests of the different Member States which solemnly signed it in October 2004. It is said to be 'a good try'. That was not enough, as we now know, to convince all those with a stake in the ratification process to give their assent. But having tried hard once, and failed, it becomes much harder, for all concerned, to achieve the same satisfactory compromise the second time around. It is easy to see how the failure of political leadership both in the EU institutions and in the Member States during the ratification process has now let the 'referendum genie' out of the bottle, and it will be hard if not impossible to put it back. It will not be easy for those who seek to push for the further development of the European Union to go back to the elite-led process of treaty reform and incremental change which dominated the years 1985-2001 (during which time no less than four amending treaties were signed[1]).

[1] Single European Act 1985, Treaty of Maastricht 1992, Treaty of Amsterdam 1997, Treaty of Nice 2001.

Moreover political elites dominated not only the issue of treaty reform but also the key decisions about enlargement which preceded the accession of twelve countries in 2004 and 2007; all of these decisions were taken behind closed doors in the European Council, despite their supreme importance for citizens in all the Member States and accession countries. It is not only the changed tenor of many discussions about the future of the Constitutional Treaty, but also the way in which the current accession negotiations involving Croatia and Turkey are being handled with an eye to wider public opinion, which highlight how difficult it now is to revert to the *ex ante* situation of elite decision-making behind closed doors. For it cannot now be assumed that any such decisions about the structure or fundamental direction of the EU would eventually receive consent and approbation from national electorates, whether directly via referendums or indirectly via general elections, or indeed passively as a result of the passage of time. In that sense, it can truly be argued that there is a crisis concerning the political core of the EU.

2 LEGAL AND POLITICAL CONSTITUTIONALISM IN THE EU

In this paper, I want to outline the importance of incorporating legal as well as political questions into the debate about the EU's constitutional future. As an essential supplement to the political arguments outlined above, this paper develops a separate legal-constitutionalist argument about the future of EU constitutionalism. Two questions will be asked:

- what are the principal contemporary features of the European Union's 'old' constitution, and what are the pressures affecting further development of this constitution (small 'c') at the present time; and
- is it possible to revert to 'old' incremental constitutionalism, given the failure of the 'new' constitutionalist enterprise which aimed to give the European Union a single documentary constitutional text, which many interpreted (rightly or wrongly) as a constitution with a big 'C'?

Here is not the place to rehearse in full the arguments regarding the EU's constitutional past, present and future. Suffice to say that there exists a symbiotic relationship between the two key reference points for constitution-building in the EU – informal and incremental constitution-building (small 'c'), and formal and documentary constitution-building (big 'C').[2]

On the one hand, we have what the EU's gradually evolving informal constitutional framework which has a composite structure, and is based on the existing treaties, as interpreted and applied by the Court of Justice and other political and legal actors. This composite constitutional structure enshrines both the rules according to which the EU operates, and the underlying political and ideological values and structures which infuse these rules.[3] Speaking schematically, one could summarise the central tenets of this constitutional structure as the following:

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[2] For more detail see J. Shaw, 'Europe's Constitutional Future' [2005] *Public Law* 132–151.

[3] N. Walker, "The White Paper in Constitutional Context", in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, (eds.) C. Joerges, Y. Mény and J.H.H. Weiler, Jean Monnet Papers 6/01 (2001), www.jeanmonnetprogram.org.

- The principle of the supremacy of EU law in relation to national law;
- The possibility for individuals to rely upon provisions of EU law before the national courts, the obligation on national courts to interpret national law in the light of EU law to achieve a conforming understanding of national law, and the possibility for and, in some circumstances, the obligation on national courts to refer questions of EU law to the Court of Justice for resolution;
- The authoritative role of the Court of Justice in giving rulings on the meaning and validity of provisions of EU law, and the emphasis which it has placed in its case law on rule of law issues and the role of fundamental rights in the EU legal order;
- The principle of limited powers, whereby the EU institutions are limited by reference to the objectives and competences defined in the EU Treaties;
- The principle of implied powers, which means that provided the EU institutions have been given a particular objective under the EU Treaties, they will also have the power to pursue that same objective.

This framework has evolved gradually and incrementally, since the early 1960s, when the Court of Justice handed down a number of seminal judgments, in particular *Costa* v. *ENEL* and *Van Gend en Loos*,[4] right through to the present time. Successive treaty amendments have also formed an important part of that evolving framework. However, since 2000, the EU and its Member States have been engaged – thus far unsuccessfully – in the qualitatively different attempt to develop the EU's constitutional framework, this time through the drawing up and adoption of a more encompassing and unitary documentary constitution. This is the second reference point for EU constitution-building.

This phase of constitutional development began with the Declaration on the Future of the Union appended to the Treaty of Nice, which recognised the unsatisfactory nature of the Inter-governmental Conference which concluded in December 2000 and articulated some of the key challenges facing an enlarging EU in the future. Eventually, after the work of the Convention on the Future of the Union and a further IGC had been concluded in 2004, that section of the process concluded with the signature by the Member States of the Treaty establishing a Constitution for the European Union in October 2004.[5] However, signature merely signalled the beginning of the ratification process which was always expected to be challenging. It now seems extremely unlikely that the Constitutional Treaty will ever come into force in its current form, given that it was rejected in popular referendums in France and the Netherlands in 2005. With the ratification process stalled indefinitely, the Constitutional Treaty itself for a long time has seemed to exist in limbo, even after the attempts by the German Presidency in early 2007 to revive the reform process.

[4] Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 6/64 *Costa* v. *ENEL* [1964] ECR 585.
[5] OJ 2004 C310/1.

There is, however, a strong relationship between these two points of reference for constitution-building. The Constitutional Treaty itself was very much a hybrid document. It drew very heavily upon the resources offered by the existing informal constitutional framework, while at the time innovating in a number of important areas, especially in relation to institutional design.[6] Had the Constitutional Treaty come into force as originally scheduled, on 1 November 2006, it would have been impossible to understand the future arrangements without frequent and detailed reference back to what had gone before, because of the symbiotic relationship which would exist between the 'new' and the 'old' EU constitutionalism.[7]

The future direction of EU 'new' constitutionalism is hard to predict, even after the German Presidency began serious attempts in early 2007 to revive the reform the process. It has been suggested that a type of 'Constitutional-Treaty-lite', or a 'Nice Treaty *bis*', which might garner sufficient support at the national level from governments, but which would not necessarily need ratification via referendum because of its limited character.[8] Such a document would be an amending treaty, rather than one which formally replaced the earlier treaties (if not the *acquis*), as was the case with the Constitutional Treaty. The focus in many of these proposals, although they have differed in areas of detail, has primarily been upon minimal institutional reform to smooth the ongoing effects of both the 2004 and 2007 enlargements,[9] and possible future enlargements.[10] A limited number of observers do still call for the resurrection of the Constitutional Treaty itself,[11] albeit sometimes in a revised form, in order to focus more directly on the issues where the EU is expected to 'deliver', such as climate change and social issues.[12]

