



**Department of Political and Social Sciences**

**THE USES OF LEGITIMACY**  
**Models of EU Legitimacy Assessed in Light of the**  
**European Parliament's Debates on BSE and the**  
**Constitutional Treaty**

**Hilde Hatleskog Zeiner**

Thesis submitted for assessment with a view to obtaining the degree of  
Doctor of Political and Social Sciences of the European University Institute

Florence, June, 2008

EUROPEAN UNIVERSITY INSTITUTE  
Department of Political and Social Sciences

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### **Examining Board:**

Professor Michael Keating, European University Institute, Supervisor  
Professor Christine Chwaszcza, European University Institute, Co-supervisor  
Professor Dario Castiglione, University of Exeter  
Professor Ulrika Mörth, Stockholm University

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## **ABSTRACT**

### **The Uses of Legitimacy. Models of EU Legitimacy Assessed in Light of the European Parliament's debates on BSE and the Constitutional Treaty.**

This thesis examines the uses of legitimacy in debates on European integration. It treats the issue at a normative and empirical level. The normative part is an analysis of four theoretical contributions to the discourse on EU democracy: the standard version of the democratic deficit, the regulatory state, multi-level governance and integration through deliberation. The empirical part explores the political use of the theories' legitimacy claims in two cases: the European Parliament's inquiry into BSE and its debates relating to the Convention on the Future of Europe.

The analysis reveals certain problems in theoretical and political discourse. Whereas the critique of the standard version has some merit, the positions formulating non-majoritarian notions of EU democracy are equally, if not more, problematic. The regulatory state, multi-level governance and integration through deliberation dress up old ideas – technocracy, interest group pluralism and constitutionalism respectively – and attempt to reinvest them with democratic legitimacy. The cases further illustrate the problem. For one thing, they indicate that the assumptions of the positions do not hold. What is more, non-majoritarian approaches to EU democracy, while allowing political actors to use the language of democracy, do not provide them with concrete proposals as to how existing structures might be democratised. The result is a discrepancy between the language of democracy, promising popular control and political equality, and the proposals for institutional and constitutional reforms, which tend to either discourage mass engagement or obscure how and in what capacity citizens are to participate.

There is a tendency, I conclude, to confuse democracy with legitimacy, and legitimacy with consensus. As a result, the attempts at rearticulating EU democracy succeed neither in establishing a new basis for EU democracy, nor in identifying different or new forms of legitimacy. From this, three consequences derive: First, the democratic deficit should be regarded as structurally determined. Second, the persistence of the democratic deficit requires a thorough debate on the scope of EU competences. Finally, more attention should be devoted to the role of national and regional actors in European integration.

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# 1. THE LEGITIMACY OF THE EUROPEAN UNION

By most accounts the European Union (EU) is a success story. Often depicted as a process informed by the ideals of peace, prosperity and supranationalism (Weiler 1999a; Tallberg 2001; European Parliament 2001a; Warleigh 2003; Bartolini 2006),<sup>1</sup> the EU is the result of voluntary economic and political integration among European nation states (Hix 2005). Since the beginning, integration has been both widened and deepened. In five waves, the EU has been enlarged; from 6 member states in 1952 to 27 in 2007.<sup>2</sup> From the initial coal and steel community, it has evolved into an economic and political union with a common market, a common currency and common political institutions. In short, the EU represents a unique degree of political integration beyond the nation state (Börzel 2005).

With success come new challenges. This study deals with one such challenge, namely legitimacy. It is generally, if not universally, accepted that European integration has moved beyond the point where it can rely on international (indirect) legitimacy alone. The EU is more than an international organisation, and cannot therefore be legitimised as such. For one thing, the introduction of qualified majority voting in the Council means that national governments risk being outvoted, but nevertheless have to abide by decisions. Moreover, the supremacy and direct effect of Community legislation significantly impinge on national sovereignty. Finally, the European Parliament has been transformed from a consultative body into a directly elected assembly with growing legislative competences. As summed up by Bartolini (2005:167): “decisions are no longer unanimous and exit options are tending to be progressively reduced”. Hence, issues of legitimacy are brought to the fore.

How, then, can the EU be legitimated? In the absence of international legitimacy, democratisation appears to be the obvious answer. The EU, it is argued, is increasingly involved in the allocation of social and political values throughout Europe” (Hix 1998:42).

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<sup>1</sup> “When, after the horrors of the Second World War, Europe was at its nadir, a handful of visionaries regenerated it, proceeding from the bare bones of shared ideals such as peace as the supreme value, a democratic system of freedoms as the tool of coexistence, economic and social progress as the material bedrock of the system, and a union as the long-term goal and the cement to bind the other parts together” (European Parliament 2001a).

<sup>2</sup> In 1973, Denmark, Ireland and the UK joined the six founding members, Belgium, France, Germany, Italy Luxembourg and the Netherlands. In 1981, Greece became a member, and was followed by Portugal and Spain in 1986. Finland, Sweden and Austria joined in 1995. With the Eastern enlargement, in 2004, the number of member states increased from 15 to 25. The new member states included: Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, the Czech Republic and Hungary. Finally, Bulgaria and Rumania became members in 2007.

Yet, its democratic credentials remain weak. There is a lack of democratic accountability, little scope for input-oriented legitimacy and decision-makers are rarely mandated by voters (Mair 2005b). Put simply, EU decision-making does not abide by the principles of popular control and political equality. Ostensibly, the answer lies in a strengthening of political electoral responsibility, along the lines of either a democratically accountable presidential system or parliamentary democracy.

There is a caveat, however. The EU has no *demos*. As explained by Scharpf (1999:9), there is “no question that the Union is very far from having achieved the ‘thick’ collective identity that we have come to take for granted in national democracies – and in its absence, institutional reforms will not greatly increase the input-oriented legitimacy of decisions taken by majority rule”. From this, different implications are drawn. Some maintain that the EU, in its present form, cannot be democratised. “There is no chance of a possible EU democracy, because there is no European people, no *demos*. No *demos*, no democracy – quite simple” (Neunreiter 2000:148). Others insist on the possibility of a European political identity emerging. The *demos*, they argue, is constructed through democratic practice rather than vice versa (Habermas 1992; Beetham and Lord 1998; Hix 1998). Finally, some suggest that, in the absence of a European *demos*, EU democracy must be established on a different basis. The EU, in this view, is an entity *sui generis*, and, as such, it requires a *sui generis* normative theory (Eriksen and Neyer 2003). There is, Majone (1998:6) contends, “an urgent need to reset the standards by which we assess the legitimacy of European integration and of the institutions which guide the process”.

At issue, in other words, is the nature of the legitimacy deficit and thereby also the nature of European integration. Two sets of questions are salient: What characterises the EU as a polity, and what kind of regime is best suited to it? What are the relevant and normatively valid standards of legitimacy, and how can they be translated into viable institutional structures? Integration research has tackled these questions from two angles: One approach is to start from well-known organisational forms, most notably the nation state, and ask what principles of legitimacy these rest on. The other is to start from general principles, and ask what the EU should look like in order to comply with these principles. Thus, the first approach relies on *inductive* theoretical notions, while the latter insists that notions of EU legitimacy must be compatible with a *deductive* theoretical construction (cf. Closa 2001:110-111).

