Reflexive integration in Europe

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Abstract

Integration may occur through coercion and intergovernmental bargaining - through blackmail, tradition, functional adaptation, copying, diffusion or exit - but it may also occur through reflexive reason-giving and entrenched commitments. The usefulness of such an approach to transnational and supranational systems of governance is due to the fact that such entities lack compliance mechanisms such as majority vote and a collective identity. I find however that deliberation has to be supplemented with law and trust as resources for collective action. Problem-solving as a decision-making mechanism needs to be complemented with institutionalised forms of collective goal attainment and impartial conflict resolution. This constitutes the basis for delineating four stylized polity models of the EU.
Introduction

Today’s Europe is marked by an remarkable pace of integration. Major changes have taken place within a short period of the time and the pace of change is accelerating. A wide range of new policy fields have been subjected to integrated action and collective decision-making. There is a deepening as well as a widening of integration. The European Union (the EU) now consist of 25 member states. However, there is confusion and disagreement about the future design. What kind of order should the Union develop into? There are widely different cooperative schemes, ambitions and outlooks, and patterns of integration vary depending on function, interests 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.

Even though there is confusion and disagreement, the EU is currently about to transform itself and establish itself as an autonomous polity. It is about to proclaim itself as a political union with extended competencies. Since the late 1980s European cooperation has progressed and changed the cooperative scheme of an international organization whose legitimacy derived solely from the member states – the Masters of the Treaties – to an organization in its own right. Increasingly majority vote has replaced unanimity as a decision rule in several policy fields. Progressively the Union has obtained a resource basis of its own. It has become a polity which allocates and reallocates values throughout Europe. In fact, the EU, which is a creature of the member states, has contributed to transform them, either directly or by unleashing processes of mutual learning and adaptation. These transformations are part of a process through which the European nation states transcend the Westphalian order. Integration in Europe, then, not only testifies to Europeanization of the nation states but also to new forms of political governance emerging beyond the international system of state relations. While international affairs traditionally are conducted through diplomacy and intergovernmental bargaining between executive branches of government, we are now witnessing problem-solving – collective goal attainment and conflict-resolution – in policy networks and

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transnational institutions as well as in supranational organizations such as the European Parliament, the European Court of Justice (the ECJ) and the Commission. The EU may be seen to have developed beyond that of an international regime or an international organization. It constitutes a new type of political order that does not fit into the traditional dichotomy of intergovernmental versus nation state regulation. How should it be conceived of and how to account for the development in theoretical terms? Integrated European cooperation has moved beyond a market regime, but does it come down to transnational risk regulation and problem-solving, or does it represent a supranational move based on common values – a value-based community – and/ or a development towards a rights-based post-national union, based on a full-fledged political citizenship?

In this paper I explore the possibility of deliberation as an analytical category to comprehend integration beyond the nation-state. Deliberation designates the rule of reasons, viz., that actors coordinate their actions by giving and responding to reasons (Habermas 1981; Forst 2001). The actors reflexively monitor the circumstances of their activities and base their interventions on intersubjectively accessible reasons. The usefulness of such an approach to transnational and supranational systems of governance is due to the fact that such systems to a large degree lack compliance mechanisms such as majority vote and a collective identity. The EU, initially, is a non-hierarchical system based on voluntary cooperation. Deliberative theory based on communicative rationality is seen as an alternative to rational choice perspective underpinning ‘liberal intergovernmentalism’ which sees integration as driven by the interest-maximation of the contracting partners (Moravcsik, 1998). It is also an alternative to neo-functionalism’s perspective on ‘unreflective’ spill-over processes from low to ‘high politics’ (Haas 1961).

In this paper I outline the reflexive approach to the European integration process with regard to the basic analytical categories deliberation and problem-solving. First I address some developments of the EU integration process and the dynamics that have pushed it in a supranational direction. Second I point to deliberation as the medium of problem-solving, which however, requires trust and law as complement resources for collective action. In a third move I see polity building as a problem-solving procedure based on
experimental inquiry, but one that needs to be supplemented with mechanisms for collective goal attainment and impartial conflict resolution. After this I outline four analytical models of the EU which represent ideal-typical polity-options. They are premised on different merits of deliberation, i.e., epistemic, transformative and moral merits.

**A heterarchical order?**

The EU is not a federation nor is it a confederation. While the latter depicts a union of states – with indirect and delegated powers – a federal system is a union of citizens based on an institutional arrangement like that of a sovereign state albeit more complex. The EU-polity has clear supranational elements such as a Court of Justice (ECJ) which guarantees supremacy of EU law within its field of competence, and a directly elected Parliament which has obtained the power of co-decision with the intergovernmental Council in a wide range of policy-fields. The term polity in the present use does not imply a full-fledged state, but a system in which a central polity coexists with local units. In Europe the member states and the EU have both shared and independent powers with neither having supreme authority over the other. The EU has not only got supranational political institutions, but also a Central Bank, a single currency, a material constitution and is now also aspiring to be a polity with competences on foreign and security policy. The EU has supranational dimensions and does not fit the customary concept of state, as it does not possess the required means, such as monopoly of violence and taxation, and a well developed collective identity necessary for majority vote, to enforce its will. It is not sovereign within a fixed, contiguous and clearly delimited territory.[^3] There are no European jails, no army and no police force.

The EU is a polity without a nation and a state. The supranationality that marks it is non-hierarchical and is a consequence of its peculiar ‘separation of powers’, which is due to the

[^3]: Sovereignty may take different forms, but the classical doctrine states that ‘first, no one can be the subject of more than one sovereign, second, only one sovereign power can prevail with a territory, third, all citizens possess the same status and rights, and fourth, the bond between citizen and sovereign excludes the alien’ (Linklater 1996: 95).
role of the Commission and the Council, which combine representative and executive functions. This kind of supranationality ensures the member states a strong and consistent say in collective decision-making processes – in particular through the Council of the European Union. The institutional structure of the EU embodies a complex mixture of supranational, transnational and intergovernmental elements. There is disagreement among scholars with regard to how this order should be portrayed.