Perhaps the better view about the political future of European constitutionalism at this stage is to avoid too much short term prognosis about the Constitutional Treaty and to adopt instead a longer term perspective.[13] Such a perspective would focus, with an open mind, on the question: 'what sort of constitution for what sort of European Union?' Some commentators have pointed out that, over a period of years or even decades, the most enduring and effective ideas put forward in documents such as the earlier Tindemans report of 1976 or the Draft Treaty of European Union elaborated by the first directly elected Parliament after 1979, have tended to be incorporated into the European Union's legal and constitutional structure in the end.[14] The Constitutional Treaty may eventually fall into this category, acting as a laboratory of ideas over

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[6] See generally J-C. Piris, *The Constitution for Europe: A Legal Analysis*, (Cambridge: Cambridge University Press, 2006).

[7] J. Shaw, 'Legal and Political Sources of the Treaty establishing a Constitution for Europe', (2004) 55 *Northern Ireland Legal Quarterly* 214–241.

[8] See the proposal for a mini-treaty by French Presidential candidate of the right Nicolas Sarkozy: N. Sarkozy, Speech to Friends of Europe, 8 September 2006, Brussels; 'France's Sarkozy urges EU reform', BBC News Website, 8 September 2006, http://news.bbc.co.uk/1/hi/world/europe/5327488.stm; N. Sarkozy, 'EU reform: what we need to do', *Europe's World*, Autumn 2006, 56.

[9] E.g J. Emmanouilidis and Almut Metz, *Renewing the European Answer*, Bertelsmann Stiftung, CAP, EU-Reform Papers, 2006/2.

[10] 'MEPs outline list of further reforms for EU enlargement', EU Observer, 14 November 2006, http://euobserver.com/15/22850.

[11] 'European Socialists set to relaunch Constitution', *EurActiv*, 24 October 2006, http://www.euractiv.com/en/constitution/european-socialists-set-relaunch-constitution/article-159040.

[12] A. Duff, *Plan B: How to Rescue the European Constitution*, Notre Europe, Studies and Research, No. 52, 2006.

[13] See also Shaw, above note 2 at 150–151.

[14] P. de Schoutheete, 'Scenarios for escaping the constitutional impasse', *Europe's World*, Summer 2006, 74.

a period of time. To put it another way, if what is in the Constitutional Treaty would 'work' in an EU context, then it will most likely be picked up again in future reforms, probably piecemeal rather than all at once, over a period of years.

However, if the longer term view is adopted (and the longer term view can co-exist comfortably with the adoption of minimal institutional reforms in the shorter term), the ideas of 'old' incremental constitutionalism will inevitably remain at the forefront of discussion. The longer term view would reject a fixed end-point for the development of the European Union, but would continue to embrace the ambiguous and hard to define nature of the EU as it exists at present, with its mixture of federal, supranational and intergovernmental features, both legally and politically. It is impossible to know the finality of integration, *pace* the wishes of former German Foreign Minister Joschka Fischer.[15] In the meantime, what we do know is that it is not only in the political sphere that there are sometimes uncomfortable relations between the European Union and its Member States, but also in the legal sphere.

3 EU CONSTITUTIONALISM: A PLURALIST CHALLENGE

Some legal commentators have sought to apply doctrines of legal pluralism familiar from legal anthropology and legal theory in order to provide a conceptually satisfactory frame for the sometimes uncomfortable juxtaposition of national law and what is still most accurately termed 'European Community' law (i.e. the law stemming from the Treaty of Rome establishing the European (Economic) Community). Legal pluralism, as a theoretical model, focuses on the plurality of sources (and types) of law, recognising sources beyond the two paradigms of national law and international law. Consequently, when applied to the European Union, legal pluralism goes beyond the stark conceptions of monism and dualism which have traditionally been used in order to figure out the relationships between EC law and national law.[16] EC law, and indeed the European Union legal order as a whole, escape the binary classification of national and international law, when one takes into account the complexity of the relationship between EC law and national law as conceived by the Court of Justice and national courts. In addition, EC law puts in place unique relationships between national courts *inter se* based on principles such as mutual recognition, which require judicial cooperation across boundaries. These relationships go well beyond that which normally would pertain between two sovereign states. Legal pluralism emphasises the interdependence and intertwined nature of the different legal orders, and does not insist – as national courts often do – upon either the fundamentally separate nature of each of the legal orders, or the notion that one system must necessarily, in the final analysis, encompass the other. As a variant of legal pluralism, theories such as multi-

[15] J. Fischer, *From Confederation to Federation -Thoughts on the finality of European integration*, Speech given at the Humboldt University Berlin, 12 May 2000. Available from http://www.rewi.hu-berlin.de/WHI/english/.

[16] For examples see N. Walker, 'European Constitutionalism and European Integration', [1996] *Public Law* 266, N. MacCormick, *Questioning Sovereignty*, (Oxford: Oxford University Press, 1999); M. La Torre, 'Legal Pluralism as Evolutionary Achievement of Community Law', (1999) 12 *Ratio Juris* 182-195; C. Richmond, 'Preserving the identity crisis: autonomy, system and sovereignty in European law', (1997) 16 *Law and Philosophy* 377–420.

level constitutionalism explicitly incorporate both the EU and the national constitutional orders into a multi-stranded and complex unity.[17]

While national judges have generally eschewed the explicit adoption of the theories which have been expounded by academic commentators, a review of the application of EC law in the national courts shows that the majority of national courts, including national constitutional courts, have pragmatically avoided engaging in too many conflicts with the strictures of the doctrines which the Court of Justice has advanced about, for example, the supremacy of Community law. Thus national judges have preferred to use tools of interpretation, sometimes implicitly ceding ground to EC law, in preference to fostering outright clashes.[18] A minority of national courts have ceded authority to the Court of Justice in a rather explicit way, e.g. in Belgium. In the UK, the subtle drafting of the European Communities Act 1972, combined with some creative and quite euro-friendly interpretation on the part of most of the higher judges, has meant that there is generally little overt conflict between UK law and EC law, despite what one might expect as a result of the doctrine of parliamentary sovereignty. Even in Germany, Italy and Denmark, where there has been explicit articulation at the level of higher courts, and especially constitutional courts, of the strict requirements of national sovereignty and the supremacy of national constitutional rules, in practice there have been relatively few concrete challenges to the effects of EC law.