So far, neither approach has yielded desired results. In spite of the effort put into the debate, the EU remains ill-defined both as a polity and a regime. There is considerable



disagreement not only on where to go and how to get there, but also on where we are in the first place. The outcome of more than a decade of debating issues of legitimacy is a number of conflicting, and more or less controversial, visions of Europe. Academic debate on the legitimacy deficit, Føllesdal and Hix (2006:533) note, is characterised by “ever more convoluted opinions as to the symptoms, diagnoses, cures and even side-effects of any medication”. Hence, there are multiple definitions of the legitimacy deficit and its remedies, and seemingly little prospect of resolving the issue. In brief, the debate has reached an impasse.

How might the deadlock be broken? The basic claim of this study is that normative theoretical debate would benefit from empirical input. For one thing, empirical study might help establish the extent to which EU institutions, actors and policies enjoy *de facto* validity. Do people think there are good reasons why they ought to obey EU law, and what do they think these reasons are? The underlying assumption being that a norm can be valid in a normative sense, and yet be invalid in practice. Legitimacy, in this view, demands that the members of society accept the legitimacy claim in question, that it can be justified in terms of their beliefs (cf. Beetham 1991). It matters, in short, how the parties themselves frame legitimacy: what understanding of legitimacy they subscribe to, how they evaluate existing authority relations, and what changes they envisage and desire. Legitimacy ought, according to this logic, to be studied in context, thus allowing for an analysis of both its normative and empirical aspects.

Empirical legitimacy, however, is not the object of this study. Rather, the ambition is to critically examine legitimacy claims put forward in the theoretical discourse on EU legitimacy. Are the claims compelling or convincing? Obviously, these are questions of a normative nature, and cannot be answered through empirical analysis alone. However, whereas normative validity cannot be established empirically, empirical study might nevertheless illuminate normative discourse. Most notably, it might reveal weaknesses or limitations in theoretical models. Theoretical contributions claim not only to have identified normatively compelling models of European integration, but also to adequately capture the nature, functions and goals of European integration (see for example Majone 1998). Studying issues of legitimacy at an empirical level could, therefore, contribute to theory development by allowing us to examine the plausibility of empirical assumptions. Moreover, charting political actors’ reasoning about issues of legitimacy should reveal not only their positioning on legitimacy issues, but also how and to what extent normative theory affects political or practical reasoning. Is there a connection between the quality of theoretical arguments and the

quality of political arguments? If so, could an analysis of legitimacy claims in political discourse help us identify and understand deficiencies in theoretical discourse?

This study deals with these questions. A three-step approach is pursued: The first step consists of an exploration of major theoretical discourse on EU legitimacy. Has it succeeded in substantiating democratic and/or legitimate models of European integration? The claims of the main theoretical approaches are analysed. The legitimacy claims of the approaches are identified, as well as the empirical assumptions on which they rest. The second step is an exploration of legitimacy claims put forward by the members of the European Parliament in two cases – the BSE crisis and the Constitution for Europe (hereafter: the Constitutional Treaty). Although an interesting exercise in itself, mapping the representatives' beliefs in legitimacy is not the main objective. Rather, the ambition, as highlighted above, is to examine normative theory in light of political discourse. The third step, therefore, is to ask what the debates of the European Parliament can tell us about theoretical discourse. More specifically, the ambition is to discuss what the application of general normative principles in a particular political context reveals about the normative claims and empirical assumptions of the theories.

This chapter introduces the discourse on EU legitimacy and democracy. It presents the major theoretical formulations of EU legitimacy: the standard version of the democratic deficit, as well as the main alternatives to it - non-majoritarian democracy, substitute democratic legitimation and deliberative democracy. It proceeds with a presentation of political arenas where debates on legitimacy are taking place. Finally, the structure of the thesis is outlined. I start, however, with the observation which is the starting point of this study, namely the need to distinguish democracy from legitimacy and legitimacy from consensus.

## ***1.1 Democracy, legitimacy and consensus***

EU research, Trezn and Eder (2004:6) observe, has “become a new experimental field for pushing all kinds of claims and normative expectations about the desirable ends and means of European integration”. In consequence, the discourse is complex and difficult to grasp, perhaps leaving the observer with the impression that “anything goes”. To a large degree, this is due to the complexity of the subject matter and the “essential contestability” of the concepts. To some extent, however, the confusion may stem from a lack of stringency in the

use of the concepts. Two pitfalls merit particular attention: First, the tendency to conflate legitimacy with democracy, and, second, the tendency to conflate legitimacy with consensus. In this section, I discuss how these concepts relate to one another.

Democracy and legitimacy are interrelated but not coterminous. Legitimacy refers to the principles that justify a certain kind of rule or a certain system of ruling, democracy refers to a particular mode of legitimate rule. Put alternatively, whereas legitimacy concerns the reasons why people ought to obey the law, democracy presents us with a particular justification for obedience, namely popular control and political equality.<sup>3</sup> Thus, a system of collective decision-making enjoys democratic legitimacy to the extent that it “is subject to control by all members of the relevant association, or all those under its authority, considered as equals” (Beetham 1999:4-5). From this, two implications follow: First, democracy – as a concept – is less contestable than commonly assumed. Second, democracy is not the only principle of legitimacy available to modern states.

Democracy is commonly referred to as an “essentially contested concept”, a concept about whose definition there can in principle be no grounds for agreement (cf. Gallie 1956). However, Beetham (1999) convincingly argues that whereas theories of democracy are subject to much controversy, the concept itself is less so. The principles of popular control and political equality, he explains, underlie most accepted definitions of democracy, and can therefore be said to constitute its meaning. Consequently, “we should distinguish between the *concept* of democracy, which in my view is incontestable, and whose point of reference lies at one end of the spectrum of possibilities, and different *theories* of democracy, which involve contestable claims about how much democracy is desirable and practicable, and how it might be realised in a sustainable form” (Beetham 1999:33). At issue, in other words, is not the concept itself, but the extent to which the principles of popular control and political equality ought to give way to other legitimate concerns.

By implication, even in democratic states, legitimacy cannot be reduced to democracy. In contemporary debates, four principles are invoked to legitimise the political arrangements in question: the right, the good, the fair, and stability. The first two direct attention to the output-side of collective decision-making, stipulating that a law or order is legitimate to the

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<sup>3</sup> The principle of popular control demands that the people should have a say in the making of public policy, that collective decision-making should be subject to control by those in whose name decisions are made. In democratic theory, the principle of popular control goes hand in hand with the principle of political equality. Political equality assumes that “all members of the association are adequately qualified to participate on an equal footing with the others in the process of governing the association” (Dahl 1989:31). Therefore, participation rights, such as the right to vote and the right to hold office, should be equally distributed among the members of the political order.

extent that it reflects the public interest. However, whereas the right depicts legitimacy as a question of truth, the good rejects the notion of incorrigible or undeniable truths, insisting instead that systems of collective decision-making are legitimate to the extent that they allow for better as opposed to worse outcomes (cf. Flathman 1995). The fair, in contrast, directs attention to the input-side, asking whether decisions have come about through fair procedure. Legitimacy, accordingly, is understood as a quality of the system of decision-making itself. Finally, stability emphasises the need to identify workable solutions. Particularly in multinational states, whose citizens have conflicting values, goals and identities, it is argued that justice must on occasion be compromised for the sake of political stability (cf. Norman 2001).<sup>4</sup>

In theory, the relationship between these principles is relatively clear cut. Technocracy, for instance, tells us that the right takes precedence over other considerations, and what Schumpeter (1976 [1943]) identifies as the “classical doctrine of democracy” insists that the main objective of collective decision-making is to identify and promote the common good. In reality, however, issues of legitimacy and democracy are more muddled. For one thing, there are different interpretations of the principles of popular control and political equality. To some, “the will of the people” is coterminous with the common good. To others, it results from fair procedure. Furthermore, both in theory and practice trade-offs are made between democracy, on the one hand, and other principles of legitimacy, on the other. Consociational democracies, for instance, attempt to strike a balance between fair procedure and stability. To varying degrees, moreover, all democratic states display non-democratic features, such as corporatist practices, delegation to independent experts and policy networks. In short, not only are there alternative interpretations and institutionalisations of democracy, there are also a “variety of arrangements that are (...) thought to legitimize the exercise of public power and the use of public resources at the national level” (Scharpf 1999:13).