Some analysts see the EU as a system of multilevel and multi-centric governance: Decision-making and implementation are diffused to networks, partnerships and private actors in transnational structures of governance. Common problems that require common solutions are coordinated by joint problem-solving in policy networks and committees.\(^4\) The exercise of political authority is no longer exclusively statal – the relationship between state and non-state actors is non-hierarchical. Such a regime is based on shared authority, and the major task is not ‘redistribution’, but ‘regulation’ of social and political risks. Hence the prevalence of governance and not political rule through responsible institutions such as parliament and bureaucracy – generally thought of as government based on one single (monocephalous) line of accountability anchored in the rights of the citizens. Governance depicts innovative practices of networks and horizontal forms of interaction. It is based on a private law framework where the production of norms is seen as the result of a spontaneous coordination process. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other on the basis of ‘soft law’. In this view the EU comes close to a heterarchy: Political authority is not centralized as in the hierarchical order of the state model nor is it decentralized as in an anarchical order. Rather the units of the system pool their sovereignties. There is a shift from a hierarchical substantive orientation, to be found in given rules and aims, to a horizontal heterarchical and procedural approach, operating with the

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\(^4\) There is a large body of literature on this; see e.g. Marks 1993; Marks et al. 1996; Hix 1998; Jachtenfuchs 1996; Jachtenfuchs and Kohler-Koch 1996; Joerges and Vos 1999; Ladeur 1999; Eising and Kohler-Koch 1999; Eriksen et al. 2003b; Neyer 2003, 2004; Olsen 2004.
localised and linked potential generated from private and public action and the linkages inherent to them.

(Ladeur 1999: 156)

Heterarchy is, however, deficient in empirical terms because a supranational structure endowed with a dispute resolution mechanism is in place, viz., a court that bases its rulings on recognition of the primacy of Union law and on the principle of rule of (hard) law. The integration process has moved the EU beyond and international organization as well as beyond a heterarchy. Due to this fact democracy needs to be brought to bear on the EU. Its actions have consequences for the citizens’ interests and values, for their freedom and welfare. The acts of the Union are thus not merely regulative as it allocates resources throughout Europe and affect the citizens in most walks of life, even if only by means of impeding other levels’ ability to act. Heterarchy is deficient with regard to democracy in that there is little chance of equal access and public accountability. Egalitarian structures of law-making are lacking. An order exercising power in the form of conflict resolution and resource allocation is in need of popular control according to the dictum that all legislative power stems from the people. ‘Whatever a people cannot impose upon itself cannot be imposed upon it by the legislator either.’ (Kant 1797: 85). I return to the democratic problem of the Union in Chapter 11. The question now is how to explain the making of a supranational order.

The dynamics of integration

European cooperation started out as a pragmatic form of collaboration on coal and steel, underpinned by the peace motive. World War I and II profoundly affected the states and citizens all over Europe, and all depended on each other for a peaceful restoration of postwar Europe. Cooperation was initially problem-solving for the members caused by their interdependence. The solving of common problems led to more cooperation, the building of trust relationships and to the discovery of new problems of common concern. Increasingly, supranational polity formation took place with conflict resolution and goal attainment institutions of its own, which, however, spurred new questions about the legitimacy basis of such a polity.
In the beginning, [the European Union] was more of an economic and technical collaboration. [...] At long last, Europe is on its way to becoming one big family, without bloodshed, a real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead.

(European Council 2001)

The reflexive approach depicts cooperation as a response to societal problems, and institution formation as a response to the indirect consequences of such, which increasingly catches on and has polity consequences. Polity-building is the result of deepened integration driven by intelligent problem-solving, but problem-solving leads to juridification, to more legal regulation which again triggers claims to democracy and reflexive juridification, as James Bohman puts it in the present volume. It is ‘legalization without democratic politics’ (Brunkhorst 2004: 100). Hence the integration process is not a linear mono-causal process driven by unintended feedback loops as analytical functionalism suggests, neither by the federalist ideas of constitutionalists like Altiero Spinelli (1966) and Ernesto Rossi, nor by ‘the hidden hand’ of Jean Monnet who foresaw a federation as the necessary outcome of closer cooperation (Monnet 1978: 392f). Rather the integration process is to a large degree driven by contestation and opposition as it came to be seen as a technocratic, elite driven project conducted in isolation from the people. The obvious answer to such allegations was democratic reforms, which, however, as a consequence led to more integration and supranationalism.

Integration is a process where actors shift their loyalties and activities towards a new centre with the authoritative right to regulate interests and allocate resources (Schmitter 1969: 166). Integration thus entails solving the problem of collective action – the free rider problem. In causal terms, we may conceive of integration beyond the nation-state as a process where states and non-state actors cooperate in joint problem-solving sites across national borders in Europe, thereby creating a transnational society. As the activities increase, common standards, rules, and dispute resolution mechanisms – regulation and coordinating mechanisms – are needed, which, in turn, trigger reflexive and self-reflexive
processes conducive to the establishment of authoritative institutions that can control and command obedience in the name of all. Hence, the European institutions develop into something more than agents of the member states (Stone Sweet 2004: 236). It becomes a polity in its own right.