What has sometimes been an uneasy settlement between different legal authorities of the Member States and the EU, which tend to see themselves as the guardians of their respective legal orders, has persisted for a remarkably long time. However, since what appears to be the failure of the Constitutional Treaty, do we now find ourselves in a different situation? Can it be said, against the backdrop of such a long period of pragmatic acceptance, that there has now been an *ex post facto* delegitimation of the Court of Justice's constitutionalisation of the original founding treaties, and of its constitutionalising case law such as *Costa* v. *ENEL* and *Van Gend en Loos*? The question must be asked whether this could be said to be one of the effects of the French and Dutch referendum votes. After all, two of the changes proposed by the Constitutional Treaty which were rejected by the French and Dutch voters did concern the sedimentation of this form of 'old' constitutionalism for the EU, notably Article I-6 of the Constitutional Treaty on the question of supremacy (which came under discussion in the Netherlands during the referendum campaign) and Article I-9 on the incorporation of the Charter of Fundamental Rights as a legally binding source of law.

Even if we cannot attribute a direct causality to the French and Dutch referendum votes, could at least a more diffuse challenge to the underlying legitimation of EU law be found in the additional challenges faced by the EU legal order as it faces up to simultaneous processes of widening and deepening? Widening – that is enlargement – sees the challenge of incorporating

[17] E.g. I.Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review* 703–750.

[18] See J. Shaw, *Law of the European Union*, Basingstoke, Palgrave, 2000, 3rd edition, 430–432 and 476–480.

another twelve legal orders within the multilevel constitutional order of the Union since 2004. This cannot happen overnight, or without challenges at the domestic level. The issue of (recently regained) national sovereignty (in both practical and legal terms) is a live issue in most if not all of the twelve new Member States. In many cases, those same states have been endowed, since the early 1990s, with rather activist constitutional courts. Deepening of European integration has occurred, in recent years, most notably in the area of justice and home affairs. This is an area where a substantial amount of EU policy-making still occurs under the heading of the so-called third pillar, where both the procedures for adopting new legal instruments, and in some respects those instruments themselves, are of a hybrid nature, where they are in more respects akin to international law instruments than those of the supranational European Community, or first pillar. On the other hand, the area of justice and home affairs law, which raises many questions about immigration and asylum policy, judicial cooperation in criminal law and criminal procedure matters, and civil liberties at the national level, is one which is seen as central to notions of national sovereignty. Moreover, the national constitutional frameworks of the Member States, which establish systems of administrative law and criminal procedural law, are the backdrop against which the precise scope of legal rights and duties are frequently contested between the judiciary, the legislature and the executive. If this delicate balance were to be seriously disrupted as a result of EU level intervention in this area, it is possible to see some serious challenges in the future to the authority of EU instruments adopted in this field and to the scope and exercise of EU competences.

The remainder of this paper will look at some examples where the EU legal order either is, or may in the near future be, under challenge as a consequence of either widening or deepening, or both simultaneously.

4 THE CHALLENGE OF ENLARGEMENT

The legal consequences of enlargement include the empowering of national courts in relation to national legislatures and executives, as national courts of the new Member States become part of the legal order of the EU. Questions are bound to arise about the proper scope of judicial activism and restraint in that context.[19] The challenge of enlargement also means that courts, especially national constitutional courts, have to decide how to mediate the impact of EU law upon the national constitutional system. This means that the national courts of the new Member States must revisit some dilemmas which have long faced those of the existing Member States.

In 2005, the Polish Constitutional Court concluded that there was nothing unconstitutional for Poland in its accession to the EU (as the EU stands at the moment). It took the opportunity,

[19] Z. Kuhn, 'The Application of European Law in the New Member States: Several (Early) Predictions', (2005) 6 *German Law Journal* 563–582.

[20] Judgment of 11 May 2005, K18/04, summary of judgment in English available at http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm. For commentary see K. Kowalik-Bańczyk, 'Shall we polish it up? The Polish Constitutional Tribunal and the idea of supremacy of EU law', (2005) 6 *German Law Journal* 1355–1366.

however, to highlight some future risks for the application of EU law in Poland, by emphasising the absolute supremacy of Polish law over EU law, from the perspective of Polish constitutional integrity.[20] The trenchant nature of the Polish court's conclusions has had at least one commentator calling for ongoing 'constitutional modesty' on the part of the European Court of Justice and European Union law.[21] On the one hand, the Polish court articulated, not for the first time, the pragmatic constitutional principle of sympathetic disposition towards the process of European integration and cooperation between states, which should lead wherever possible to the avoidance of explicit conflicts. However, it cautioned that this principle has limits, such as that the interpretation placed upon a national constitutional norm must not contradict the wording of national constitutional law, and must not create an irreconcilable meaning. It also acknowledged that there may be irreconcilable inconsistencies between constitutional norms (which constitute the supreme law of Poland) and a Community norm. It held that:

> Such a collision may in no event be resolved by assuming the supremacy of the Community norm over a constitutional norm. Nor may it lead to a situation whereby the constitutional norm loses its binding force and is substituted by a Community norm, not may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation.

In such a case, only a constitutional amendment would be able to remove the conflict. The court also called for the application of subsidiarity and a duty of mutual loyalty between the Union institutions and the Member States, such as would require the ECJ to be sympathetically disposed towards the national legal systems.

Some of the language of the Polish Constitutional Court recalls the rather dramatic language of the German Constitutional Court in its judgment on the ratification of the Treaty of Maastricht.[22] Indeed, it would be wrong to suggest that the problem of fitting together national law and EU law is a problem unique to the courts of the new Member States. It is notable that when determining that there were no difficulties in the Constitutional Treaty's supremacy clause (Article I-6) for ratification by France and Spain, the respective constitutional courts of those two states viewed the issue primarily from a 'national' rather than an EU perspective.[23] For example, while recognising that the supremacy clause merely reflected a principle of European Community law which already existed, the French court none the less confirmed a national-centric view of the relationship of the EU legal order and the French legal order by holding that the French constitution stands outside the EU legal order and is thus not bound by EU law.[24] The Constitutional Treaty was treated as an international treaty, a measure which does not engage for France an enhanced level of integration which might mandate a constitutional

[21] D. Chalmers, 'Constitutional Modesty (editorial)', (2005) 30 *European Law Review* 459.
[22] *Brunner* v. *The European Union Treaty* [1994] 1 CMLR 57 (unofficial English translation).
[23] Judgment of the *Conseil constitutionnel* no. 2004/505 DC of 19 November 2004, available at http://www.conseil-constitutionnel.fr/decision/2004/2004505/2004505dc.pdf; judgment of the *Tribunal Constitucional* no. DTC 1/2004 of 13 December 2004, available at http://www.tribunalconstitucional.es/Stc2004/DTC2004-001.htm.
[24] For a review of the judgments see T. Papadimitriou, 'Constitution européenne et constitutions nationals: l'habile convergence des juges constitutionnels français et espagnol', *Cahiers du Conseil constitutionnel*, no. 18, November 2004 – March 2005, available at http://www.conseil-constitutionnel.fr/cahiers/.

amendment. However, in practice, as with the Polish case, the *Conseil constitutionnel* found interpretative means in order to avoid a direct conflict.

