Europe in Search of its Legitimacy
Assessing strategies of legitimation

By
Erik Oddvar Eriksen and John Erik Fossum
ARENA, University of Oslo

Abstract
How can the EU rectify its legitimacy deficit? On the basis of three logics of political integration we identify explicit strategies for how the legitimacy deficit of the EU can be remedied. The first strategy amounts to a scaling down of the ambitions of the polity-makers in the EU. If pursued to the full, the EU would end up as a problem-solving or special purpose organisation. Here the EU’s own legitimacy is held to be dependent on its performance and on the legitimacy of the Member States. The second strategy emphasises the need to deepen the collective self-understanding of Europeans. Consistent pursuit of this would make the EU a value-based community in a cultural sense. In this case legitimacy derives from a shared cultural identity. These two modes of legitimation figure strongly in the debate on and in aspects of the EU, but both have become problematic. The third strategy concentrates on the need to readjust and heighten the ambitions of the polity-makers so as to make the EU into a federal multicultural union founded on basic rights and democratic decision-making procedures. This latter strategy sees legitimacy as relying on a set of constitutional and communicative presuppositions, which ensure public deliberation. How robust is such an alternative and how salient is it, as opposed to the other two strategies, in the process of integration?
Introduction

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

In the EU, a driving force as well as a product of change, there are widely different co-operative schemes, ambitions and outlooks, and patterns of integration vary depending on function, interest, and territory. The EU is a novel type of entity whose principled and constitutional status is ambiguous and incomplete, and whose underlying telos is not clear.

It is generally recognised that the EU suffers from important legitimacy deficiencies. These are linked not only to aspects of its structural and institutional make-up, but also to the normative justifications that the EU can readily draw upon. This onus on legitimacy is lent further urgency by the decision to proceed with enlargement and by attempts to expand co-operation in the fields of justice and home affairs, and common foreign and security policy. Accordingly, the question of the legitimacy of the EU has entered centre stage of the political and academic discourse on the EU.

But whilst the process of integration is widely criticised, the commentators often do not agree, nor do they necessarily emphasise the same problems. For instance, some are concerned with costs and efficiency, others with technocracy and lack of popular participation, and others with the absence of a sense of community and identity. Some critics denounce the EU for its lack of ambitions, whereas others denounce it for its overly strong ambitions. The issue is not that of applying a set of ready-made prescriptions, as there are several. The question is which prescriptions. In other words, how can the EU ‘repair’ its alleged legitimacy deficit?
Such a debate does not start in a vacuum. It relates to the structure already erected, which is not a state (nor is it an international organization). It can therefore not draw on the resources and identifications that democratic nation-states draw upon. This is theoretically challenging. One set of challenges pertains to how integration beyond the nation state can be achieved and deemed legitimate. Another set pertains to whether transnational and supranational institutions at all can be democratic.

The choices made will depend to a large extent on the preferred balance between the requirement of efficient problem solving and of democratic legitimacy. The EU faces pressures both in terms of efficiency and in terms of legitimacy. With the prospect of up to twelve new Member States its ability to live up to expectations of efficient problem solving will be put to the test. In future debates about forging a citizens’ Europe, the EU will face the challenge of finding an appropriate balance between competing requirements. But there are several options with regard to the probable development of the EU and these rely on qualitatively different normative standards. Three normatively distinct and stylised options can be derived from the structure in place and from the debate on its legitimacy.

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

These options have dramatically different constitutional implications. The first speaks of the EU in terms of a problem-solving entity based on a narrow economic citizenship; the second of the EU as a value-based community premised on social and cultural citizenship; and the third of a rights-based post-national union, based on a
full-fledged political citizenship. Which option is the most viable and to which of these does the ongoing constitution-making process speak? Viability refers to normative status and empirical relevance. The purpose of this assessment is to offer a contribution to the breaching of the gap between normative standards and principles on the one hand and empirical realities on the other.

In the following pages we first clarify the normative foundation and mode of legitimation that each strategy is based on. Then we spell out and operationalise each strategy, as well as provide an assessment of the most important merits and demerits of each. After that, we conduct a brief assessment of each of the strategies. How viable are they in normative and empirical terms? The final part of the paper holds the conclusion.

**Three strategies of legitimation**

The recognition, in the Laeken Declaration (2001) that the EU stands at a crossroads, only serves to underline that there are qualitatively different developmental paths available to it. The recently established Convention on the Future of Europe is unprecedented. Its very appointing and composition are testimony to the seriousness with which the EU now takes this question. Up until this event, however, those in charge of the integration process have consistently failed to engage in such a debate. Neither have they provided a set of agreed-upon blueprints for how to think of the EU in legitimacy terms, although they voice support for certain standards and principles. But when these are not expressed in polity terms or when their institutional expressions are not clarified, analysts and populace are left in bewilderment; hence creating distrust and legitimacy problems. What theoretical solutions can be conceived of in order to solve the problem of legitimacy?