The supranational character of the Union’s legal structure started with the constitutionalization of the Treaty system, which transformed the EC from an international regime into a quasi-federal legal system based on the precepts of higher law-constitutionalism. All legal persons and not just states, have judicially enforceable rights. Furthermore, Article 177 of the Treaty of Rome (EEC) states that whenever Community law is needed for the resolution of a dispute before a national court, the presiding judge may (sometimes must) request the ECJ for an adequate and authoritative interpretation. Due to case law, the Doctrine of Supremacy (1964) states that, in cases of disputes between a national norm and an EC legal norm, the national norm must give way; and the Doctrine of Direct Effect (1962, 1974) says that, under certain conditions, EC norms – Treaty law and secondary legislation – grant the citizens rights that must be protected in national courts. In the Treaty establishing a Constitution for Europe, recognition of primacy of Union law is now stated (European Council 2004: Part I, Article 10-1). Further, the progressive strengthening of the doctrines of supremacy and direct effect is coupled with the growth of the number of EU provisions and Court rulings, where the Court acts as a trustee of the Treaty and not as an agent of the member states. The net upshot is that:

The constitutionalization of the Treaty of Rome constitutes an ‘unintended consequence’ of monumental proportions. The member states, after all, had designed an enforcement system that one can characterize as ‘international law plus’, being (a) the compulsory nature of the Court’s jurisdiction, and (b) the obligatory participation of the Commission in various proceedings.

(Stone Sweet 2003: 27)\(^5\)

\(^5\) Now it is contested whether this is merely an ‘unintended consequence’, as ‘l’idée européenne’ had been around for several centuries when Robert Schuman, French minister of foreign affairs, 9 May 1950,
The present state of affairs is due to a protracted process of integration since its inception with the Paris Treaty. The basis for cooperation deepened and broadened: From the Paris (1951) and Rome (1957) Treaties, through the Single European Act (1986), Maastricht (1992), Amsterdam (1997), Nice (2000), to the Laeken declaration (2001) and the present-day work on forging a constitution. The EU is clearly something less than a federation but more than a club, a ‘Zweckbundnis’ (Verband), regime or a confederation. The latter can not be democratic as it is the states not the citizens that are the masters; states are the sole sources of legitimacy and they act internationally on indirect and delegated powers on governance functions. It is the member states that are the contracting parties in an intergovernmental organization. However, at least from the early 1990s the EU has proclaimed its commitment to democracy, and to the principle of direct legitimacy: the power wielding institutions should be authorized by the people and be accountable to the affected parties. The Charter of Fundamental Rights (of 2000) included now as part II of the draft Constitution is the most explicit commitment as of yet to a full blown political union founded on democracy and human rights – a rights-based citizens’ Union (Eriksen et al. 2003a).

In order to understand the dynamics of such a development we need to explore the concept of problem-solving which is at the heart of the European integration project. It is a vital intake to explain the integration process but what does its coordinative power consist of?

**Problem-solving, voting and bargaining**

In political science *problem-solving* is a mode of decision-making distinguished from *bargaining* and *confrontation*. Confrontation denotes the appeal to the will (volition) or preference of a dominant actor (or a coalition of actors) who dispose of means to compel compliance if necessary. In formalized political systems majority *vote* is the basic proposed the plan for Europe, a plan that ‘a représenté une étape capitale dans la construction européenne: il a marqué le début du rapprochement franco-allemand, condition préalable à toute organisation de l’Europe de l’Ouest, et il a crée la première institution supranationale européenne’ (Gerbet 1983: 101).
mechanism of sanction in the confrontational mode. It is those who control the most votes that win. Bargaining may be depicted as the strategic employment of threats and warnings in order to achieve given ends.\textsuperscript{6} Control over vital resources outside of the negotiation site – such as the threats of exit, strike and lockout – is the action-coordinating mechanism of bargaining. In bargaining sites it is the resources not the votes that decide (Rokkan 1966). In both cases external sanction mechanisms are employed – the number of votes and the resources at disposal – in order to reach a decision. Voting and bargaining both sanction action and terminate the decision-making process solely on the basis of quantitative vectors. When it comes to problem-solving there need not be such external sanction mechanism in play to ensure compliance with a plan of action. Rather its coordinative power may stem from the cooperation process itself, or so I shall argue.

Fritz Scharpf (1988: 258) contends that problem-solving is premised on the ‘appeal to common (‘solidaristic’) values’ and ‘resort to ostracism and exclusion as the ultimate collective sanction’. The capacity to coordinate action is in this case dependent upon the prevailing habits, customs, conventions and then on the ultimate threat of exclusion of non-compliers. However, problem-solving also takes place when such preconditions do not exist. The coordinative force of problem-solving – its ability to harmonize action – should therefore be sought for in the process itself – in the process of finding efficient or right solutions.\textsuperscript{7} Scharpf’s conception of problem-solving seems to:

1) overestimate the pool of collective values required, and
2) underestimate the force of reasons in the coordination of actions.

\textsuperscript{6} Or in Jon Elster’s formulation: ‘To bargain is to engage in communication for the purpose of \textit{forcing} or \textit{inducing} the opponent to accept one’s claim. To achieve this end, bargainers rely on threats and promises that will have to be executed outside of the assembly itself.’ (Elster 1992: 15)

\textsuperscript{7} It may also be seen merely as a question of rational choice: ‘The underlying process involves choosing among alternatives by using some decision rule that compares alternatives in terms of their expected consequences for antecedent goals. The model is one of intendedly rational choice under conditions of risk and is familiar in statistical decision theory, as well as in microeconomic and behavioral theories of choice.’ (March and Olsen 1989: 59; cp. March and Simon 1958).
1) Agreement on values, on the common good, may be more or less present, may be diffuse and may even be non-existent as a resource for joint problem-solving. Further, given the social and cultural complexity of modern societies, such a ‘collectivistic substrate’ can not merely be taken for granted. The presence of a value consensus based on common virtues and a collective we-feeling may not be counted on in a pluralistic context. On the other hand, a common value base required for collective action can be created through enduring social interaction and communicative practices. It can result from intensified cooperation.