What is striking about the Polish case is that the challenge is posed in starker language than have been most challenges from national courts thus far. It will be interesting to see at what point the Polish court might in the future tip towards asserting the logical consequences of its stark language of sovereignty through a rejection of the applicability of EU law in a particular case within Poland. In the accession treaty case, in practice, it avoids stark conflict by adopting pragmatic interpretations of the interrelationship between EU law and national law in order to ensure a concordant accommodation of the two legal orders. This exemplifies, as does the French case on the Constitutional Treaty, the uncomfortable co-existence of the two putatively sovereign orders of the Member States and the European Union. As John Bell has noted (*à propos* the *Conseil constitutionnel*):

> The constitutional order of the EU and that of the Member State can adjust happily to each other, as long as the ultimate question of who is sovereign is never put to the test.[25]

With enlargement, the task of avoiding the mutually assured destruction of the national and EU legal orders through incommensurable claims upon sovereignty, a threat which Joseph Weiler highlighted some years ago,[26] becomes ever more challenging.

5 THE CHALLENGE OF DEEPENING

As regards the issue of deepening, it is the particular challenges posed by the European Union's ever more frequent and far reaching incursions into the field of justice and home affairs, and in particular national criminal law and criminal procedure, which demand attention above all else. In the *Pupino* case,[27] the Court of Justice addressed for the first time the question of the effects within national legal orders of measures adopted by the Council of Ministers under the powers conferred upon it under Title VI of the Treaty on European Union, dealing with police and judicial cooperation in criminal matters (the so-called 'third pillar').[28] In essence, the Court of Justice was dealing with the question of the extent to which the doctrines of the EU's 'old constitutionalism', developed within the framework of the 'first pillar', or the EC Treaty, could be relevant in relation to the effects of third pillar measures, specifically in that case a Framework Decision on the Standing of Victims in Criminal Proceedings.[29]

According to Article 34(2)(b) TEU, framework decisions are "binding on the Member States as to the result to be achieved, but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect." They thus share the same characteristics in terms

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[25] J.S. Bell, 'French Constitutional Council and European Law', (2005) 54 *International and Comparative Law Quarterly* 735–744 at 744.

[26] J.H.H. Weiler, 'The Reformation of European Constitutionalism', (1998) 35 *Journal of Common Market Studies* 97–131 at 125.

[27] Case C-105/03 *Pupino* [2005] ECR. I-5285.

[28] Space precludes the coverage of two other cases which examine the interactions between the first and the third pillars: Case C-160/03 *Spain* v. *Eurojust* [2005] ECR I-2077 and Case C-176/03 *Commission* v. *Council* [2005] ECR I-7879.

[29] Framework Decision 2001/220, OJ 2001 L82/1.

of legal effects as directives, at least so far as these are expressed in Article 249 EC. However, when the Member States decided to create a new type of legal instrument which they saw as suitable for achieving the goals of Title VI of the Treaty on European Union, they explicitly excluded one of the key effects which Court of Justice case law has ascribed to appropriate provisions of directives, which are sufficiently precise and unconditional to be enforced by national judges, namely 'direct effect.'[30] That is, provisions of framework decisions cannot be relied upon by individuals before national courts as giving rise to rights which must be enforced in their favour.

However, the provisions of Article 34(2)(b) TEU did not deter the Court of Justice from extending a number of principles of 'old' EU constitutionalism which were not explicitly excluded by the Member States in the same way as direct effect. It began with the principle of loyal cooperation contained in Article 10 EC. The Court concluded (rejecting an argument made by the UK and Italian governments) that:

> It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions.[31]

This conclusion, once combined with the binding character of the framework decision under Article 34, helped the Court to conclude that there was a general obligation on national courts to interpret national law so far as is possible in conformity with relevant provisions of EU law. This is a similar obligation to that which exists as a general principle under the law pertaining to the EC Treaty, an obligation which is derived, like the general principle of the loyal cooperation of the Member States, from Article 10 EC.[32] The Court indicated that it made no difference that its jurisdiction under Title VI of the Treaty on European differs from that under the EC Treaty. It was likewise no obstacle to this conclusion that there exists in the TEU no equivalent to Article 10 EC; such a principle is implicit, as the Court noted, in view of ensuring the effectiveness or *effet utile* of Title VI. Thus having read a version of Article 10 into the Title VI of the Treaty of European Union, the Court was easily able to conclude that the consequential obligations upon national courts also pertained, including the duty of sympathetic interpretation, or indirect effect as it is sometimes termed. The Court then concluded that Articles 2, 3 and 8(4) of the Framework Decision on the Victims of Crime must be interpreted as enabling the national court to authorise young children, who claimed that they had been victims of maltreatment which was not of a sexual nature, to give their testimony in accordance with arrangements guaranteeing them an appropriate level of protection, for instance outside and prior to the public trial. This was despite the fact that under Italian law, as it stood, such arrangements applied only for the benefit of those who claimed to be victims of maltreatment of a sexual nature.

[30] Case 41/74 *Van Duyn* v. *Home Office* [1974] ECR 137.
[31] Para. 42 of the judgment.
[32] Case 14/83 *Von Colson* [1984] ECR 1891; Case C-106/89 *Marleasing* [1990] ECR I-4135.

While the Court's reasoning has been subjected to some sharp criticisms,[33] generally the judgment has been welcomed as bridging the 'constitutional divide'[34] between the third pillar and the first pillar and extending greater judicial protection into the area of the third pillar (since the situation is highly unsatisfactory under the Treaties as they stand).[35] In some ways, the Court's judgment anticipated the 'de-pillarisation' which the Constitutional Treaty proposed to introduce into the European Union system, with the same legal instruments and legislative procedure being applicable across the board, including – with few exceptions – in the area of justice and home affairs.