The problems facing the EU are complex, and there is no single set of solutions. Instead, they may be handled through quite different or even contrasting solutions, and which may lead to very different outcomes in Europe. As such they involve making political choices and setting priorities. For analytical purposes, three key strategies may be identified that can be used to ‘repair’ the EU’s legitimacy deficits. They are suggested paths of institutional development for increasing legitimacy. The
strategies are based on three different conceptions of rationality – instrumental, contextual and communicative (or normative) and their adherent warranting notions: efficiency, identity and justice. The latter conception of rationality does not solely designate consistency or preference driven action based on calculus of success, nor merely norm-conformity or accordance with entrenched standards of appropriateness, but rather public reason-giving: when criticised plans of action can be justified by explicating the relevant situation in a legitimate manner. Hence, the notion of deliberative democracy and communicative rationality, which refer to the possibility of publicly defending a course of action. These modes are connected to three notions of democracy:

a) The economic-utilitarian variant, which holds democracy to be first and foremost a decision-making method or a method of preference aggregation

b) The republican-communitarian notion which conceives of democracy as a way of life in a cultural sense


3 Communitarians or republicans pursue a particular conception of the good, and give precedence to the good over the right. See e.g. Michael Sandel, Liberalism and the Limits of Justice (Cambridge:
c) The cosmopolitan notion which is based on a set of legal and deliberative presuppositions of a cognitive-universalist nature\(^4\)

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

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

This line of reasoning is brought one step further in the third logic as the EU is conceived of as a polity *sui generis*. As such it has reached firmly beyond intergovernmentalism, and has established a polity that is sensitive to cultural difference. The EU, in this view, is in need of direct legitimation and a firmer basis of popular participation than the one provided for by the democratic processes at the

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state level. Here the integration process hinges on the ability to establish a fair system of co-operation founded on basic rights and democratic procedures for deliberation and decision-making.

*Three logics of integration*

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<tr>
<th>Conception of rationality</th>
<th>Mode of legitimation</th>
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<td>Contextual</td>
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The strategies presented here provide different answers to the question of the legitimacy of the EU, and hence to the question of legitimate governance. That is not to say that they are equally valid from a normative point of view, nor that they are entirely optional, i.e. that they can be adopted entirely without constraints.

These strategies are not necessarily mutually exclusive. The forging of a polity may entail drawing on one strategy more than another at a given time or stage in the process, whereas the end result, to be stable, may require a mix. It is also conceivable that an entity will exhibit considerable sectoral or even geographical variation with regard to which strategy predominates (as is best envisaged in Phillippe Schmitter’s *condominio*). We develop and discuss them as distinct strategies because that makes it easier to sort out which principal alternatives the peoples of Europe are faced with. This is important in order to clarify the nature of the choices that are involved, including the costs and benefits – in normative and empirical terms – that are associated with each strategy. It is also a way to substantiate our implicit hypothesis that the third strategy is the most viable. Normative viability, however, offers little assurance of empirical success, as such. It hinges on support, sustenance and

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susceptibility. In other words, power matters. Viability therefore also relates to degree of conformity with prevailing constellations of power.

Does the EU move towards a post-national, federal Union? To establish whether so is the case, it is necessary to examine the extent to which the process will comply with the standards of legitimacy embedded in the logic of integration based on deliberative democracy. This is the main question we address here.

This article offers an overview of the strategies and some more impressionistic comments on the status of the EU. A more thorough assessment would require probing deeper into the mixes and whether the previous embrace of one such serves to facilitate or stymie the adoption or grafting on of another strategy.

**Strategy One: The EU as a mere problem-solving regime**

The first strategy is premised on an economic notion of legitimation. It depicts an enlarged EU that instead of clarifying and addressing the question of identity and democracy opts for a looser organisational form that emphasises binding economic co-operation. There is little onus on collective tasks and obligations beyond the narrow interests and preferences of the Member States. This type of organisation is based on an economic-utilitarian mode of thinking. It comes close to the notion of the EU as a “special purpose association of functional integration.” Membership in the EU derives from its discernible benefits. According to this strategy, the EU is best conceived of as a functional type of organisation whose purpose it is to promote the interests of the Member States.

The pattern of integration that informs this strategy reflects the constellation of constraints and opportunities of economically interdependent states steeped in a largely self-help international system. Asymmetrical relations of power pattern the integration and systemic constraints propel it in an economic direction. “European integration exemplifies a distinctly modern form of power politics, peacefully pursued by democratic states for largely economic reasons through the exploitation of

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asymmetrical interdependence and the manipulation of institutional commitments.”