2) Problem-solving refers to the use of knowledge in a given situation. It has a cognitive dimension and is thus accessible for rational appraisal. Critical interlocutors may query whether the knowledgebase is adequate for the choice of action. Is sufficient information collected for cogent decision-making? Problem-solving has to do with the finding of answers to posed questions and with solutions that may or may not be rational, viz. well grounded. It is a cooperative effort in order to overcome exigencies and obstacles in a manner that can be deemed successful or not successful, good or bad, right or wrong.

The logic underpinning problem-solving differs thus from that of the other two modes of decision-making – bargaining and voting – in that it does not contain a clear-cut external sanction mechanism, but is dependent on the process. That is, on the manner in which the participants define problems and suggest solutions and on the nature and quality of the process in which they assess and justify proposals and solutions. This means that the resource base and the potential for effective sanctioning are not at the same level of formalization as that of the former two, making calculation and prediction of the results of the interaction process more difficult. Problem-solving is inherently linked to reflection, reason giving and the reaching common understanding. The medium for this is deliberation as it compels actors to verbalize and justify their plans of action in case of conflict. This may change someone’s attitudes or beliefs, which is necessary in order for actors to harmonize action plans voluntarily.
Deliberation and will-formation

When identities and values are involved, when actors do not know who they are or what they want, they cannot bargain or vote; when opinions differ and consensus on a common metric is missing, actors must argue. In this way deliberation reaches deeper than does bargaining and voting. One cannot hold a vote or bargain unless alternatives are clarified and conflicts are sorted out so that a common understanding, at least as to what one disagrees about, is established. One must also argue for choosing the bargaining and voting procedures. The deliberative process of arguing and counter-arguing is a process ‘that shapes the identity and interests of citizens in ways that contribute to the formation of a public conception of the public good’ (Cohen 1989: 19). Deliberation designates the process of reaching agreement through reason-giving. Such a process may end in consensus with regard to a particular decision, or in conflict. In the latter case, deliberation needs to be succeeded by bargaining and/or voting.

In theoretical terms deliberation is an action coordinating mechanism suited to explain the level of agreement and consensus reached in committees, conventions and networks. Its explanatory power is based on the motivational force of reasons, viz., that the insights into good reasons have behavioural consequences. Deliberation denotes an actor’s attempt to come to an agreement about the definition of a situation, i.e., to reach a common understanding of how a given situation should be described. The ability to reach consensus on empirical and normative questions is due to the obligation to provide reasons, which is forced upon every participant in real discourses. In a well performed deliberative process the participants will find out which reasons are good enough. Deliberation increases legitimacy as it includes affected parties and gives them a chance to argue their case. It also makes for qualitatively good and fair decisions as far as the members put forward arguments and respond to counterarguments in a rational manner. Rational deliberation has a number of merits, among them are:

1) Deliberation leads to improvements in information and judgement: it is a cognitive process for the assessment of reasons in order to reach just decisions and establish
conceptions of the common good. This *epistemic value* of deliberation by implication also increases the likelihood that losers comply with majoritarian decisions.

2) Deliberation has the capacity of shaping preferences and transforming opinions conducive to collective will-formation, viz., the *transformative value* of deliberation. This is due to the ‘world-disclosing effect’ of deliberation changing empirical and normative outlooks as well as collective self-interpretations.

3) It also has *moral value* as it is a constraint upon political power-holders. Only by justifying collective decisions towards the ones affected can one know whether or not they are right. Deliberation is a principle that sets the conditions for how to reach correct decisions, hence the concept of deliberative democracy.

Thus, deliberation does not merely constitute the medium of rational problem-solving and a coordinative mechanism, it also provides a democratic standard. One should, however, keep in mind that the epistemic dimension is vital to all theories of deliberation as far as they are premised on the acquisition and employment of knowledge and hence the force of reasons.

**Reflexive polity-building**

In this perspective deliberative politics is seen as a *reflexively organized learning process* – as a problem-solving procedure that brings in knowledge and relevant normative perspectives and qualifies (or validates) them in order to establish mutual understanding and agreement. ‘Politics has the function of coordinating the learning process of the whole society.’ (Deutsch and Markovits 1980: 38) Deliberative politics, when institutionalized correctly, contributes to resolve conflicts impartially and achieve common aims legitimately. Consequently, we may conceive of societies as problem-solving entities in which success can be measured according to *collective rationality* – that is according to standards of justice and the common good (Peters 1991: 204ff; Habermas 1996: 319).
The democratic procedure is a special variant of this idea of societal problem-solving as it represents the institutionalization of communicative processes for the selection of problems and solutions for a community. Reflexivity is here taken to depict the actor’s rational monitoring of the circumstances of their activities. Deliberation is, then, not solely an instrument for reaching better decisions but also for learning through the testing of arguments. That agents can provide self-reflexive interpretations of as well as provide intelligible, inter-subjective reasons for their behaviour is procedurally entrenched. The democratic procedure makes voice possible, challenge arguments and compels actors to justify their claims by institutionalizing critical opposition and choice opportunities. It spurs reflection over the process. Hence, we may speak of institutional reflexivity, which Giddens (1991: 20) defines as ‘[t]he regularised use of knowledge about circumstances of social life as a constitutive element in its organization and transformation’. Such procedural self-reference entails communication over communication and reflection over the selection of selections, to talk with Niklas Luhmann. Of course, selections may be perverse and communication may fail, but can, due to the epistemic value of public deliberation, be corrected. This value then not only increases the probability for compliance but also ground the assumption of collective rationality as the outcome of well conducted deliberative processes.