Much has been made of the timing of the judgment, which was handed down in July 2005, just after the infamous 'no votes' in the French and Dutch referendums. It is probably rather artificial to highlight that the judgment came literally within weeks of the referendums. All judgments are finalised some time before they are actually made publicly available, because of the constraints of the translation services in the Court of Justice, so the referendums themselves probably came too late to affect in any way the content of the judgment. However, more generally, the period during which the case was considered by the Court cuts across the timespan when it was becoming increasingly obvious that there were bound to be severe ratification difficulties because of the various referendums likely to be held. If it hade not been the French or the Dutch, it would most likely have been the referendums held in Ireland, the UK, or Denmark. It would be difficult to suggest that the judges as individuals could have been impervious to the gathering dark clouds affecting the referendum process from the beginning of 2005 onwards. As Fletcher puts it:

> As the EU faces yet another political crisis following the failure of the Constitutional Treaty, the European Court of Justice has boldly stepped in to flex its transformative constitutional muscles once again.[36]

At this early stage it remains uncertain how the national courts will react to such an additional demand to make provision for the effective application not just of EC law in its narrow sense, but now also of EU law in a wider (and traditionally more intergovernmental) sense? Moreover, it is not clear whether the conclusions of the Court of Justice should be regarded as being binding not only on the courts of a state such as Italy, which has provided for references to be made by national courts to the Court of Justice under Article 35 TEU, but also on those of a state such as the UK, which has not so provided. Thus UK courts are unable to consult the Court of Justice on the meaning and effects of measures of the institutions adopted under Title VI, although presumably they should draw inspiration from the interpretations given by the Court of Justice in cases where the latter has had an opportunity to pronounce upon 'third pillar law'. Furthermore, domestically, will the principle of sympathetic interpretation, which inevitably leads national courts to make use of purposive canons of interpretation rather than narrower

[33] E.g. M. Fletcher, 'Extending "indirect effect" to the third pillar: the significance of *Pupino*', (2005) 30 *European Law Review* 862–877.
[34] Fletcher, above note 33 at 862.
[35] M. Dougan, 'Legal Developments', (2006) 44 *JCMS Annual Review* 119–35, at 129.
[36] Fletcher, above note 33 at 877.

textual approaches alone, sit comfortably with the principle of legality in criminal law which demands a strict interpretation of the scope of any text which imposes criminal liability? The Court reiterated that the application of the principle of sympathetic interpretation in a case like this must not lead to the creation of new offences where this has not occurred independently through national implementing legislation, and should not trigger criminal liability in and of itself. However, it is hard to draw a very sharp distinction between that limitation on the principle of sympathetic interpretation imposed by the Court of Justice and a case such as *Pupino*, where it is the conduct of proceedings which is at issue.

Some evidence regarding the possible range of reactions of national courts to the challenges posed by *Pupino* can be drawn from the manner in which the national courts have started to deal with the issues raised by the Framework Decision establishing the European Arrest Warrant,[37] especially a first tranche of cases which have seen constitutional challenges to the validity of domestic legislation implementing the Arrest Warrant. A number of national constitutional courts (those in Poland,[38] Germany[39] and Cyprus[40]) have annulled the transposing national legislation, on the grounds that it infringes the relevant national constitution. The particular difficulties facing national constitutional courts have been the question of surrendering nationals to the authorities of another state, and whether a sufficient basis had been provided in national law. However, it is not hard to see in the various national judgments an underlying concern about the demands place on the national criminal justice systems by the principle of mutual recognition, enacted in a measure such as the European Arrest Warrant Framework Decision.

The difficulty facing the EU is that, in the absence of an equivalent provision in Title VI of the Treaty on European Union to Article 226 EC, which empowers the Commission to police the implementation of EU law by the national authorities and to bring defaulting Member States before the Court of Justice if necessary, the whole system underpinning the European Arrest Warrant may unravel. While the Polish Constitutional Court suspended the effects of its judgment, allowing the national government time to find a solution to the problems of implementing the European Arrest Warrant in a way which was in conformity with Poland's EU obligations,[41] the German Constitutional Court annulled the national legislation with immediate effect, thus reinstating the previous cumbersome measures dependent upon political discretion rather than the mutual recognition of judicial measures. This provoked a reaction in Spain, because the effect of the German decision was the release of a German national whose sur-

[37] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/1.

[38] Judgment of 17 April 2005, P 1/05. See a note by D. Leczykiewicz (2006) 43 *Common Market Law Review* 1181–1191.

[39] Judgment of 18.7.2005, 2 BvR 2236/04, available at: http://www.bverfg.de/entscheidungen/rs200507182bvr223604.html. The Polish and German cases are discussed in J. Komárek, 'European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony', Jean Monnet Working Paper 10/05, www.jeanmonnetprogram.org.

[40] Judgment of 7 November 2005, Case 294/2005.

[41] Subsequent amendments to the Polish Constitution, after a lengthy debate in the Polish Parliament, have adopted a political compromise situation, by allowing for the extradition of Polish nationals in limited circumstances, which is not strictly in conformity with the European Arrest Warrant Framework Decision, but which is probably sufficient to head off a serious constitutional clash.

render, in connection with various investigations into terrorism and alleged Al Qaeda membership, had been sought by Spain. The Spanish courts thus concluded that the old rules now applied to German requests for extradition, and that all the relevant papers must be presented within 45 days, or those currently detained in Spain at the behest of European Arrest Warrants issuing from Germany would be released.

Of course, it is arguable that before taking such steps any Spanish court should first have referred a question to the Court of Justice, questioning what, if any, principles of EU law (e.g. that articulated in *Pupino*) might be applicable in this type of case, bearing in mind the lacuna in German law as a consequence of the judgment of the German Constitutional Court. However, given the general reluctance of most national constitutional courts to refer questions to the Court of Justice, this is a rather theoretical objection to the Spanish approach in the face of the German judgment. It should be noted that in the context of a challenge on fundamental rights grounds to the legality of the European Arrest Warrant Framework Decision itself, brought about via the Belgian courts on behalf of a Belgium lawyers' association, the Advocate General in his Opinion referred to the European Arrest Warrant cases generating

> a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law. The Court of Justice must participate in that debate by embracing the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national systems.[42]

Thus far, the Court's contribution to the debate has been limited to rejecting the claim that the Framework Decision was not validly adopted under Article 34(2) of the Treaty on European Union.[43] However, this is unlikely to be the last legal test faced by the Court in this area. The issue of the constitutional foundations of the European Union, and the relationship between these foundations and the constitutions of the Member States, remains – it would seem – far from finally settled, in the legal as in the political sphere.

6 CONCLUSIONS

This paper has attempted to add to the debate about the constitutional future of the European Union by incorporating also a legal perspective. It has not only brought the 'old', small 'c', constitutionalism of the European Union back into focus, but it has also emphasised the plural nature of the constitutional structure of the Union, highlighting the ongoing difficulties inherent in negotiating the fit between the constitutional frameworks of the Union and its Member States. While there may be a greater willingness to use the language of constitutionalism in many political descriptions of what the EU is and how it works, the underlying difficulties attendant upon the ambiguous character of the EU remain as significant as ever.

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[42] Case C-303/05 *Advocaten voor de Wereld VZW* v. *Leden van de Ministerraad*, Opinion of Mr Advocate General Ruiz-Jarabo Colomer of 12 September 2006, at para. 8.