Such co-operation is maintained through institutions complying with an intergovernmental rather than a supranational logic.

From this reading of the EU and the integration process, several traits pertaining to its legitimacy can be discerned. For one, the EU is seen as a derivative of the European nation-states - hence in democratic terms indirect legitimation is sufficient. For the EU itself, its legitimacy is related to its performance. As such it is highly conditional. It cannot draw on anything but actual performance and is therefore unstable. Support is withdrawn whenever expectations are not met.

There is no real onus on redistribution within an enlarged Europe, this strategy envisions, except as side payments in complex rounds of bargaining, or for the sake of stability. Rather, enlargement provides the Member States with an expanded market and increased security vis-a-vis former foreign powers. It ensures clearly delimited and stable boundaries to the outside world. Further, when it comes to enlargement and increased co-operation in the area of security and defence there is considerable disagreement as to the merits and applicability of this strategy. It is difficult to form a collective will, and the Member States are apt to pursue their own interests in these areas. The risks of defection are high. Only states that share common economic or security interests will likely co-operate. On the other hand, when faced with high risks of defection, the EU has a strong incentive to include only those states that really matter. Extensive co-operation and a strong sense of obligation towards a common defence and security policy, within the framework of a loosely structured economic organisation, will only be available in situations of crisis and when there are obvious external threats.

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8 Andrew Moravcsik, ”A liberal intergovernmental approach to the EC,” Journal of Common Market Studies 31 (1993): 473-524, argues that the national governments are able to use the supranational institutions of the EU contribute to sustain its intergovernmental character. He asserts that «Ironically, the EU’s ‘democratic deficit’ may be a fundamental source of its success,» ibid., 515.
Indicators of Strategy One pertain to the discernible and tangible material benefits associated with EU membership; co-operation and membership as premised on an ongoing calculation of costs and benefits; and the explicit recognition that the legitimacy of the EU is founded on its performance and as ultimately premised on the democratic legitimacy of the Member States.⁹

*Stymied expectations?*

There are obvious advantages associated with this strategy. For instance, there is no need to clarify what are common concerns and what are items to be handled separately by each Member State. Efficiency in terms of the satisfaction of the

⁹ One possible concretisation of this strategy could consist of the following elements:

- significant formal and informal constraints on supranational institution-building
- very weak or non-existent supranational decision-making and sanctioning ability, at least in non-market matters
- very limited scope for redistribution
- weak and highly constrained fiscal and taxing ability
- limited scope and range of regulatory measures beyond the operation of the Common Market
- highly constrained and delimited process of democratic will-formation
- the absence of a European *commune bonum* or we-feeling
- no independent civil and political rights basis
members’ interests lends legitimacy unto itself and there is at present a sufficient value basis in the EU to ensure this.\textsuperscript{10}

The obvious disadvantage is that whilst this strategy might have worked in the earlier EU (or more appropriately EEC or EC), it nevertheless represents a regression or step backwards from what has already been achieved, and it is reasonable to anticipate further losses in legitimacy and motivation as a consequence of frustrated and stymied expectations. This problem is likely to be exacerbated with enlargement, as the weak democratic and market based traditions and institutions of many of the applicant countries, will not lend ready support to this value basis. In a far more complex, diverse and value pluralist Europe we cannot expect that the current consensus on economic values as the overarching goal can be sustained or will be accepted, at least not in its present form. The applicant countries still differ a lot from their Western European neighbours in terms of their basic economic structures, in terms of the composition, level and type of economic performance, as well as in their relative and absolute wealth.

Explicit efforts to ensure a common value-basis and/or a set of supportive institutions with sanctioning ability seem required to sustain co-operation over time. This is so because outputs or functional results themselves are in need of legitimation. A collective identity or other ‘non-majoritarian’ sources of legitimacy are required in order to co-ordinate action and solve the problem of collective action. This requires further elaboration.

According to the economic view of democracy, the EU is merely a means for efficient decision-making or a method for preference aggregation: Hence, the reference to the

notion of “output-oriented legitimisation”, which highlights positive results or consequences for the ‘stakeholders’. It is the results that count in international organisations when they are conceived of as merely *intergovernmental*. The veto-power of all participants makes for legitimisation unto itself, as parties will not consent to decisions that are contrary to their interests. Only decisions that no one will find unprofitable — *pareto-optimal* solutions — or that will make parties worse off, will be produced. This lends legitimacy to international negotiations. The notion of *instrumental rationality* becomes the requisite tool for assessing the performance of such organisations. Action is conceived of as motivated by preferences and anticipation of consequences. The question is whether the best means among alternatives is selected in order to realise given preferences, i.e., according to their expected consequences for antecedent ends. However, functional interdependence and interest accommodation are inherently unstable, as actors will opt out of co-operation whenever they are faced with a better option. Interests make parties friends one day and enemies the next. Therefore, a political order cannot be reduced to the pursuit of self-interest or to the requirements of functional adaptation. As interests generate unstable equilibria, norms or values are required to motivate collective action.