Such a perspective sits very well with the pragmatist theory of John Dewey (1927), to whom successful problem-solving depends on the degree to which actors manage to collaborate and engage in deliberation on a free and equal basis. Voluntary cooperation on practical questions, based on the free access to information and mutual deliberation, constitutes an ‘intelligent’ problem-solving method. The more free the participants are to suggest proposals and to assess information and assumptions, the more rational the problem-solving. It is this model of societal cooperation that Dewey applies to democracy, as he sees it as the political form of organization based on conscious deliberation and experimentation in which human intelligence can be fully realized. The

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8 'Von Reflexivität soll immer dann die Rede sein, wenn ein Prozess als das Selbst fungiert, auf das die ihm zugehörige Operation der Referenz sich bezieht.' (Luhmann 1987: 601, see also 610; cp. Maus 1986: 391).
9 On perverse selectivity see Brunkhorst 1999: 378; Luhmann 1997: Chapter VII.
growth of democratic communication is a requirement for *experimental inquiry* – for problem-solving within most fields of action in modern societies (Putnam 1991).

Dewey reconstructs polity-building stemming from simple forms of cooperation on solving common problems, viz. the collective inquiry of the citizens. There is no postulation of a collective identity or common interest at the outset – the society is not conceived of as an ethical society – but commonality is established during the process of attending to and solving the problems facing the actors:

> Recognition of evil consequences brought about a common interest which required for its maintenance certain measures and rules, together with the selection of certain persons as their guardians, interpreters, and, if need be, their executors.

(Deewey 1927: 17)

The combined, unintended consequences of problem-solving lead to the formation of public spheres because it is in the affected parties’ interest to control such consequences but also because there is an obligation to provide reasons to the ones affected. ¹⁰ A public sphere and subsequently a polity come about and become organized as far as the indirect consequences are discovered and the affected ones succeed in establishing regulative schemes of action by’ internalizing the externalities’.

Those indirectly and seriously affected for good or for evil form a group distinctive enough to require recognition and a name. The name selected is the Public. This public is organized and made effective by means of representatives who as guardians of custom, as legislators, as executives, judges, etc., care for its especial interest by methods intended to regulate the conjoint actions of individuals and groups. Then, and in so far association adds to itself political

¹⁰ ‘The public consists of all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically attended to.’ (Deewey 1927: 15–6). On this, see Honneth 1998: 192; Putnam 1991; Schmalz-Bruns 1995: 214ff; Kettner 1998: 60; Joas 1996; Brunkhorst 1998.
organization, and something which may be government comes into being: the public is a political state.

(Dewey 1927: 35)

However, in this theory of polity-building there is a true danger of scientism and technocracy.\textsuperscript{11} Consequentialism bears the burden of justification. The rights that protect the integrity and autonomy of the individual, independent of their interests and problems, are missing. The principle of democratic justification in a deontological sense can hardly be compensated for by the inquiry of the citizens coming together to solve common problems. We are faced with the risk of forfeiting the individual for the collective good. The Deweyan perspective has to be supplemented because practical problem-solving according to the standards of efficiency and the collective good, involves burden sharing and the allocation of costs, hence brings about questions of rights and justice. There is a hierarchical dimension to the idea of reflexive self-constitutionalization, according to Schmalz-Bruns (Chapter 3), as reflexivity entails the public use of reason that establishes \textit{the moral point of view} according to which moral reasons can appear as what they are – hierarchically superior. Democracy conceived of as self-government constituted by the unintended consequences of action must be supplemented with a rights-based perspective. Moreover, we should distinguish between the case when actors face the same challenge in a situation and wish to overcome it cooperatively, and when they run into a conflict which they want to solve consensually (Habermas 1989). The former refers to what goals or what ‘good society’ we would like to realize – \textit{goal-attainment}, the latter to the rules for \textit{conflict-regulation}. The general problem of political integration on democratic terms, which has to do with the relationship between deliberation, law and trust, can be reconstructed in three steps.

\textsuperscript{11} And we should also note, as another pragmatist does, that ‘[a]s democracy now exists, there is not this development of communication so that individuals can put themselves into the attitudes of those whom they affect’ (Mead 1934: 328).
Law, trust and deliberation

First, as integration has to do with shifting the bounds of loyalty and with the solving of the free rider problem, it requires surrender or delegation of sovereignty. For integration to come about there is a need to overcome the problem of collective action, which arises as soon as a common good can not be restricted for the ones bringing it about. For such, moral, deontic norms that tell what is obligatory, right and just are required to stabilize social relations. Interests and pragmatic concerns shift according to the problems to be solved and establish no stable basis for a polity. They do not guard against defection. The problem here is that even though deliberative theory explicates the ability of actors to obey by the better argument, by standards of truth and justice, it does not explain collective action or the delegation of sovereignty. There may be reasons to oppose even a rational agreement, and nobody is obliged to comply with social norms unless all others also comply. Pure virtues and unsanctioned norms are too weak to integrate activities in larger collectivities; they are too weak instruments to harness individual behaviour. Social norms need to be supplemented with legal statutes that connect breaches and defection with sanctions. Moreover, deliberation does not determine the necessary scope of participation in the deliberative process itself. These are the reasons why law based on subjective rights entitlements is such a conspicuous feature of modern societies.

Secondly, there is an unsettled issue with regard to the social or cultural substrate required for action coordination by means of communicative rationality. A minimum level of trust and confidence – a modicum of non-egoistic commitment – is necessary for cooperative goal attainment and conflict resolution to come about – for fair play and promise-keeping. Informal modes of social coordination are needed to solve numerous collective action problems. Absence of trust paralyzes collective action (Offe 1999). A common value base entrusts actors to engage in communicative relations, to enter the deliberative circle allowing themselves to be swayed by the force of the better argument. Trust functions to absorb the risk of social disintegration that may arise when political orders are reproduced only through the mechanisms of law and deliberation. This condition refers to the pertinent question of the value base of Europe, the commonality, the shared feelings, belongings and aspirations that make for integration. Such can range from a common spiritual basis, via the legacy of
the Enlightenment to the post-war peace motive and the idea of a united Europe, which all points to a motivational substrate for integration engendering trust and confidence. The research problem has to do with squaring the following circle: How much legal institutionalization is needed for cooperation to come about, how much deliberation is required before common commitments become obligatory commitments?