Increasingly, such arrangements – commonly referred to as new modes of governance – are depicted as alternatives to electoral accountability (see for example Majone 1998; Scott 2000; Moravcsik 2004; Smismans 2004b; see also discussion in Mair 2005a). Though justifications vary, the arrangements are commonly defended in terms of the public interest. They contribute, the argument goes, to output legitimacy, and are, under certain conditions, thought to promote the public interest more effectively than electoral accountability (Majone 1996c; Scharpf 1999; Scott 2000). Globalisation and ideological changes, such as the “New

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<sup>4</sup> As Keating (2001b) reminds us, however, too much emphasis on stability carries with it the risk that ethical principles disappear altogether in the search for solutions that can work.

Public Management” agenda, have limited the state’s capacity to exercise vertical control over policy-making (Pierre and Peters 2000; Papadopoulos 2003), have raised the question of “whether it is realistic and methodologically correct to assess the legitimacy of present institutions and policy-making processes with reference to norms that are largely irrelevant today and may not become relevant in the future” (Majone 1998:27). In other words, there is a growing concern that traditional forms of democratic legitimacy are losing importance, coupled with renewed interest in alternatives to electorally-based democracy.

Proponents of governance are sometimes accused of confusing legitimacy with democracy. However, Bartolini convincingly argues, there is also the risk that they confuse legitimacy with consensus. Legitimacy, he reminds us, concerns “the principles and procedures through which it can be rationally argued that collectivized decisions must be accepted by those who have not participated in them, or, while participating have not had their preferences satisfied” (Bartolini 2005:166). By implication, he adds, legitimacy problems emerge in conditions of no unanimity and no exit. Accordingly, to the extent that they presuppose the existence of a public interest or rely on the active participation of all concerned parties, output-oriented approaches are vulnerable to two sorts of criticisms: First, by only dealing with issues that require generalised consensus or agreement, they effectively avoid those issues for which legitimacy is normally required. Second, to the extent that decisions come about through the participation or consultation of all involved parties, output-oriented approaches rely on input rather than output. In the first case, legitimacy is resolved *ex ante*, in the latter, it is not obvious how legitimacy can be extended beyond the scope of those participating in the decision (Bartolini 2005).

In sum, democracy, legitimacy and consensus are interrelated but distinct concepts. Legitimacy concerns the conditions under which rulers have a right to rule, democracy is a particular form of legitimate rule, and consensus is required where there is an absence of legitimacy. For the debate on EU legitimacy, two consequences derive: First, a distinction should be made between, on the one hand, contributions seeking to establish whether the EU can and ought to be democratised, and what an eventual EU democracy might look like, and, on the other, contributions seeking to establish alternatives to democratic legitimacy in the EU. Second, a distinction should be made between contributions which address issues of legitimacy and contributions which avoid such issues, instead relying on some notion of generalised consensus. Chapter 2 discusses whether major theoretical discourse about EU legitimacy upholds these distinctions. The next section introduces the theoretical frameworks in question.

## *1.2 Theorising the legitimacy deficit*

At the outset, there was but one democratic deficit. The issue was not how democracy, and thereby the democratic deficit, should be defined, but whether or not the EU ought to be democratised. For some time, however, the standard version of the democratic deficit (cf. Weiler, Haltern and Mayer 1995) and its corollary, parliamentary democracy, no longer enjoys the privilege of being taken for granted. Some dispute the existence of a democratic deficit (see for example Moravcsik 2002);<sup>5</sup> others insist that a notion of democratic legitimacy more suited to the EU must be formulated (see for example Weale 1997). Three attempts at reframing have gained particular salience: the regulatory state, multi-level governance and integration through deliberation. All claim to establish procedures that are both democratic and appropriate to the EU. One of the main purposes of this thesis is to critically examine this claim. Before entering into this discussion, however, it must be established that the theories are, in fact, distinct theoretical models, as well as how the models relate to one another, and what their normative implications are.

The regulatory model describes the EU as a regulatory polity, whose legitimacy stems from its ability to produce Pareto-efficient outcomes. Although several authors discuss the role of regulatory legitimacy in the EU, the position has come to be associated with the works of Majone who, in numerous contributions, has developed the notion of the regulatory state (see for example Majone 1994; 1996a; 1998; 2000; 2002). Put succinctly, the regulatory state denotes the delegation of competences from the member states – *qua* principals – to supranational institutions acting as their agents. The effect is to insulate certain policies from domestic electoral contest. Thus, Majone contends, the EU cannot and ought not to be compared to parliamentary systems. To the extent that the EU can be compared to anything, it is the regulatory agencies found at the domestic level in Europe, such as telecom agencies, central banks and competition authorities. It is, in short, an “independent fourth branch of government” (Majone 1993).

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<sup>5</sup> Moravcsik asks that less attention be devoted to ideal models of democracy, and more to the real-world practices of existing democratic governments. When compared to the practice of democracy, he insists (1998b; 2002; 2003; 2004), democratic deficit claims are wholly unfounded. “Though centralized electoral control and collective deliberation remain relatively weak and diffuse”, he argues (2004:338), “constitutional and material restrictions on the EU’s mandate, inter-institutional checks and balances, indirect democratic control via national governments, and the modest but increasing powers of the European Parliament are more than sufficient to assure that in most of what it does, EU policy-making is generally clean, transparent, effective and politically responsive to the demands of Europeans”.

Regulatory legitimacy stems from competence. It “is based on the recognition of strong asymmetries of knowledge and on the acceptance of the requirements that stratify access to the credentials for them” (Bartolini 2005:171). In contrast to parliamentary legitimacy, regulatory legitimacy is premised on the recognition of inequality. This inequality, moreover, is relevant for authority. Moravcsik sums up the case for regulatory legitimacy as follows: Given “the complexity of many policy issues, the rational ignorance and apathy of many publics, the desire to protect minority rights, and the power of certain special interests in situations of open political contestation” (Moravcsik 2002:622), delegation to independent experts “redresses rather than creates biases in political representation, deliberation and output” (Moravcsik 2002:603). Put alternatively, lack of democratic accountability is justified to the extent that expert decision-making is more effective than parliamentary decision-making.

By implication, regulatory legitimacy only applies where efficiency is not a contested value. It is, Bartolini (2005:171) points out, limited to matters where “individual values and interest are easily generalizable (as is the interest to survive, be healthy, be safe, etc.) and which, as such, are ‘pre-defined’”. Regulatory legitimacy, accordingly, hinges on the possibility of separating efficiency and redistributive concerns. Majone (1996c:296) explains: “the delegation of important policy-making powers to independent institutions is justified only in the sphere of efficiency issues, where reliance on expertise and on a problem-solving style of decision-making is more important than reliance on direct political accountability. Where redistributive concerns prevail, legitimacy can be ensured only by majoritarian means”. A restricted agenda, then, is an absolute condition for legitimacy. The EU is, and ought to remain, a regulatory state.