Recent developments, in policy, political and institutional terms have rendered the intergovernmental mode of legitimisation inadequate. The principles, organisational and institutional structures, and action programmes, associated with present-day EU, impress upon analysts and decision makers alike that it has emerged into a polity *in its own right*, and is no longer a mere derivative of the Member States. Its impact on the

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11 Fritz Scharpf, *Governin in Europe: Effective and Democratic?*


13 This is to say that such forms of collective action could theoretically be modelled as rational choices from the actors’ point of view by means of game theory (tit-for-tat strategies and repetitive games), Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books 1984). However, these are ‘as if’ explanations and seem highly speculative and unrealistic and quite often also cynical. For instance, the tendency to explain integration and enlargement as the mere results of side-payments, seems overly suspicious and overlooks the force of justice in international affairs and of opinions about rectification of previously committed injustice in Europe.
citizens, the consumers, the workers, the clients, and the producers as well as the nation states is profound. Hence, the performance-based and indirect mode of legitimation is seen as insufficient. Indirect and performance-based legitimation does not suffice to account for present-day EU in democratic terms.

**Strategy Two: The EU as a Value-based Community**

The second strategy is premised on the need to further clarify the value basis of the European community, through a collective process of self-interpretation, based on a republican-communitarian reading of democracy. 14 Who are the peoples of Europe and who do they want to be? One option is to revitalise the Christian and humanist values, which can serve as the foundation on which a deeper sense of unity and community can be created. In this perspective the EU is a geographically delimited entity, but one which has not yet fully discovered a common identity which can serve as the basis for developing stable goals and visions. Further revitalising traditions, mores and memories of whatever common European values and affiliations there are may provide the EU with a more solid basis for further integration. Because of a common destiny, a common fate induced by common vulnerabilities people are turned into compatriots willing to take on new collective obligations to provide for each other’s well-being.

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

From this reading of the EU, to be legitimate a common identity is needed for securing trust, that is, in order for subjects of collective decision-making to be committed. Every political order presupposes some kind of cultural substrate to foster allegiance and respect for laws. Even if the EU is something less than a state, it requires identity due to its ability to make collective decisions. The ultimate objective of such a strategy is to establish a we-feeling, and a sense of brotherhood and sisterhood. Such a search for a common European identity can make the EU into a value-based community, which does provide a sound basis for citizenship. It is also a means of drawing bounds, by defining who are Europeans and who are not. Such a strategy may also contribute to consolidate the Member States at the present level of institution building.

The anticipated developmental sequence in the figure is very close to that depicted in the nation-building literature. Indicators of Strategy Two refer to a set of identifiable values that permit an unambiguous determination of who are Europeans and what the bounds of the EU are; co-operation and membership are presented as informed by and as vital to the realisation of a set of identifiable values; and the explicit recognition
that the legitimacy of the EU is founded on a set of values that permit conception and sustenance of the EU as a value based community.  

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

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15 One possible concretisation of this strategy could hold the following elements:

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

However, there are obvious disadvantages with this strategy. There are normative problems associated with developing a cultural basis for inclusion/exclusion – for which countries that are to be included – because such a distinction may conflict with universal human rights. People have rights that should not be trum ped by collective utility calculations or by value communities.\(^{16}\) Further, it is far from clear what values and virtues that are uniquely European, as opposed to universally shared, or shared among smaller or more localised groups and collectives of people. For instance, there is little doubt that in value-terms, as well as in institutional terms, there are significant differences in Western Europe in the amount of support for European integration and supranational structures. Historically, following Rokkan\(^ {17}\) it is possible to define a European ‘core’, which, roughly, corresponds with the six founding members of the EU. This notion of a ‘core’ is also somewhat reflected in the notion of flexible integration, which opens up for a group of Member States to pursue the integration process further than the rest (provided they comply with certain guidelines). Further deepening and widening of the EU will easily exacerbate the tensions between the ‘core’ countries and those outside. Rather than value-based consensus the more likely prospect of the pursuit of such a strategy is to foster ‘deep diversity’.\(^ {18}\) Or it may stimulate a retreat to Europe’s heartland, in that those least committed to integration withdraw from it. Provisions for such withdrawal are now under consideration.\(^ {19}\)

If the EU, however, is successful in establishing a value-based community, such a community will have a set of clearly demarcated bounds to the outside world, thus

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\(^{18}\) For this term, see Charles Taylor, *Reconciling the solitudes: essays on Canadian federalism and nationalism* (Montreal & Kingston: McGill-Queen’s University Press, 1993).