Third, cultural values are context bound and possess only relative validity. Rights derived from universal moral norms are called for in order to stabilize a wide and composite polity. But rights may be given by non-democratic entities. Even non-enfranchised citizens – even children, slaves and illegal immigrants – enjoy rights. Rights may be decided and allocated autocratically. Courts and administrative agencies adjudicate conflicts autonomously according to established rights but only the democratic enactment can validate them. The legal medium is not merely a system of sanctions, it is also one of presumably rational principles. When law is rational and legitimate, people may obey out of *insight*, not merely because of its attendant sanctions. What then is needed is to bring democracy – the principle of popular self rule – to bear upon the integration process, because only by including those affected can one know whether a law is legitimate.

The deliberative perspective alerts us to the fact that political integration starts when actors face problems and seek to solve them cooperatively; when the consequences and by-products of this cooperation affect third parties and become visible and problematic in legitimacy terms. That is when one has to answer questions like: Who are responsible for inflicted harms? Who should pay for negative by-products? Who to hold to account when third parties suffer? The proposition here is that when a *value-consensus* is no longer there to handle questions of this kind automatically, reflexive processes come about. Critique and opposition trigger reflection and justificatory discourses in post-traditional contexts. In the EU the value-based ‘permissive consensus’ has come to an end (Abromeit 1998). The EU is contested and opposed to by large groups in many countries.

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12 Consult note 4 on this point.
Law is a reflexive mechanism for solving conflicts in modern societies. It is also through legal procedures that legitimation problems can be alleviated. Of the long-established authorities, religion, law, state and tradition, it is only law that has survived the corrosion process of modernity (Frankenberg 2003). But under modern conditions there is, as mentioned, a split between problem-solving within the domain of politics and within the domain of law. Both are specialized on reaching collectively binding decisions, but while politics has to do with the will-formation necessary for efficient goal attainment, law pertains to the stabilization of behavioural expectations necessary for peaceful interest-regulation.

**Beyond problem-solving**

The dynamic and multifaceted character of the EU makes us aware of the fact that the development of cooperation in Europe may take different directions: it may become more tightly integrated, it may become more complex and multifaceted, or the integration may unravel. The open-ended nature of the present situation can be illustrated by the challenge of enlargement. Enlargement can be handled either through scaling down the ambitions of the polity-makers in the EU (reduce or roll back integration), or through increasing the capabilities of the EU (further deepen and widen integration).

A distinction is needed between a problem-solving, derivative entity (from the member states) that performs governance and risk regulation functions, and a full-fledged polity able to mediate conflicts and (re)allocate resources through collectively binding decisions. The former treats problems that are of a mundane, technical-economic nature and preferences that do not invoke strong evaluations: In cases of conflicts of interest disputes can be resolved with reference to *justice as mutual advantage* (Barry 1989). This concept of justice pertains to the benefits of mutual cooperation and stems from the constraints self-interested parties may rationally install on themselves in order to realize their long-term interests (cp. Gauthier 1986). Problem-solving for mutual benefits will not do in normative terms when the questions to be answered and the problems to be solved involve conflicts over norms, over values and identities – when actions have distributional costs. Then authoritative institutions for impartial conflict regulation and

This concept rests on the insight that actor neutral reasons are needed to justify a norm. Reasons based on self-interests do not fulfil the requirement of impartiality as morality entails upholding norms simply because they are right and violating them are wrong, hence some disputes can not be settled with reference to mutual advantage. Simply establishing an equilibrium outcome does not imply that it is right. When cooperation affects the interests and identities of the members, when it has distributive effects, the resolution of conflicts has to be settled with reference to higher ranking principles and moral norms revolving on what is equally just for all. In a deontological, Kantian perspective norms are valid when they can be justified from every affected party’s perspective, viz., when everybody’s interests and values are taken into consideration and given a due hearing. According to the discourse theory the test of the validity of norms is not whether they are profitable for one or the other but whether it can reasonably be expected that all would agree – for identical reasons – in a rational discourse. However, all would not agree unless non-compliers are sanctioned – hence the prevalence of law.

When integration catches on and brings about public institutions for regulating interpersonal conflicts and for realizing collective goals authoritatively and legitimately – consistent with the rule of law and the principle of popular sovereignty – we may talk about a democratic polity capable of collective action. The more proper procedures and institutions are in place to regulate conflicts impartially and allocate collective resources according to conceptions of the collective good, the more the polity becomes a polity in its own right. It obtains the authoritative power to solve problems and command in the name of all the members.

What kind of entity is the EU then? Is it a regulatory regime, a value-based polity or a fledgling post-national federation (Eriksen and Fossum 2004)?
Four polity-options

As mentioned, the EU faces pressures both in terms of efficiency and in terms of
democratic legitimacy. With now ten new member states (25 in total), its ability to live up
to expectations of efficient problem-solving will be put to the test. In present (and future)
debates about forging a citizens’ Europe, the EU faces the challenge of finding an
appropriate balance between the competing requirements of efficiency and legitimacy.
However, democratic legitimacy may be obtained in two ways. It may be obtained
indirectly via national democracy or directly on the basis of its own actions and
procedures. As long as, or to the degree that, the EU is an intergovernmental organization
in the hands of the member states, when it is merely a means for them to solve their
perceived problems, its legitimacy basis can be derived from the democratic processes of
opinion-formation and decision-making at the national level. But when this is no longer
the case, when the EU’s actions profoundly influence the identities and interests of the
member states and their citizens, when the EU becomes a supranational entity,
democratic theory requires it to establish the legitimacy basis of its own. Hence, we talk
about direct legitimacy obtained through the processes and procedures of the Union itself.