The regulatory state belongs to a strand of research referred to as “EU governance”. Multi-level governance is another example of the governance research agenda.<sup>6</sup> The two share certain key features, most notably an emphasis on regulatory policies, detached political contestation, and the key role accorded to supranational actors in the Community Method (Kohler-Koch and Rittberger 2006). Both, moreover, have their origins at the national level. Nevertheless, there are important differences between the two. For one thing, multi-level governance restricts neither the EU agenda nor the participants in decision-making. On the contrary, it envisages a patchwork of goals, actors, practices and institutions. Furthermore,

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<sup>6</sup> The term was coined by Marks (1993; see also Marks, Hooghe and Blank 1996). Here, however, the term does not refer to the works of particular authors, but is a synthesis of various contributions to the governance turn in EU studies.

whereas the regulatory state emphasises the output side of legitimacy, multi-level governance also stresses the input side of collective decision-making (Kohler-Koch and Rittberger 2006). More specifically, multi-level governance rests on a special kind of input, namely the participation of concerned and affected interests (Bartolini 2005). In sum, the quality of multi-level governance is seen to depend on the extent to which it produces output consistent with the preferences of its citizens, its ability to channel and regulate conflict by including a variety of interest groups in decision-making, as well as the extent to which it succeeds in co-opting stakeholders.

Many of the contributions to the governance literature are ambivalent as to the potential of governance to enhance EU legitimacy (Kohler-Koch and Rittberger 2006). Increasingly, however, the legitimising potential of governance is emphasised.<sup>7</sup> The case for governance can be summed up as follows: First, governance generates output legitimacy. The active involvement of the actors whose compliance is needed, contributes to the effectiveness of policy implementation. Second, output-oriented legitimacy extends beyond the participants in governance structures, to broader publics. To some, this extension is achieved through the deliberative nature of the EU system of governance (Cohen and Sabel 1997; Joerges and Neyer 1997; Neyer 2004). To others, transparency and horizontal accountability contribute to the wider legitimacy of governance (Héritier 1999; Scott 2000). Finally, governance is thought to contribute to input legitimacy. According to one position, EU governance is democratic (Joerges and Neyer 1997); according to another, it has democratic potential (Dehousse 2003; Smismans 2004b); and according to a third position, EU governance is a substitute for democratic legitimacy (Héritier 1999).

As the above discussion indicates, multi-level governance is not a unified position. Rather, it comprises various mechanisms, and, hence various legitimising principles. As a result, governance remains ambiguous and underspecified as a concept, let alone as a theory (Kohler-Koch and Rittberger 2006). The question, therefore, is how the governance approach can be synthesised. Héritier's (1999) elements of democratic legitimation appears to be a

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<sup>7</sup> Bartolini (2005) describes the history of the concept in three steps: Originally, governance structures and procedures were envisaged as functioning only in limited and sectoral areas, remote from the broader concerns of public opinion. Over time, however, the involvement of concerned and affected actors is presented as a source of legitimacy, so that their participation in policy-making has come to be considered a new principle of legitimacy. From here, Bartolini (2005:168) concludes, "the argument has developed to suggest that these structures and procedures are, indeed, a form of 'political legitimacy' of its own, and that the decisions stemming from them are the most legitimate that can be achieved in the sectoral domain. Finally, a further shift of the reasoning concludes that traditional forms of political democracy heavily—although never exclusively—anchored to the partisan-electoral-legislative process can be effectively substituted by these new structures and procedures in various decisional fields."



good starting point. Starting from the empirical characteristics of the EU as a political system, Héri-tier describes a patchwork of institutional mechanisms and corresponding modes of legitimation. Three features of EU decision-making are highlighted: the transparency programme, supportive networks and horizontal accountability. “The described strategies and processes”, she contends, “reinforce democratic support and accountability but do not allow the democratic definition of overall goals for the European polity as such” (Héri-tier 1999 [abstract]). Rather than relying on one specific theory of European governance, this notion of “substitute democratic legitimation” organises the discussion on multi-level governance.

Finally, integration through deliberation is analysed. The approach attempts to formulate a version of deliberative democracy for the EU, and is associated with the works of Habermas, Eriksen and Fossum. Three “pillars” are central to the notion of integration through deliberation: First, a representative system of democracy, with an emphasis on the deliberative qualities of parliaments (Eriksen and Fossum 2002). Second, a European-wide public sphere, “a common space for free communication that is secured by legal rights to freedom of expression and assembly, where problems are discovered, but also thematized and dramatized and formed into opinions and wills that formal decision-making agencies are to act upon” (Eriksen and Fossum 2002:403). Finally, constitutional patriotism. Public support for EU institutions, actors and policies, the argument goes, is generated by, and resides in, a constitutional patriotism (Habermas 1998; 2001b) emanating “from a set of legally entrenched rights and democratic procedures, (...) which also reflects political affect and identification” (Eriksen and Fossum 2004:446). Hence, the argument goes, the adoption of a formal European constitution is crucial for integration. It will not only make manifest the shift in powers which has already taken place; it will also allow the EU to constitute itself as a political community (Habermas 2004 [2001]).

Thus defined, there is some degree of overlap between the deliberative model and the other models. Like the standard version of the democratic deficit, integration through deliberation argues from the vantage point of parliamentary democracy. It can therefore reasonably be argued that deliberative democracy is not an alternative to representative democracy but a complement to it. Nevertheless, where the standard version of the democratic deficit talks about “the mobilisation of bias” (cf. Schattschneider 1960), the deliberative model talks about the integrative force of arguments. This shift in emphasis has important implications for the debate on EU legitimacy. Most notably, it entails a change in the understanding of politics. The aim of the political process is no longer to regulate conflict but to dissolve it. As a result, a new understanding of representation emerges. Whereas the

concern in the standard version is the representation of all members of the political association, the concern of the deliberative model is the representation of all arguments. These differences, I argue, are important enough for the two to be treated as distinct models of European integration.<sup>8</sup>

Although the list is by no means exhaustive, the regulatory state, multi-level governance and integration through deliberation may be thought of as the main alternatives to the standard version of the democratic deficit. In spite of their differences, the three theories share the double ambition of reformulating democracy and adapting it to the cultural and political pluralism of the EU. Yet, as we will see in chapter 2, there are good reasons for questioning both their democratic credentials and their suitability to the EU polity. For the present, however, we will not dwell on the force of their normative claims, but focus on the empirical assumptions implicit in the normative models. First, the legitimacy claims of the regulatory state hinge upon the possibility to distinguish regulation from redistribution. Second, multi-level governance trusts that EU policy-makers are mutually distrustful, and that this distrust compels them to pursue the public good rather than particularistic interests. Finally, integration through deliberation is premised on the distinction between constitutional and normal politics, with the former standing above and outside the latter. The question, then, is whether these assumptions stand up to empirical scrutiny. In order to provide a basis for the discussion of this question, I study the framing of legitimacy in post-Maastricht constitutional and policy-making debates.