\(^{19}\) For instance, Article 46 of the Preliminary draft Constitutional Treaty is entitled “Withdrawal from the Union” (CONV 369/02).
raising the prospect of a «Fortress Europe», which is based on neglect of the legitimate needs of bordering states. There are thus normative problems involved in this model that cannot be solved adequately by bringing ‘the peoples’ of Europe together in communal and public settings.

**Forms of democratic legitimacy**

Democracy is not only about satisfying pre-established preferences or producing goods and commodities for a society, but is also a way to find out what problems need collective attention, what values deserve to be realised, and how hard choices should be made between non-commensurable entities. It is a way to establish standards and to set priorities. Hence, the second notion of legitimation - which we for the sake of simplicity will name communitarian, sees democracy foremost as a place to deliberate upon the common good, and to establish bonds of solidarity. People address each other as fellow citizens within specific communal settings. Here they are called upon to take stands on collective problems in democratic assemblies. Such interaction helps mould and shape their preferences, and a clearer conception of the common good or the common interest is developed, which turns people into compatriots – brothers and sisters – that are capable of collective action. This will engender civil compliance and character of the members of the group.\(^{20}\) In this perspective legitimacy stems from primordial sources of belonging, which constitute the identity of the group and provide the *cultural substrate* of collective decision-making.\(^{21}\) Identity is reproduced and changed through a hermeneutical process of self-clarification, i.e., a process of reflection and deliberation in which the members’ interpretation of who they are and want to be. In this reading democracy is not one among several alternative principles of associated life that may be chosen at will; rather it designates the very idea of communal life itself. Democracy, then, is considered as an instrument for the preservation of society – for some sort of pre-established context and given values.\(^{22}\)


\(^{21}\) Cf. Grimm, “Does Europe Need a Constitution?”

The problem raised by this strategy is first that the EU is a post-communitarian entity, with different value systems. For it to function some modicum of a common will has to be articulated. Such common will cannot simply be based on the basic commonalities of the existing collectives, i.e., the nation states. Modern societies are marked by value pluralism, and conflicting views on the common good within and among groups, local communities and cultures. Where many members share certain values, the rights and status of minorities could become threatened. The problem is the status of those rights whose validity derives from the collective deliberations. If they are reflections only of the deliberations of that particular community what is their status in normative terms? Does this differ from those instances where (human) rights are not enacted upon by democratic regimes, as is the case in totalitarian states? The problem of this kind of communitarian republicanism is that it pictures democracy as a process of collective self-discovery, which only gives human rights a binding status as long as they correspond with the collective self-understanding of that society.23

The normative essence of modern constitutions is tied to the respect for the individual – its integrity and dignity. This also has to be expressed in a political culture based on tolerance of difference and on the principle that disagreements should be settled by argument, and in the working principles of the polity. The politico-institutional nexus of the modern state entails rights both for protecting the integrity of the individual – negative freedom – and for making possible participation in the opinion- and will formation processes – political rights - which make for positive freedom. Democracy then should be conceived of not only as an organisational arrangement but also as a legitimation principle, i.e. a procedure that sets the terms for reaching legitimate decisions. Further, by legitimate decisions we mean that people accept the results because they find them right or worthy of respect.

Only deliberation can ensure democratic legitimacy as it entails the act of justifying the results to the people who are affected by them. Public deliberation is the way to find out what is good, right and just in the political sphere of action. It is only possible to test the quality of arguments in a debate in which all affected parties are involved.

23 Habermas, The Inclusion of the Other, 239ff.
This is the task of the public sphere, the realm outside of state-administration and the market, and in which people gather and become a public and hold the decision-makers accountable. A public sphere whose generic set of conditions are freedom, inclusion, equality, participation and open agenda, is then required for testing which norms are justified. This is according to the criteria of discourse-theory, which states that only a norm that has been approved in a free and open debate is valid. Then, the quest for a European public sphere (or a set of strongly overlapping publics) is of utmost importance for democracy to thrive, given that the EU has become a polity with considerable governing competencies, and whose decisions affect both the citizens and the Member States profoundly. For the people of Europe to become citizens - who not only see themselves as the subjects of the law, but also as its authors - they have to be equipped with political rights, and other requisite resources. Citizenship implies the ability to rule over one’s equals and to be ruled in turn.

**Transcending the nation state**

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

The EU was established as a type of interstate co-operation. But it has changed, and so has the international context, which also deeply affects the future direction of the EU. The EU has established an ‘incomplete’ constitutional arrangement - its principled status is also not clear. The EU's democratic deficit, it is generally held, is due to the lack of European political parties, a weakly developed system of representative accountability, and the absence of a truly European public sphere.