Legitimacy is one thing, efficient problem-solving another. They are however interrelated
because capability – an organized capacity to act – is part and parcel of democracy
understood as citizens’ self-rule through politics and law as the citizens have to be able to
influence their cooperative conditions to be autonomous in a public sense. Thus,
legitimacy without capability is futile. But capability bereft of legitimacy is unstable and
inefficient. In the EU there is a tension between efficiency and legitimacy as it is torn
between solving the immediate problems of the member states and gaining popular
support. While efficient problem-solving requires capability to achieve goals, legitimacy
has to do with shaping policies in a democratic manner and achieving approval of the
actions undertaken.

How able is the union to undertake collective measures and to solve problems rationally?
There are, as mentioned, two forms of collective will-formation which become necessary
in the absence of a value-consensus and when the issues raise more than pragmatic
questions: *goal attainment* and *conflict regulation*. The first one is the prototypical political mode of collective decision-making based on the mobilization of support for collective goal realization. The authoritative allocation of resources is forged on the basis of the collective mobilization of resources for goal attainment subsequently decided on and implemented by political and administrative institutions (Easton 1953). Conflict-resolution is prototypically the domain of law as it involves the settling of disputes through adjudication. The decision-making standard here is justice: impartial assessment of all the interests and values of the affected parties. The basic action-coordinating problems of a social order then have to do with conflict-regulation and the pursuit of collective goals according to standards of the common good.\(^\text{13}\)

*Table 1.* Functions of the ideal-typical polity-options

<table>
<thead>
<tr>
<th>Democratic legitimacy</th>
<th>Collective goal attainment</th>
<th>Interpersonal conflict resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indirect</td>
<td>Market-based cooperation</td>
<td>Regulatory risk regulation</td>
</tr>
<tr>
<td>Direct</td>
<td>Value-based redistribution</td>
<td>Democratic rights-assignments</td>
</tr>
</tbody>
</table>

When we cross-tabulate the legitimacy dimension and the collective decision-making dimension and apply them to the integration process four possibilities appear (see Table 1). One option is to conceive of the Union as an international organization performing

\(^{13}\) ‘Collective will-formation refers to the stabilization of mutual behavioral expectations in the case of conflict or the choice and effective realization of collective goals in the case of cooperation.’ (Habermas 1989: 145). Cp. the AGIL scheme of Parsons (1951).
market functions. Onus is then on efficient problem-solving and the four freedoms of market integration. The second option arises when one takes the regulation of risks into consideration and the complex arrangement in place in the Union to deal with these problems. But this activity is not merely regulative – it has market-correcting and redistributive effects, and as legitimacy here is derived (from the member states) as in the first model, it is deficient in democratic terms. However, some argue that due to the epistemic value of deliberation, this kind of network governance constitutes a viable alternative to government.\footnote{See e.g. Bohman’s contribution to this volume; Dryzek 2000; Cohen and Sabel 1997, 2003; Gerstenberg 2002.} The third option is to deepen the collective self-understanding, so as to make the EU into a value-based community, founded on a common European identity. In this way a people or a demos emerges so as to enable the EU to cope with its integration problems. However, legitimation through collective identity need not comply with the criteria of democratic self-government, and democracy is the one remaining legitimating principle of government in post-conventional societies (cp. Dryzek 2000). Hence the fourth polity-option which envisions a constitutional-democratic entity, viz., one based on entrenched political citizenship – a set of common civil and political rights – to empower the citizens to be and see themselves as the ‘co-authors’ of the law.

**A market-based regime**

The EU may be conceived of as an interest-based entity as it from the very start was held to be an instrument for solving the perceived problems of the original few member states. From this stems the free trade conception of European integration. This type of organization comes close to the notion of the EU as a ‘special purpose association of functional integration’ (Ipsen 1972). The legitimacy of the EU depends on its discernible benefits for the members. In this economic conception, the EU is based on the notion of a legally regulated market with a common currency and a common set of rules regulating the movement of goods, services, capital and people (Moravcsik 1998). Cooperation is restricted to the realm of economics. The role of the institutions at the EU level is to sustain the Single Market. They are entirely dependent on the member states for their
funding and to a large extent also for the implementation and functioning of the Market. Member states are directly represented in the core decision-making bodies as an additional means of assuring that the entity does not expand beyond the economic realm and encroach upon state prerogatives pertaining to security, welfare and identity. This system is, thus, premised on the notion of indirect legitimacy, i.e., the EU is legitimate insofar as it sustains an efficient market and respects the preferences of the member states in non-economic matters (Scharpf 1999). Preferences are respected and aggregated, not shaped, amended or tested in deliberative sites. However, as integration has grown deeper and more demanding, as the realms of common action and policy-making have increased and as institution building has continued, this notion of the entity has been challenged.