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<sup>8</sup> In some versions, however, deliberative democracy is presented as an alternative to representative democracy (see for example Dryzek 1990). As evidenced by contributions such as “directly-deliberative polyarchy” (Cohen and Sabel 1997) and “deliberative supranationalism” (Joerges and Neyer 1997), the notion of deliberative democracy as something distinct from representative democracy has also found its way into integration theory. According to Cohen and Sabel (1997), the EU’s “poly-centric” system of governance is conducive to deliberative decision-making, which, in turn, enhances its problem-solving capacity. According to Joerges and Neyer (1997: [abstract]) comitology can be thought of as an instance of deliberative supranationalism, “a deliberative style of European regulatory policy-making which aims at building up co-ordination capacities, establishing a culture of inter-administrative partnership, and creating conditions in which the organizations responsible for managing particular policies are able to meet emerging challenges”. Both contributions are, in my view, attempts at defining EU governance in democratic terms. As such, they can reasonably be treated as contributions to the governance research agenda.

### *1.3 Debating legitimacy*

The Maastricht Treaty put issues of legitimacy on the European political agenda. It marked the end of the “permissive consensus” which had long allowed the European political elite to pursue its goals with the tacit support of European citizens. Whereas constitution-making prior to Maastricht has been likened to a “doing without hearkening” (Weiler 1999a), or constitutionalisation without constitutional debate, the Maastricht Treaty and its aftermath sparked intensive debates on the goals and foundations of European integration. It demonstrated that “public opinion in all Member States is no longer willing to accept the orthodoxies of European integration, in particular the seemingly overriding political imperative which demanded acceptance, come what may of the dynamics of Union evolution” (Weiler 1999a:4). Thus, Maastricht transformed the democratic deficit, which had until then been of mere academic interest, into an issue of general concern.

A protracted debate on how to restore public confidence followed in its wake. Since the early 1990s, treaty reform has been a more or less permanent feature on the EU agenda, from Maastricht, via Amsterdam and Nice, to the Constitutional Treaty. The series of treaty reforms have, among other things, endeavoured to respond to citizens’ legitimacy concerns. In particular, European decision-makers have sought to confer greater democratic legitimacy on EU institutions and to improve the efficiency of the institutional framework. Over time, the constitutional element in these debates has become more explicit, and the convention method was introduced with the aim of providing an institutional framework within which these debates could occur (cf. Walker 2003). The failed ratification of the Constitutional Treaty, however, means that questions pertaining to the form and content of European constitution-making remain unresolved.<sup>9</sup>

The post-Nice constitutional debates, starting with the Declaration on the future of the Union annexed to the Treaty of Nice and culminating in the presentation of the draft Constitutional Treaty in 2003, constitute one of my two cases. In addition to the long-awaited institutional reforms, two concerns were central to the debates (European Council 2001): the need to bring the EU closer to its citizens and the introduction of a new method of treaty

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<sup>9</sup> What is clear is that the Constitutional Treaty did not provide the EU with the *finalité politique* that its proponents had hoped for. The Constitutional Treaty, signed in Rome on 29 October 2004, was rejected twice, first by the French electorate and a few days later by the Dutch electorate. After a “period of reflection”, attempts have been made at salvaging parts of the text in the form of an EU Reform Treaty. The 27 member states agreed in June 2007 to a mandate for an intergovernmental conference to finalise the details of the Reform Treaty. Agreement on a text, the so-called Lisbon Treaty, was made in Lisbon on 19 October 2007, and, if it is ratified by all member states, the Lisbon Treaty will enter into force in December 2009.

reform. There was a realisation that, on the one hand, the widening and deepening of European integration “required more public legitimacy and support than the effective performance of bureaucrats and technocrats in the duller reaches of economic policy could provide” (Dobson and Føllesdal 2004a:2), and, on the other, that time was ripe for a more democratic approach to treaty reform. Thus, the Convention on the Future of Europe, consisting of representatives of national and European institutions, convened to prepare the ground for the next intergovernmental conference. It soon became clear the Convention interpreted its mandate in constitutional terms, and, after well over a year of deliberations, it presented its draft Constitutional Treaty to the Tessaaloniki European Council on 20 June 2003. The case study focuses on the contributions of the European Parliament to this process, from its discussions of the Treaty of Nice in May 2001 to its evaluation of the draft Constitutional Treaty in September 2003.

The constitutional process has elicited considerable debate in academic circles. Initially, the debate was dominated by the question of whether or not the EU needed a constitution (Weiler 2003; Habermas 2004 [2001]), whether it already had a constitution and what European constitutionalism consisted in (see contributions in Eriksen, Fossum and Menéndez 2001; Eriksen, Fossum and Menéndez 2002b). Later, attention shifted to the character of deliberations in the Convention (Bellamy and Schönlau 2004a; Closa 2004; Magnette 2004), the status of the (draft) Constitutional Treaty (Grimm 2004) and how it should be interpreted in light of normative theory (see contributions in Dobson and Føllesdal 2004b). Finally, the question was how to interpret the failed ratification of the Constitutional Treaty (Bellamy 2006a; Dehousse 2006). Despite differences in focus and theoretical apparatus, one feature is shared: All contributions cite the constitutional experience in support of (or opposition to) particular understandings of European integration. The result is that, more often than not, empirical data are used to illustrate and defend general and abstract theories of European integration, rather than to critically test and refine them. In other words, the constitutional debates have become a new arena for debating the “nature of the beast” and its legitimacy.

The debate on legitimacy, however, is not restricted to its constitutional aspects. As testimony to its importance, the question of legitimacy has been raised outside the formalised context of treaty reform.<sup>10</sup> Issues of legitimacy emerge in debates on EU policy, something

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<sup>10</sup> Two Commission initiatives are oft quoted examples: the governance initiative and the Plan D for Democracy, Dialogue and Debate. The first discussing how to adapt EU institutions and establish more coherence in EU

which the choice of cases should reflect. With this in mind, I have chosen as my second case one whose constitutional relevance is at best indirect, namely the BSE crisis. Described as a “seminal event in the history of European integration” (Chambers 1999:96), it is credited with the “creation of a potentially novel administrative landscape” (Vincent 2004:499), and compared to the French “empty chair” policy (Chambers 1999). The crisis affected consumer behaviour, spurred a comprehensive reform of EU food law and regulation, impacted on the Common Agricultural Policy, altered the institutional balance within the EU, affected the relationship between the EU and its member states and between the member states themselves. More importantly for my purposes, it was also the starting point of a principled discussion on the nature, function and goals of European integration. It started as a debate on how to regulate the market in foodstuffs and ended up as a debate on the legitimacy and democratic qualities of EU decision-making (Zeiner 2002).

Its impact has not gone unnoticed. In particular, the effect of the crisis on EU food law and regulation (see for example Hellebø 1999; Veggeland 1999; Vos 2000) and the altered institutional balance (Chambers 1999) have received attention. In addition, the crisis is frequently used by EU scholars to illustrate more general theoretical points. The BSE crisis has been cited as evidence of a “credibility crisis of EU regulation” (Majone 2000), the risk of capture in comitology (Dehousse 1999), lack of transparency in comitology (Joerges and Neyer 1997), and the “political administration” of the EU (Neyer 2000), to name but a few contributions. Implicitly or explicitly, these contributions place the BSE crisis in the wider context of the ongoing debate on EU legitimacy. However, empirical investigations into the crisis rarely go beyond anecdotal evidence. Only exceptionally are these insights translated into testable hypotheses (for notable exceptions, see Skogstad 2001; Krapohl 2003; Krapohl and Zurek 2006).