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These problems are lent urgency as the EU actively engages in further widening and deepening of the integration process. Enlargement to the East and the South is a daunting challenge, as the structure that was initially set up to accommodate six Member States and found wanting then, will in the present situation with its current needs have to accommodate up to twelve new and far more diverse Member States. Many of these states lack traditions of a liberal political culture and have only recently adopted democratic structures of governance. The EU is also actively involved in a further deepening of the integration process, as it seeks to expand its competencies in justice and home affairs and not the least in the areas of common security and defence.

After a lengthy process of technocratically driven integration, which culminated in the Maastricht Treaty (TEU), the period since then has been marked by an increased awareness among analysts and EU officials alike of the lack of popular support and sanction. During the Maastricht Treaty process, the peoples of Europe struck back - in a series of hard won referenda on the ratification of the TEU. This event was the single most important incident to alert people to the EU’s profound legitimacy deficit. In the last decade the process of European integration has picked up new momentum, in both depth and breadth terms and has further underlined the need to clarify the nature and status of the EU. The TEU made clear that the EU no longer could draw its democratic legitimacy from the Member States. Is the EU then a novel entity whose legitimacy has to be established and considered with reference to the EU itself? If so, the question as to in whose interest the EU is relates to a more profound concern, namely to whom the EU ‘belongs’ and what kind of entity it is and should be. Thus we are faced with profound questions of what the European Union’s identity is based on, what its basis for allegiance rests on, and how its boundaries are determined. In the third strategy political identity based on normative principles is brought to the fore, rather than the cultural forms of identities as prescribed by the second, value-based strategy.
Strategy Three: The EU as a post-national federation

The third strategy is based on a rights-based procedural-democratic notion of legitimation. It is premised on the recognised need for continuing the process of institution building at the political level. It posits a wider, cosmopolitan conception of democracy, on the premise that decision makers will be forced to pay attention to a wide range of popular opinions because of broad public debate, European as well as non-European, transnational movements (i.e. (I)NGOs) and supranational and international bodies of norm enforcement – in order to obtain legitimacy. The strategy posits that decision-makers will be compelled to pay attention to popular opinion in order to obtain legitimacy, also because they face a set of rights holders who are cognisant of their entitlements (and obligations).

The pattern of integration responds to communicative power. The deliberations that emanate form a multitude of public spheres are channelled into and shaped, transformed, and tested by a set of basic individual rights and democratic procedural arrangements. In this reading rights are “legally institutionalized relations of universal respect for the autonomy and dignity of persons...” Legal rights are founded on the notion of reciprocal recognition, and as such foster a sense of community allegiance. Rights are also important in establishing a rights-based system of democratic governance.

The strategy is premised on ongoing constitution making to establish a set of principles that provide the entity with democratic legitimacy. Such a strategy is also

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consistent with the integration process, as “the EU constitution lies less in the founding Treaties than in the gradual ‘constitutionalisation’ of the EU legal system.”

The presumption is that public support will reside in a constitutional patriotism, which emanates from a set of legally entrenched fundamental rights and democratic procedures, but which also focuses political affect and identification. Empirically speaking, this springs from a mutually supportive process, where constitution making is carried forth so as to establish an EU citizenship based on entrenched political rights, reformed decision making procedures, and clearer divisions of competencies along vertical and horizontal lines, i.e. between the institutions at the EU-level and the Member States (vertical) and among the institutions at the EU-level (horizontal). This process will likely further stimulate parliamentarisation, thus making the EP a full-fledged Parliament and the Council a ‘second’ chamber and co-legislator with the EP. Other institutional measures include the use of optional referenda and institutional measures aimed at amplifying the role and sphere of public deliberation (in a multitude of increasingly convergent public spheres) and critical scrutiny of decision makers as the most prominent means to ensure the common will to prevail in the EU system. The legitimacy deficit is thus ‘mended’ by involving the citizens of Europe directly or via their representatives in the EU system of deliberation and decision-making. In this manner a European demos is also shaped, but the approach is quite different from that pursued in the second strategy listed above. What is more, in this strategy the EU’s foundation and its boundaries are justified within a cosmopolitan framework. The development of the EU is connected to and highly dependent on the

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29 «So a Europe which is more ethical, which places at the heart of everything it does respect for a number of principles which, in the case of France, underpins a republican code of ethics, and, as far as the whole of Europe is concerned constitute a shared code of ethics» (Jacques Chirac, press Conference, Cologne (4 June 1999)
support and further development of similar regional associations in the rest of the world and on a democratised and rights-enforcing UN.

The figure depicts how a common sense of allegiance and attachment can be fostered through legal-institutional means.