[43] Case C-303/05 *Leden van de Ministerraad*

It would be wrong to construe the rejection of the Constitutional Treaty as direct challenge of the constitutional future of the European Union. Given the relatively stable and well-functioning legal order which continues to underpin the EU, despite the complex and sometimes contested multilevel framework in which this constitutional framework operates, it seems that there is something solid for the EU to fall back upon. However, the paper has pointed out the pressures which are being brought to bear upon the 'old' constitutional framework, through widening and deepening, and has noted that these are occurring at precisely the same time that the EU is facing a future without a 'new' form of big 'C' constitutionalism given the referendum rejections of the Constitutional Treaty. It would be foolish to reject prematurely the possibility that there could be some diffuse cross-pollination between the two dimensions of EU constitutionalism, whether presently or at some point in the future, just as there would have been complex interactions between old and new constitutionalism in the event that the Constitutional Treaty *had* been ratified and come into force.

Recent case law has demonstrated that the Court of Justice has started to identify some lines of development which ameliorate some of the more obvious weaknesses of the third pillar in relation to judicial oversight. It has not referred directly to those weaknesses, but the nature of its reasoning, which explicitly pulls ideas across from the first pillar into the third pillar without a direct textual authority in the Treaty on European Union, makes it hard to escape the impression that the Court is aware of those weaknesses and believes that they should, indeed, be addressed, if necessary through judicial action. The wisdom, not to mention the legitimacy, of such judicial activism at a time when the EU legal order is still adjusting to the impact of twelve new Member States remains to be seen.

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THE EUROPEAN UNION: RHETORIC AND REALITY

Andrew Moravcsik

You will find that I am less enthusiastic about encouraging democratic participation and deliberation than my colleagues, particularly Professor Føllesdal. As I have chosen a more populist mode of presentation today, I hope I don't insult anybody's intelligence by summarizing academic research in a relatively non-academic way.

I will pose the question and I would like to start by responding very briefly to what my distinguished colleague said. I will address the question that Jo Shaw raised about what we can learn from the failure of the European constitutional project in a sense of the explicit constitutional treaty. But I think there are serious things that scholars, not just of law and political philosophy but also political science, can bring to bear on this question of what we can learn from the constitutional project, and it is in that vein that I analyze it.

Professor Shaw referred to unnamed people who might take what she called an unconstructive view of the failure, saying "it was a narrow escape" and "I told you so." I do say both of those things, but the essential argument is this that whereas it is true that most of us would I think support the substantive content of changes in the constitution – at least I would and I think my colleagues do. The changes are modest but I think that they are by and large good. The constitution was not primarily about substantive content, in fact its substantive content was modest. The constitution was about political legitimation. It was a different strategy to try to legitimate the European Union, or if you want to be vulgar about it, it was a strategy of public relations and it was a strategy to make the European Union and its reforms more popular, more politically palatable. In that sense and with regard to that goal the constitutional project failed utterly. I think we can learn lessons from this failure about what is possible in terms of democratising international institutions in general in the EU in particular.

I do think we can and are ensured to go back to the more elite-driven process that we had before. If we can't go back to a more elite-driven traditional EU process then we have to live with what we have got now without substantial democratisation, because democratisation will a) make the situation worse; and b) is normatively not justifiable in this case. My aim is to make that into a constructive view by outlining a different perspective of what we learn here. This view is based on a fundamental difference with Professor Føllesdal to some extent on how to assess political institutions. The primary purpose of a modern constitution, it seems to me, is to reach a reasoned and normatively justifiable judgment about what things should be subject to direct political participation and deliberation and what things should not. Not since the ancient Greeks has anybody even pretended to assert that all things should be discussed in common participatory fora, and even then surely they were not. Modern political systems certainly do not do this, and many things are exempted from direct participation, ranging from human rights to trade policy, diverse regulatory issues, the things that involve experts and there are many reasons why this is so.

The criterion, and here I will quote Andreas Føllesdal to try to establish some grade of agreement, is whether or not a given constitution "remains responsive to the best interests of citizens" – now there are three words that are important there, (1) *responsive*, it is a representative institution and it represents interest, (2) *the best interest*, it doesn't represent all interests at all times but only those that the constitution-makers would deem to be those that are normatively justifiable of being represented, and that is a difficult and complex judgment and (3) *citizens*. It is in the final analysis what people want, the best things that they want, that the constitution is designed to create, and I think the current EU system is more capable of meeting that standard than any more participatory or more democratic system that has been proposed. Primarily not because the issues are technical or that experts have to deal with them or they are things like human rights that we traditionally give to courts or because it involves central banking and things like that. All those things are true, but it's not the core argument. The core reason is because in certain areas and particularly in its relationship to various biases and tendencies in domestic policies the EU will be more representative of European interests if it is less democratic. *More representative because it is less democratic* it is this paradox that I want to explore. I will in the following address the general topic of the conference, which is the possibilities and limits of the EU and then its democratic legitimacy, because I think the two questions are very closely connected.

The starting point for understanding the constitutional process in Europe is to understand that there is a rhetorical gap in Europe, an existent 50 year rhetorical gap. In Brussels people do not say what they do, instead they offer an idealistic justification for things and that is what the constitutional process was about. It was the process of selling the EU as a grand constitutional project. Very explicitly from Joshka Fischer through to the very end, the strategy was that if you appeal to people with this grand constitutional rhetoric and with the rhetoric of democracy they will like Europe better, they will generate political support and the EU will be more legitimate. And this results in a perpetual overselling of Europe. People constantly, and particularly those who are in the European business, are pressing for more centralisation of policy in Europe. They tend to sell Europe in terms of these grand idealistic goals rather than in terms of pragmatic results. The result of that, paradoxically, is disappointment and fear. The rhetoric of European integration is constantly a rhetoric of disappointment, of things that should have happened, that could have happened, that might happen and did not, and that is where we are right now, where people have an idea in their mind, at least those people who work in the area of Europe have an idea and they feel disappointed that it was not achieved.

The moment that something like the constitution does not work out people immediately start talking about the collapse and dissolution of the European Union and they wring their hands in Brussels international capital about this. The idea is that it is a permanent setback to the European process when something like this happens, because it is constantly being judged against this idea of an ever closer union to a state. So in an odd sense, even though if you talk to anybody, they will all say, "oh, we don't believe in the United States of Europe", but most people who are in the European business act as if they believe in the United States of Europe

in the sense that they are rarely prepared to oppose outright efforts to promote greater centralization of power and they focus disproportionably on those areas where they wish there were greater co-operation. That is not true and increasingly untrue of all scholars, but it is surprisingly true of practitioners particularly the kind of people who were involved in promoting the constitutional project.