A regulatory entity

More recently the EU has come to be seen as a regulatory entity made up of a wide range of politically independent institutions such as specialist agencies, Central Banks, judicial review, and delegation of policy-making powers to independent regulatory commissions (Majone 1996) This entity is more comprehensive than a Single Market, in that its foremost role is to resolve the problems of the member states in an increasingly globalized world on the basis of approved knowledge bases. Globalization entails a range of additional problems pertaining to environmental degradation, social dislocation, international crime, terrorism and migration. Hence the risk scenario of modern society: the unforeseen and unknown consequences – the negative by-products – of human activities that can not be rationally calculated nor established safeguards against (cp. Beck 1986: 386ff; Luhmann 1991). Participation in epistemic communities enhances knowledge and reduces the information problem with regard to choice under conditions of risk. In the EU many boundary-crossing problems are addressed by cross-national regulatory agencies. As with the Market model, the member states bar the structure at the EU level from affecting core state interests and preferences. This together with well-developed systems for accountability and surveillance are held to suffice in ensuring legitimacy. In transnational structures of governance the epistemic value of deliberation bears the burden of democratic legitimation (Cohen and Sabel 1997, 2003; Gerstenberg 2002).
Proponents of the regulatory model contend that the existing institutional complex of the EU does, in fact, also produce a more transparent and accountable policy process than the domestic policy processes of the member states actually do. The argument is that this structure provides for a constant presence of national officials in the Council and in comitology. The oversight of 15 (now 25) national governments, the tradition of publicizing Council decisions, the complex and multi-level stages of decision-making, and the extensive publicity and interest intermediation and the role of the NGOs, etc., keep the EU in close contact with the constituencies. From the limited perspective of the EU as a regulatory entity – dealing with regulation, not redistribution – this, it is contended, will suffice. But as already hinted to, regulatory politics within the Union is not merely pragmatic problem-solving, as it has costs, allocates values and is deeply involved in issues of a moral and ethical nature.

A value-based entity

The third notion of the EU is that of a value-based community. The EU is seen as a geographically delimited entity with a common identity which can serve as the basis for developing stable goals and visions, based on the revitalization of traditions, mores and memories of the common European values and affiliations. Because of a sense of 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 wellbeing. This is seen to be the solidaristic basis of the nation-state as well as of the welfare state, and the EU also needs such a symbolized collective ‘we’ if it is to be authoritative and legitimate. To sustain an ability to make collective decisions over time, a European identity is required (Grimm 1995; Miller 1995; Offé 1998). 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, for specifying rights and duties of its members and to set the terms for inclusion/exclusion. It is a means of drawing bounds, by defining who are Europeans and who are not. This entity is premised on achieving a *value-consensus* founded on a given and shared set of cultural identifications. Enlarging such an entity is a major challenge as it will proceed in the direction of and according to value-
Based similarity between the EU and the applicant states. However, Europe exhibits pluralistic value patterns, and since there is no European nation – not an identity of a ‘Staatsvolk’ – that a polity can be based on, a value-based community is obsolete, at least for the foreseeable future. That is as long as the intermediate structures of civil society such as Europeanized party systems, NGO’s, social movements, media and a common language that make possible transnational discourse on the same topics at the same time, are missing. At present, there is no European people that can govern itself democratically and give themselves a constitution (Grimm 2004). The question of a viable Union is seen to depend on the ability to shape a common identity through a collective process of self-interpretation among Europeans, hence speaking to the transformative value of deliberation.

However, there is yet another alternative as European law has already acquired supranational normativity and thus is made binding on the member states and the citizens. It has changed the boundaries and the logic of cooperation between the states in Europe in such a way that a legitimacy basis has to be derived from the entrenched rights and procedures at the supranational level.

**A post-national union**

In the age of globalization the subject of democracy is multinational, resting on a plurality of demoi rather than on one people conceived of as a macro-subject. But only a polity that has obtained legitimate power to act on the common action norms is sovereign. A federation is a composite state constituted by diversity, which, however, exhibits one identifiable seat of authority complying with the basic democratic doctrine that ‘all power stems from the people’. In the EU the legitimizing principle of a sovereign authority in the form of a people or a properly elected assembly symbolizing the people is not in place. But what may be counted on as a legitimizing principle is a system of rule emanating from a constitution-making process. The fourth and final conception of the EU is that of a federal-type entity stemming from the fusion of European constitutional traditions and horizons (Bogdandy and Nettesheim 1996). This entity needs to be equipped with a democratic constitution; citizenship based on entrenched political rights,
delineated competencies along vertical and horizontal lines (i.e. between the institutions at the EU-level and the member states, and among the institutions at the EU-level, respectively). This polity is premised on the democratic constitutional state and represents an extension of this model to the European level (Habermas 1996; Mancini 1998). The standards of democratic government are brought to the fore through the principles and values adopted by the EU as well as through its institutional and constitutional developments, in particular from the making of the Charter of Fundamental Rights in 2000 and onwards.

This model is premised on direct legitimacy: the citizens are included directly or via their representatives in the decision-making process of the EU. Key words are a bill of rights and a competence catalogue, a parliament based on direct representation of European citizens and a Council of States as a second chamber. The institutional complex of the Union, the rights, the procedures, the policy-making processes and sites it embodies, make for participation in and accountability of the law-making process. In this conception a European demos and a collective will are also shaped, but the approach is quite different from that associated with the EU as a value-based community set out above. This conception is premised on reconciliation and the transformations of the member states identities due to the public use of reason – with regard to justice as mutual recognition – and not merely through the hermeneutical interpretation of who we are. Deliberation on the basis of rights and norms shape collective interests and is a constraint upon the power holders – hence the moral merit of deliberation. The challenge of enlargement is to ensure that new member states are willing and able to uphold the democratic values entrenched in this conception of the EU.

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Conclusion

These ideal type polity options are taken as possible outcomes of the present integration process. The EU is a multidimensional organization and since integration processes are multifaceted, different areas of integration proceed by their own logic and speed it is important to conduct issue specific studies. The salience of these models therefore varies across levels and policy-fields. The EU is a political system that extensively makes use of law to create order and purpose, but law-making and law enforcement take place within a structure that combines hierarchical and horizontal procedures. Whereas a central body with superior resources is clearly absent, the system has developed a well established legal hierarchy and consented authority relations buttressed by deliberative processes. The EU has clearly moved beyond intergovernmentalism but has it developed into a regulatory entity based on transnational structures of governance, a value-based polity premised on a common European identity or a rights-based post-national union: a full fledged political polity - equipped with goal attainment and conflict resolution mechanisms - with sovereign control within a clearly delimited territory?
References