In both cases, the academic debates have centred round theory development rather than theory testing. According to Hooghe (2001:2-3), this is a general problem of EU research. Few theorists, she points out, “have succeeded in translating their conceptual models into testable hypotheses”, and, what is more, “few empirical EU scholars have devoted attention to systematic testing of competing theories against evidence”. In a similar vein, Andersen laments EU scholars’ tendency to be forever packing the bags for journeys not taken. One challenge, he suggests, “is to strengthen the links to the rich empirical data that increasingly are available, and in a way that makes it possible to refine theory and not only

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policies under the existing treaties, the second seeking to establish a clear view of EU citizens’ needs and expectations (European Commission 2001; European Commission 2005a).

illustrate general and abstract insights” (Andersen 2003:21). When pursued empirically, he continues, the empirical implications of general theoretical arguments “should be as specific and unique as possible, which would also make them risky”. The challenge, in other words, is to combine theory development and empirical investigation.

### ***1.4 Legitimacy in context***

This study examines issues of EU legitimacy at a normative and an empirical level. The ambition is neither to establish what kind of legitimacy the EU has or can have, nor to evaluate the EU on the basis of a particular model of legitimacy. Rather, the legitimacy claims themselves are the object of analysis. What happens when general norms are placed in specific historical, political and cultural contexts? The exercise is interesting for several reasons. First, studying legitimacy in context may reveal weaknesses or erroneous inferences in theoretical frameworks. The theories claim to have identified principles that are, in Pitkin’s (1972:281) phrasing, “lawful, exemplary, binding”. Inherent in the theories are assumptions about human behaviour and the nature of European integration. One question, therefore, is whether these assumptions hold. Second, placing general norms in specific context may give some indications as to the saliency of normative conflicts. Sometimes, as Bellamy and Schönlaue (2004b:416) point out, “conflicts appear intractable at the level of abstract principle but can be resolved through the *negotiation* of the details”. Consequently, studying general norms in specific contexts may reveal tensions between theory and practice; that sometimes theoretical and practical problems do not coincide (Keating 2001b). Finally, it allows us to examine the relationship between normative arguments and political reasoning. In political debates, normative claims are made in order to defend particular institutions or policies. The question is whether claims which in theory are “lawful, exemplary, binding” are conducive to exemplary political practices.

In chapter 2, the theoretical discourse on legitimacy is examined. In the last decade, observers have noted a “normative turn” in EU studies (Bellamy and Castiglione 2000a). Increasingly, researches pay attention to issues of democracy, asking why democracy is valuable, what the EU will gain from democratisation, and what form it must take to achieve the desired results (Bellamy and Castiglione 2000b). I take a closer look at the above mentioned contributions to the debate: the regulatory state, multi-level governance and

integration through deliberation. Their re-conceptualisations of democracy are, I argue, unconvincing. In various ways, and to varying degree, they all resemble what Mair (2005a) has labelled “democracy without a demos”. Despite their different vantage points, all insist that democracy must be based on consensus and neglect the need for popular input. Thus, to a greater or lesser extent, their claims rest on the existence of a putative consensus on the ends and means of European integration. Rather than accepting them as reconceptualisations of democracy, therefore, the underlying legitimacy principles should be identified and their uses discussed.

Chapter 3 outlines a programme for analysing legitimacy in context. One way of bridging normative theory and empirical work, it is suggested, is to examine the legitimacy claims put forward by participants in political debates, followed by a discussion of what the political use of legitimacy might tell us about normative theory. To this effect, this study analyses the European Parliament’s framing of issues of legitimacy in two cases: the BSE crisis and the post-Nice constitutional debates. The chapter brings up three questions for discussion: First, why study the European Parliament? Second, why are the selected cases interesting? Finally, how can the legitimacy claims be identified and analysed?

Chapter 4 explores the European Parliament’s inquiry into BSE. The deliberations of the European Parliament and its Committee of Inquiry are presented and discussed in light of three theoretical positions: First, Majone’s regulatory state. According to Majone (2000), the BSE crisis was, above all, a credibility crisis. Second, the multi-level governance approach explains the crisis as a result of capture. Finally, the standard version of the democratic deficit establishes a connection between the BSE crisis and the lack of popular input into EU decision-making. Although sympathetic to some of the arguments of the first two positions, the members of the European Parliament reject the assumptions on which they are built. In order for EU decision-making to be legitimate, they argue, it must be responsive to the opinions, interests and values of EU citizens. Neither the technocratic structures of the regulatory state, nor the pluralist practices of governance are capable of producing output that is consistent with the interests of the EU citizenry at large. The BSE crisis, the European Parliament explains, resulted from an inability to respond to changes in the problem-structure, more specifically, the demand that not only the interests of economic actors but also the interests of citizens and consumers should be taken into account in the regulation of the internal market. The European Parliament, it ascertains, is the only EU institution capable of representing all citizens, and, consequently, it must be allowed to play a more important role in EU decision-making.

The question, then, is what claims to representation are made by the European Parliament. In chapter 5, the European Parliament's framing of democracy is examined against the backdrop of the deliberative approach to constitution-making. The aim is two-fold: First, to identify the models of representation defended by the members of the European Parliament. And, second, to describe the constitutional debates in light of the deliberative model. Does the aim of establishing a fundamental consensus on the ends and means of European integration affect the content and substantive proposals of the debates? Three models of representation are discussed: The no demos thesis, constitutional tolerance and constitutional patriotism. Although the latter represents the majority view, all models find support in the deliberations of the European Parliament. In spite of the differences between them, one feature is shared: Implicitly or explicitly, the models rely on a vision of the EU as a problem-solving entity. EU decision-making, it is suggested, is about responsiveness, about discovering effective solutions to the concerns of EU citizens. Inherent in the models, then, is a vision of democracy without politics. The effect, however, is to politicise the constitution-making process. Thus, the assumption of the deliberative approach is reversed: political constitution-making, apolitical decision-making.

Finally, chapter 6 sums up the discussion. The European Parliament, I find, presents a convincing and determined rejection of output-oriented approaches to legitimacy, yet fails to establish an alternative to these approaches. That is, despite its members' insistence that EU decision-making cannot be legitimate in the absence of popular input, there is little discussion of the mechanisms of citizen input. There is, in other words, a discrepancy between the rhetoric of the European Parliament, promising popular control and political equality, and the actual content of its proposals, in which the role of the citizen remains unspecified. Herein, I argue, lies the main problem with the theoretical discourse on EU legitimacy. It allows the European political elite to justify their proposals in democratic terms, while avoiding the difficult questions of how the principles of popular control and political equality can be implemented in the EU. In the long run, however, the strategy of advocating democracy without a demos may prove self-defeating. It misrepresents the concept of democracy and abuses the concept of legitimacy, thus obscuring the true legitimacy of EU institutions and their decisions (cf. Bartolini 2005).



## 2. LEGITIMACY CLAIMS IN INTEGRATION THEORY

This chapter examines a selection of legitimacy claims put forward in integration theory. The academic debate on European integration has produced a number of conceptual models integrating theories of democracy, facts about European integration, and judgements about what the EU is and ought to become.<sup>11</sup> The dynamic of this debate seems to be the following: EU scholars have different visions of Europe, that is, different understandings of what the EU is, can and ought to become. The impact of a particular vision depends on whether it can be defended in terms of democracy. In order for a vision to be recognised as legitimate, it must be recognised as democratic. Thus, attempts at (re)defining democracy in non-majoritarian terms should be understood in the context of the debate on the ends and means of European integration. Their legitimacy claims, therefore, should not be analysed in isolation, but as an integral part of theoretical representations of the EU.