I want to argue, in contrast, that what exists today in Europe is not a frustrated movement toward an ever closer union, but in fact a stable European constitutional settlement, a stable arrangement with integrity that in fact defines a certain relationship between Europe and the Member States. Furthermore, I want to argue that that current compromise is *effective*, *stable*, and *legitimate*. It is actually better in many respects from a normative perspective and more positive than the alternatives. But it is only effective in those things that it currently does or with incremental movement in areas like Justice and Home affairs, and those areas are largely at home, managing socioeconomic interdependence and that would include to a certain extent immigration, although I hear that that function remains largely national, particularly important with regard to third country known as island immigration, which is what the political issue is really about. So only in these areas at home and abroad – in projecting civilian power globally – do we have Europe's comparative advantage in international politics. I want to argue that viewed against the baseline of the existing stable, effective and legitimate European constitutional settlement, European democracy, a greater participation in democracy would be counterproductive from the point of view of representing the best interests of European citizens.

The European Union is currently not a failure or something that is headed for failure, but it is in fact a remarkable and stable success. One needs to take a very broad historical perspective and ask what has been achieved in the broader scheme of things. First of all policy; a lot of numbers are thrown around regarding the share of EU policy-making, estimates up towards 80 per cent are based on misquotations of people who didn't say what they were said to have said. The right number is something in the order of 15–20 per cent of the rule-making of all kinds, including budgetary, goes through the European Union. So it is a minority share, but it is a very important one, and it's overwhelmingly focussed in the areas of the customs union and trade policy, regulatory policies the monetary union and for a certain amount of foreign and internal security policies.

Secondly, although it is politically controversial, it is in someway natural or not so surprising that the European Union has been able to enlarge from six to fifteen to twenty-five. In world historical perspective I think this is actually quite extraordinary. If the American President were to come back to Washington from a meeting with for example the President of Mexico and said, well we just would like to run a few institutions jointly. Let's choose the Supreme Court and the Federal Reserve and the department of agriculture and any trust division of the justice department, the President would be impeached instantly. If we said we were going to float 8 per cent of Mexican GDP for a decade, as was done for Portugal, the President would be impeached instantly. The idea that one would expand a well-functioning institution to states, which are less

than long-term democracies is really quite striking, and it shows the multicultural and geographical attractiveness of the European project.

Thirdly there are the institutions and it is striking and unique internationally that the EU has things that look very much like a Supreme Court and an elected Parliament, a Central Bank and so on, and finally – and this I really want to impress upon people, because it is important – when we want to think about why we should be satisfied with a status quo; This is an institution of world historical importance. It is older than most nation states in the world, and certainly older than most democracies. It is the only successful new form of macro-governance to emerge in a hundred years since the rise of the social welfare state by Bismarck in Germany. Fascism rose and fell, communism rose and fell, but the EU is something distinctively new, a new way of structuring power though it is made up of elements that we know, and it is the only successful innovation of its kind in a hundred years. Even if you take a more modest view of it, it is certainly the most successful and ambitious international organization in history. The EU has achieved all this and I think most people would agree that it is stable, nobody is going to reject it, and nobody is going to pull out because the economic cost above all is prohibitive of doing so. You can argue about whether Italy will be in the monetary union in ten years, but you cannot argue about whether it is going to be in the customs union or in the regulatory cooperation. It is increasingly clear from enlargement that outsiders have no alternative. This is the game in town and it is a relatively effective one.

Why did the new constitution fail, particularly when this constitution did not have a whole lot of new content in it and was largely ratifying the status quo? If everything is so wonderful, and so modest, then why is it that the constitutional project failed? The first thing to notice is that the new constitution did not pass but that this does not matter very much. People were faced with the choice between the status quo and the status quo; the status quo in one symbolic garb and the status quo in another symbolic garb.

My own view is that if you said in 1998, 2000 or 2002 that our political goal is to establish a European Foreign Minister, a shift in voting ways, and a modest expansion of parliamentary powers, and a little reform of the Commission, and we have five years to do it, then you could have done it. It is not such a monumentally large agenda despite the difficulties of Amsterdam and Nice, but certainly it doesn't amount to a whole lot. What this suggests is in fact that the system is already substantively stable even though those people who are making idealistic proposals do not propose major substantive change. In other words, there is no *grand projet*, as the French would say, for Europe.

Social policy is a joke in Europe and I think it should be acknowledged as such. Pensions, healthcare, etc. are also in the future going to be dealt with domestically. Taxing and spending is 98% domestic in Europe and is going to stay that way for the foreseeable future. Economic reforms, as everybody from the social democrats to the liberals now agrees, needs to be done nation by nation. A CAP reform is something that will emerge but only by very tough bargaining over a long period of time. Defence and foreign policy moves forward in-

crementally in important ways but not in ways that have a great constitutional significance. Ditto I would argue with immigration policy, which I think is the most interesting area constitutionally. And I would agree with Professor Shaw, that human rights are how we deal with individual rights and Justice and Home Affairs.

The difference between the constitution and any other major effort to reform the EU in history is that it had no basic *grand projet*, it had no substance of content, and that is of considerable significance if you are judging how stable the organisation is, whether there is this constitutional settlement. I would also say that the strongest argument for constitutional reform, and the one that Joshka Fischer would make, is that it was most important for foreign policy making in the EU. The areas in which it has a comparative advantage vis-à-vis the United States are actually in those areas it already controls. Things like enlargement of the European Union are, without a doubt, the single most cost-effective instrument for promoting peace and security in the post cold war world. Just compare it to the American blundering around for 1.5 trillion dollars worth of military goods in Iraq to try to generate regime change. Real regime changes are the kind of things you see in Eastern Europe, and you could see in Turkey if the political consensus were there. I think Americans would actually respect Europeans more if they just came out and said that, rather than pretending oddly as if having military forces as robust as those of the United States is the way that they generate respect in the world today.

Dr. Hallstein's metaphor was always the so-called "bicycle theory", if the EU doesn't keep moving forward toward an ever closer union you fall off the bicycle. My view, stolen shamelessly from the Economist, is: No, it's a tricycle! You can just stop wherever you want to, and in fact, constitutional engineering in a sophisticated way is about the side-end where you stop in that sense.

I will now turn to the argument that the European Union is bad because it is not under democratic control, because it is a technocracy. This starts to engage the issues that Professor Føllesdal raised. The first thing to notice about EU is that it is not a superstate, which it is often claimed to be. Compared to the US federal government, which is by Swedish standards hardly a centralized government at all, but it is still responsible for 70 % of public spending in the United States. The EU is responsible for 2 % of European public spending, and it is not going to increase in the immediate future. Civilian employees – forget about the American army for the moment – there are two million five hundred thousand of them in the US, there are ten to thirty thousand of them in Europe depending on whether you want to count all those translators and chauffeurs and the people that take the files back and forth between Strasbourg and Brussels. Active military in the US is 1.5 million, EU has none, but they may get up to 60,000 if the optimists are right, which still is not 1.5 million. The potential military then would be under 2 % of US military, and you can compare the federal judiciary just to satisfy people like Professor Shaw, who might say, yes, but the real power with the EU lies in its legal structure, but even there the US federal government really has a lot more clout.