Indicators of Strategy Three refer to the further delineation of a set of civil and political rights that permit Europeans to conceive of themselves as constitutional actors; an ongoing commitment to those legal and political institutional reforms that are conducive to the furtherance of post-national constitutional patriotism; extensive constitutional deliberation; and the explicit recognition that the legitimacy of the EU is founded on a constitutional structure that appeals to fundamental principles of justice.  

With regard to the internal structure and workings of the EU, the question of forming a coherent will is also related to the question of division of powers and competencies between levels of governance, as some policy areas are more conducive to and acknowledged as in need of concerted action. The questions listed above cannot be

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30 One possible concretisation of this strategy could look as follows:

- the active development of a European constitutional structure with a firmly entrenched rights basis which includes civil, political, social and economic rights
- a set of fundamental rights and democratic procedures, which also ensures that citizens are considered as and also consider themselves as rights holders
- a delineation of powers and responsibilities along horizontal and vertical lines
- a certain scope of redistributive measures, and an independent and significant fiscal capacity and taxing ability
- a wide scope and range of regulatory measures
assessed merely with reference to how much the EU has of each, because that would ignore the important 'federal'
or 'subsidiarity' aspect of this process. The question also pertains to whether these policy areas can be justified as requiring collective EU action and a common EU position, in other words: 'the will, the need and the ability to federalise'.

There are obvious advantages associated with this strategy, as the EU is seen to build on the very principles and rights that are uniquely European and normatively uncontroversial, as every Member State subscribes to them and also because these very moral norms are increasingly spread worldwide. One may also see this as a way to reduce the normative problem of limiting the EU or defining a set of acceptable bounds. Its bounds are set by the constraints embedded in the functionality of popular representative democracy in Europe as well as the viability of such in other similar regions. By delineating the EU in democratic terms its boundaries can be justified within a cosmopolitan framework. The borders of the EU are in this perspective to be drawn both with regard to what is required for the Union itself in order to be a self-sustainable and well-functioning democratic entity and with regard to the support and further development of similar regional associations in the rest of the world. In this way both the problem of legitimacy and the problem of establishing a set of normatively acceptable borders are solved in a universalistic manner, i.e., based on the principles of popular sovereignty and human rights.

The challenge to this way of solving the legitimacy problems pertains to the sheer heterogeneity as well as the weakly developed common understanding of the European project, both of which are likely to become further exacerbated through enlargement. This is so because different developments, experiences, histories, traditions and languages put the political discourse – the communicative community - under strain. It may be difficult to obtain the kind of civic understanding, tolerance and respect for pluralism that are all necessary for integration through democratic deliberation to take place. The demos is to be shaped by political means, hence there can be no European demos without a European democracy.
The EU is a dynamic entity. It is an ‘organisation in motion’ and marked by
dynamism, poly-centricity and flexibility and whose direction and underlying telos
are still not clear. There is little consensus on what the EU is or should be. This may
be problematic, as it can hamper the EU’s ability to handle the new problems it is
faced with. Enlargement, new collective measures regarding social policies and
foreign and security policies require more willingness to pay and to form long-ranging
commitments. Here a we-feeling - a sense of solidarity and trust - is needed.
However, the unclear and ambiguous notion of the EU may also be a resource as it
may make it easier for a wider range of different collective moods and interests to
find reasons to comply. This process again may foster the required civic-ness and trust
as a common identification cannot be presupposed but has to be created through an
inclusive deliberation process.

Reducing the ambitions of the EU, making it into a mere special purpose regime as a
solution to the legitimation problems is highly questionable. When faced with today’s
challenges, as reflected in changes wrought by globalisation to both welfare and
territorial borders such an entity may not be capable of handling the problems
effectively. There are, however, traits of the emergence of a rights-based union in the
present reform process of the EU.

Constitutionalizing the EU?

The establishment of the Convention on the Future of Europe is the single most
important sign that the EU is involved in constitution making. The question is
whether this process can be seen as an unequivocal manifestation of the salience of
the third strategy. The Convention was preceded by the recent proclamation of the
Charter of Fundamental Rights in the EU. The Charter that was prepared by a
Convention was solemnly proclaimed at the Nice IGC Meeting in December 2000
(2000/C 364/01). It contained a comprehensive list of rights, including civil, political,
social and economic ones (listed in 50 articles).

The Convention approach differs from the former IGC method, which has helped
spawn the type of treaty-based constitution that the EU currently has.\textsuperscript{31} The IGC

\textsuperscript{31} Cf. Weiler, The Constitution of Europe, “Do the New Clothes Have an Emperor?” and Other Essays.
method of treaty making and change has many of the traits of *interstate diplomacy*.\textsuperscript{32} It is intergovernmental as the Member States are dominant actors, and where parliamentary and other deliberative bodies play a marginal role. The negotiations take place in a closed and secretive and ‘bargaining’ manner – all of which are characteristic features of the first strategy.