Two questions guide analysis: First, what are the democratic credentials of the positions claiming to have established non-majoritarian alternatives to electoral accountability? Compared to the standard version of the democratic deficit the non-majoritarian alternatives seem to have reversed the ambitions: Rather than adapting Europe to make it more democratic, the notion of democracy is adapted to make it more European (Mair 2005b). The question, then, is whether the models have the potential of enhancing the democratic legitimacy of the EU or whether they represent a move away from democracy. The second question concerns the models' suitability to the EU polity. A common critique of the standard version of the democratic deficit is that it is premised on a model of democracy which is ill-suited to a heterogeneous and complex polity such as the EU. The question is whether the alternatives fare any better. Do they succeed in promoting both unity and diversity?

The structure of the chapter is as follows. It starts with a review of the standard version of the democratic deficit, and the critique so often directed at it. The critique comes in two versions: the first accepts the frame of majoritarian democracy but questions whether it can be applied to the EU, the latter proposes that EU democracy requires non-democratic

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<sup>11</sup> To name but a few of the contributions: The EU has been likened to liberal intergovernmentalism (Moravcsik 1998a), a regulatory state (Majone 1996a), a consociational bureaucratic state (Schmidt 2002), a compound republic (Fabbrini 2001), a post-national constellation (Habermas 2001b), a metrosexual superpower (Khanna 2004), and deliberative supranationalism (Joerges and Neyer 1997).

solutions. Accordingly, the next step for integration theory is to examine alternative bases for EU democracy. In this chapter, I analyse three attempts to identify alternative paths to EU democracy: non-majoritarian democracy, substitute democratic legitimacy and deliberative democracy. For each attempt at redefinition I identify, first, the model of European integration from which it springs – the regulatory state, multi-level governance and integration through deliberation – second, the principles of legitimacy on which it builds – technocratic legitimacy, interest group pluralism and deliberative legitimacy – and, finally, I discuss the normative validity and implications of these reconceptualisations.

## ***2.1 The standard version of the democratic deficit and its critique***

For long the standard version of the democratic deficit was also the only version of the democratic deficit. In the standard version, EU decision-making is compared to the practices of its member states, and found lacking. The problem, more specifically, is the extent to which political decisions are made outside the realm of parliamentary control. Accordingly, the weak linkage between the EU and its citizens is understood to be the source of the democratic deficit. Two features of the EU are highlighted (Bellamy 2006b): the shortcomings of its institutional arrangements and the absence of a European demos. As concerns the institutional dimension, it is pointed out that EU institutions are, to a large extent, insulated from political contestation. Decision-makers are only rarely mandated by voters, and the voters have few opportunities of sanctioning the behaviour of their representatives. There is, in other words, little scope for electoral accountability and popular democratic control. What is more, the EU seems incapable of generating a shift in loyalty towards itself or create a sense of shared identity among its citizens (Warleigh 2003). The challenge, accordingly, is twofold: to enhance the scope for organised, electorally-mandated input within the EU and to strengthen citizens' identification with the EU project.

The problem is that, to some degree, the two work against each other (Bellamy 2006b). The institutional reforms required to enhance democratic input, most notably strengthening the role of the European Parliament, further accentuate the problem of weak citizen identification. With this in mind, critics insist that democratisation of the EU along the lines of parliamentary democracy or other forms of majority rule will exacerbate rather than alleviate the democratic deficit. At issue is the relation between democracy and majority rule.

The standard version is premised on the notion of majority rule as fair procedure. Because citizens are bound to disagree both on the ends and means of public policy, majority rule is understood as the only procedure which respects the principles of popular control and political equality. Critics, on the other hand, insist that non-majoritarian decision-making is equally, if not more, democratic. In this section, I will expand on the notion of democracy as fair procedure, and then present the main criticisms against majority rule in the EU. First, however, I will discuss the assumptions on which the standard version rests, namely the notion of disagreement and cooperation as constituting the circumstances of democratic politics.

### **2.1.1 The circumstances of democratic politics**

Schumpeter illustrates the role of conflict in democratic practice by juxtaposing two theories of democracy: the classical doctrine of democracy and the democratic method. According to the “classical doctrine”, democracy is the “institutional arrangement for arriving at political decisions which realizes the common good” (Schumpeter 1976 [1943]:250). This doctrine, he continues, presupposes the existence of “a Common Good, the obvious beacon light of policy, which is always simple to define and which every normal person can be made to see by means of rational argument. (...) Moreover, this common good implies definite answers to all questions so that every social fact and every measure taken or to be taken can unequivocally be classed as “good” or “bad”” (Schumpeter 1976 [1943]:250). By implication, there is also a common will of the people which equals the will of all reasonable individuals, and which is coterminous with the common good.

The problem with this classical doctrine, however, is that there is no agreement on what this common good consists in. The likely candidates – justice, stability, order, efficiency, community, to name but some of the favourites – are either too general to be helpful and relevant or too specific to be generally acceptable (cf. Dahl 1989). For instance, the members of a political association may share a commitment to justice, while disagreeing as to what, more precisely, this commitment consists in. The existence and nature of the common good constitute, in other words, highly controversial issues. Simply put: “There is (...) no such thing as a uniquely determined common good” (Schumpeter 1976 [1943]:251). Rather, disagreement “is due not primarily to the fact that some people may want things other

than the common good but to the much more fundamental fact that to different individuals and groups the common good is bound to mean different things” (Schumpeter 1976 [1943]:251). Under such circumstances, the common good may prove to be nothing but “a phrase used to conceal a defence of particularistic interests” (Dahl 1989:287).

Disagreement is both inevitable and rational. In modern societies, Rawls (1996) tells us, there are numerous sources of rational disagreement, ranging from the complexity of empirical and scientific evidence to citizens’ different expectations in life. Moreover, citizens have to weigh their various ends and values against one another, and against the ends and values of other reasonable individuals. As a result, citizens are subject to the “burdens of judgement”.<sup>12</sup> It can reasonably be assumed, therefore, “that many of our most important judgements are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion” (Rawls 1996:58). Given the burdens of judgement and lack of agreement on a definition of the common good, one can but agree with Dahl’s (1989:283) assertion that every “description of a *feasible* political ideal must begin the assumption that conflict over the common good is an inevitable part of normal political life”.

However, not only disagreement but also cooperation constitutes the circumstances of politics. “Disagreement would not matter if there did not need to be a concerted course of action; and the need for a common course of action would not give rise to politics as we know it if there was not at least the potential for disagreement about what the concerted course of action should be” (Waldron 1999:102-3). A democratic society, in other words, is characterised by a mixture of conflict and cooperation. It “is cooperative in so far as broad agreement on the structure of basic social institutions is necessary in order to provide the conditions under which individuals can escape the state of nature as described by Hobbes” (Weale 1999:10).<sup>13</sup> The conflictual element stems both from reasonable disagreement and from conflicts of interest. It can be managed but never explained away. “[W]hatever else we wish away in our elaboration of ideal models of (...) democracy, we should not wish away the

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<sup>12</sup> “The idea of reasonable disagreement involves an account of the sources, or causes, of disagreement between reasonable persons so defined. These sources I refer to as the burdens of judgement” (Rawls 1996:55). Rawls (1996:56-7) lists six sources of reasonable disagreement: a. the complexity of empirical and scientific evidence, b. disagreement as to how relevant considerations ought to be weighed, c. our concepts are, without fail, vague and subject to hard cases, meaning that we must rely on judgement and interpretation, d. divergence in citizens’ total experiences means that their judgements will diverge in most cases of any significant complexity, e. there will often be different kinds of normative considerations of different force on both sides of an issue, rendering it difficult to make an overall assessment, f. any social system is limited in the values it can admit and a selection must therefore be made, providing for difficult priorities and adjustments.