The EU is not some kind of superstate out of control, it is really a very limited form of government. I have always in debates with my British counterparts pointed out, that they should love

the European Union because it is a lacking and limited government almost to a perfect extent. Then you might say from the Swedish point of view or from Professor Føllesdal's point of view, yes, but it's not really under the kind of deliberative participatory democratic control that we expect of governments in the world today. I think that is really an uncharitable reading of what goes on in the EU. The dominant institution in the EU is the European Council, and the Council of Ministers. Those bodies are made up of indirectly elected ministers and all you have to do is to go through the decisions and see how they vote to see how tight their political control actually is. It is very transparent and not very corrupt.

I did meet the former Swedish commissioner, Anita Gradin, who took out Edith Cresson. Edith Cresson is a great example of how corruption cannot survive in the European Union. This is a woman who was corrupt as Prime Minister of France even by French standards, which is saying something, and she comes to the EU and she does something tiny – she gives a small contract to some hometown person, who is not quite qualified. The Swedish Commissioner takes her out just like that, because this system has so many pressure points and it is so transparent that you just cannot get away with that kind of thing. There is also not very much money, which makes it easier not to be corrupt.

There are checks and balances between different branches of government. And finally, there is domestic implementation. If you only have ten thousand officials then you are not going to implement your own regulations. They are implemented by national governments and they are under the same democratic control they would be if it were national legislation. So national control is strong. Finally, if the EU is, as I have argued, stable, effective, under abstract democratic control – why do not the people like the EU? This perception is based almost entirely on events like the recent referenda in France and in the Netherlands. People say "look, when you give these people a chance to vote, they vote it down, they aren't happy with what the EU is doing".

I think this is extremely misleading leaving aside the fact that there was not very much substance of content to the constitution, so it is very unclear what people were voting on. The differences are more fundamental. First of all, voting in the referenda was not a response to EU policy. Citizens, when you actually poll them, are relatively satisfied with the scope of EU policy-making today. They want to see a little more foreign policy, a little less of this or that but they are either happy with it or they do not care. The constitutional provisions *per se* like the Foreign Minister were popular. The EU doesn't undermine social protection or expand immigration to an unappreciable degree. There is complete agreement in the literature on social policy in Europe that the binding constraints in social policy provision are demographic, fiscal, and political. Criticism of enlargement is a little more important, but most of it had to do with Turkey, which is not going to happen for twenty years and it is going to happen under terms, no free movement of people that violate the rhetoric of most of the people that opposed the constitutional background in the Netherlands and in France.

But most importantly, if you poll people, and this is not true of Sweden, but it is interestingly true in most European countries; EU institutions are more popular – and this is important

because Professor Føllesdal stressed the word "trust" – and more trusted than national governmental institutions. But that might not be true of Sweden, so some countries might not be as comfortable with this as others. However, for the most part the EU is actually an improvement in trust in government for Europeans, and that is a documented empirical fact.

Secondly, most voters were not concerned about EU policy, they were concerned about national policy. They do not like national unemployment and social welfare cuts. They protest violently against incumbent governments, and they are concerned about national third country immigration policies. They took it out on the EU, because they could not figure out what the constitution was about, because it was not about anything substantive. But that is not a reason for us as people, who are trying to reach an enlightened judgement about the EU, to follow them in doing that.

Now, here is the most important point and the point that I stress in the recent articles that I have written, and that is *democratic reform cannot create public support or public legitimacy* even if you tried it. There are a number of reasons for this, and the most important ones are three:

1) Government is generally unpopular these days.

The problem is not that the EU is unpopular, it is that the government is unpopular.

2) Participation does not generate public trust.

It is one of those things that we believe in, in a naïve sort of way that institutions in which we participate like parliaments or elections are more popular than those in which we do not, like courts or the army or the executive bureaucracy, but that is statistically untrue in almost every Western democracy. In fact, it is the less participatory institutions that are more popular. You will not make the EU more popular by making it more participatory and you won't make it more trusted. Both of those things are very closely polled, and it is very consistent across people. And the final and most important reason is that:

3) EU issues are not salient in the minds of voters, and therefore *cannot* play a major electoral role.

I am not saying that EU issues are technical or that it is a good thing that people don't care about them or anything like that, I am saying that the average voters can keep in their head at any given point in time about 1.5-1.8 issues. There are different sub-sectors of the population that keep different issues in their mind and it adds up to 3 or 4 in any given election cycle. Of those three or four issues, the important ones are taxing and spending, social welfare provision, education, infrastructure, pensions, healthcare and things like that and none of those are EU issues.

If you look at a recent symposium and one of my articles on this, published on the European Voice.com website, there are a couple of people that work on elections whose verdict is that it is completely absurd to think that you could have an educated debate about the kind of issues that the EU deals with. The reason is not because people would not educate themselves, but that

they do not have any incentive to do so given the very low level of salience of these issues. The structure of the Bosnian stabilization force and things like that are not major issues. Even for a major, politicised EU issue like the Services Directive, the democratic procedures in the EU work and even *that* is not a first rank electoral issue. So opening up the EU to electoral competition will simply *not* generate the kind of voter education and attention that Professor Føllesdal wants it to have.

A summary of the European referendum voter is that he first of all is angry at politics generally. He takes it out on the EU and when you force that person to address EU issues – you say that you cannot get upset about third country immigration policies, or social welfare policies, focus on the EU – he falls asleep. And this is an inherent fact, it cannot be changed, unless you were to move social welfare and all these other policies into the EU, which some people have proposed as a way of generating deliberative democracy. But I think that puts the cart before the horse. It's insane to move issues that should not be in the EU into the EU just to have a better democratic debate.

My bottom line is that this is not a failure of Europe. Europe is successful in its traditional strategy and its political legitimacy is surprisingly successful. It is a failure of the rhetoric of Europe. It is a failure about how we think about Europe and how we try to legitimate it. This leads to the one thing that bothers me most about voting down the constitution and that was the political rhetoric. You tried to shift from a model for Europe as an "Ever closer union", which I think if there is a stable, effective, legitimate European constitution settlement is no longer a useful slogan for Europe – it has a kind of 1950s technocratic feel to it – and you try to replace it with "Unity in diversity" and this I like.

I think this does reflect the fact that what is in place is a constitutional compromise, a constitutional settlement, and I think we should defend it!

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