The question is precisely what difference the Convention will make in substantive and procedural terms. For the Convention method and its results to be consistent with the central tenets of Strategy Three, the method would have to be transparent, deliberative and widely representative, and the result would have to embody the fundamental tenets of the democratic constitutional state - highlighting basic rights and representative democracy.

The Convention, now dubbed the *Constitutional Convention*, was equipped with a mandate sufficiently broad so as to forge a European constitution, although this has not been given explicit popular sanction through election or other direct consultation. In organisational terms it largely duplicates the Charter Convention in terms of its composition, i.e. is made up of a majority of parliamentarians (46 out of 66 voting members, and 26 out of 39 from the candidate countries), traits suggestive of a commitment to Strategy Three. It is set up as a deliberative body, without members that are formally bootstrapped.\textsuperscript{33} An assessment of the Convention as a deliberative body unencumbered by constraints would yield mixed results.\textsuperscript{34} Further, whereas the


Convention’s role is to come up with one or several proposals, these will be subsequently decided on in the forthcoming IGC-2004, where the Member State representatives have a privileged role. The Convention is, as a deliberative body, institutionally speaking, equipped to handle the matter of forging a constitution. But if it does not come up with a coherent proposal, what assurance is there that the IGC will be able to forge such? But even though each Member State has the power to veto any proposal that is set forth, the Convention is the clearest manifestation as of yet of the EU embarking on a self-conscious search for a viable constitutional arrangement in a manner that breaks with the intergovernmental way of conducting treaty changes. How far this will take the EU in the direction of strategy three and how much will remain within the shackles of strategy one requires further close monitoring and assessment.

Conclusion

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

After the French Revolution, nation states have not “… existed in isolation as bounded geographical totalities, and they are better thought of as multiple overlapping networks of interaction.”35 This is a process very much speeded up by the EU, which has “… established the bold idea to disconnect nationality and citizenship and this idea may well evolve to general principle which ultimately transforms the ideal of cosmopolitan citizenship into reality.”36 In this respect the EU pursues the modern idea of statehood, as divorced from nationhood: the polity is not bound by pre-political bounds. It is, according to discourse theory, not necessary for citizens to be each other’s neighbour, or native inhabitant, for solidarity and hence political

35 Held, Democracy and the Global Order, 225.
integration to come about. Hence discourse theory sits very well with supranationalism, as it decouples citizenship from nationhood and conceives of the constitution as a system for accommodating difference. It is, however, necessary to establish the institutional arrangements and firmer entrenchment of rights process and procedures for legitimate governance. We are now witnessing a constituting making process that can do the job, but because of present constraints the outcome is still open-ended.

Our approach was to take this open-endedness seriously so as to depict three normatively distinct and stylized solutions that can be derived from the structure in place and from the debate on its legitimacy. The first we presented is that the EU cannot obtain direct legitimacy. Instead it is necessary to scale down the ambitions of the polity-makers in the EU and to conceive of the EU as a problem-solving or special purpose organisation. The EU’s own legitimacy then depends on its performance and on the legitimacy of the Member States. This strategy has also long been embraced by ardent Euro-sceptics, perhaps in particular UK Conservatives.

The second answer is very different from the first and refers to the need for a collective self-understanding as Europeans. It thus defines the EU as a value-based community in a cultural sense. Legitimacy is seen as derived from a shared cultural identity. This strategy has deep roots in communitarian and ethno-nationalist thought. It posits that a viable community must be based on an already existing and clearly identifiable demos. The German Constitutional Court was deeply influenced by this line of reasoning when it made its ruling on the Maastricht Treaty (although the ruling itself is not consistent with this strategy).

The third answer concentrates on the need to readjust and heighten the ambitions of the polity-makers so as to make the EU into a federal multicultural union founded on basic rights and democratic decision-making procedures. It is recognised that the EU has become a polity in its own right, and is no longer a mere derivative of the Member States. Legitimacy is seen as derived from a set of constitutional rights and procedures, which protect citizens’ autonomy and ensure public deliberation. This position has been propounded by for instance the EP and by most of the supporters of a binding Charter of Rights and Freedoms for the EU and a European Constitution.
The process of making law equally binding on every part corresponds with the development of the EU since its inception. A purely voluntary association of states does not give rise to collectively binding agreements: it is a fragile and unstable order. It is likely to run into problems such as those that faced the *League of Nations*, which failed to authorise anyone to defend the shared principles. The EU has clearly progressed beyond the initial stage of a purely voluntary association. It is an entity with strong supranational elements, as evidenced in the character of the legal structure, and which is supported and enhanced in particular by the European Court of Justice. In its rulings, it has long asserted the principles of supremacy and direct effect, principles, which have informed the actual operations of the EU, albeit their precise status in relation to national constitutional orders remains unclear.