<sup>13</sup> This cooperation, Waldron (1999:106) notes, does not extend to “the justice-consensus that Rawlsians regard as essential to a well-ordered society”.

fact that we find ourselves living and acting alongside those with whom we do not share a view about justice, rights or political morality” (Waldron 1999:105).

What type of democracy is suited to such a society? There is, of course, no one form that democratic institutions have to take in order to manage conflict.<sup>14</sup> To be legitimate, however, they cannot be designed to accommodate only one view of the good. Rather, they must accommodate contradictory, yet equally reasonable, ideas of what is needed for them to be legitimate (Dahl 1989; Rawls 1996). Given the circumstances of politics, “political interaction and decision-making are needed not only to resolve the conflicts of interest that arise inevitably in institutions, but also to reconcile differences of view about what is in the common interest, such differences arising from diverse positions that individuals occupy in society” (Weale 1999:11). The purpose of democracy, accordingly, is to resolve rather than dissolve disagreement (Bellamy 2006b), and the preferred procedure is majority rule.<sup>15</sup>

### **2.1.2 Majority rule as fair procedure**

Majority rule is a method for transforming individual preferences into binding collective decisions. Simply put, it requires that the will of the majority prevails on matters of public policy (Weale 1999). When choosing among possible policy alternatives, decision-makers should select the alternative that best satisfies the preferences of the largest number of citizens (Dahl 1956). The outcome of democratic procedure, then, is not in essence the will of all, or the equivalent of unanimous will; it is the decision of the greatest number (Manin 1987). By implication, there is also a minority, whose will is not reflected in the decision, but who nevertheless has to abide by it. The question, accordingly, is why and under what

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<sup>14</sup> Indeed, as Weale points out, one source of conflict is disagreement over political institutions. There is no one institutional form and “different institutional arrangements will typically bestow different types of relative advantage on different types of people” (Weale 1999:10).

<sup>15</sup> Majority rule is commonly described as one feature of liberal democracy, a model of democracy displaying the following characteristics (Held 1987:36-71): 1. Sovereignty lies with the people, but is vested in representatives who can legitimately exercise state functions. 2. Regular elections, secret ballot, competition between factions, potential leaders or parties, and, finally, majority rule are the institutional bases for accountability and democratic control of representatives. 3. State powers are impersonal, i.e. legally circumscribed, and divided among the executive, the legislature and the judiciary. 4. Constitutionalism guarantees freedom from arbitrary treatment and equality before the law in the form of political, civil and, more controversially, social rights, most notably the right to vote, freedom of speech, expression and belief. 4. The separation of state from civil society, restricting the scope of state action to the establishment of a framework providing citizens with the opportunity of pursuing their private lives free from risks of violence, unacceptable social behaviour and undesired political interference.

circumstances majority rule can be considered legitimate not only for the majority but also for the minority.

Majority rule is commonly defended on the grounds that it is a fair procedure for managing conflicts over the common good. More specifically, it combines decision-making efficiency with respect for citizens' political equality. Two properties of majority rule are particularly important in this respect (cf. May 1953): First, majority rule is issue neutral. The procedure accords equal weight to citizens' preferences, guaranteeing that "no one person's conception of the good weighs more heavily in the balance than any other persons" (Weale 1999:129). It ensures that preferences are counted equally, and operates in the same way regardless of the issue under consideration. Second, it guarantees anonymity. It specifies that "no one person's preferences weigh more heavily in the balance because of who that person is" (Weale 1999:130), thus ensuring that every person's vote counts for one and no one's for more than one. Because the procedure is not intrinsically biased towards any given decision or any given group, but offers a fair way of overcoming differences of opinion, it is deemed particularly suited to promoting political equality under conditions of reasonable disagreement (Waldron 1999; Weale 1999; Bellamy 2006b).

For majority rule to be legitimate, however, certain conditions have to be met. First, citizens must recognise that they have common interests, certain common problems that can only be dealt with through co-operative enterprise. The authority of legislation, as Waldron (1999:117) insists, "must come primarily from our sense of the moral urgency and importance of the problems that it is necessary for us to address – the things that (morally) *need* to be done and must be done by us, in our millions, together, if they are to be done at all". What is more, the understanding that there is no agreement on what is good, right or just for society as a whole, only serves to highlight the necessity of common interests. In the absence of a uniquely determined common good, citizens must agree that the resolution of certain problems is sufficiently important for them to accept decisions that go against their will. Citizens "must share certain common interests and acknowledge that various collective decisions have to be made if their lives are to go well and social cooperation is to be possible" (Bellamy 2006b:729). Common interests, in other words, are necessary for citizens to accept the authority of majority rule to resolve their differences.

Second, there has to be a degree of trust and solidarity among the members of society (Bellamy 2006b). A common interpretation of this condition is that majority rule requires a linguistically integrated public (see for example Habermas 2001c; Grimm 2004; cf. Kraus

2004). Taking their cue from J. S. Mill (1972 [1861]),<sup>16</sup> political theorists have come to understand cultural diversity as a major impediment to civic solidarity and, hence, for majority rule. Democracy, in this view, does not require common ethnicity (*Volksgemeinschaft*), it does, however, require that the society has “formed an awareness of belonging together that can support majority decisions and solidarity efforts, and for it to have the capacity to communicate about its goals and problems discursively” (Grimm 2004:80). The general idea, as summed up by Kraus (2004:43), being that “a liberal democracy will only be able to avoid its break-up in situations of intense political conflict as long as its citizens share some fundamental identity patterns, as manifested by language and culture”.

One may, of course, question the plausibility of Mill’s argument. As does, for instance, Kraus (2004:54), according to whom the problem with Mill’s approach is that citizens are regarded as something “given”, a factor that is exogenous to political process, thus disregarding the fact that cultural identities “are phenomena that are socially produced and reproduced; they can be changed by political means and become the subject of processes of collective self-determination.” According to Kraus, the answer for culturally and linguistically heterogeneous polities, such as the EU, lies in cultural recognition, a political ethos nurtured by intercultural empathy. Others maintain that political identities are not prior to democracy, but result from it. The emergence of a common political identity is, according to this view, premised on a political project for a common future, rather than common history, culture or language (Habermas 1992; Beetham and Lord 1998; Hix 1998). Whether political culture is a precondition for, or a result of, democratic practice, is, of course, an empirical question. Ultimately, then, the problem with Mill, and with some of his critics one may add, is the tendency to turn an empirically open question into a normative axiom (Kraus 2004).

Notwithstanding, there has to be a high level of consensus on the principle of majority rule itself (Beetham and Lord 1998). Citizens must agree that majority rule is a fair procedure for resolving their disagreements. For outcomes to be accepted as binding, the procedure must be recognised as legitimate. At issue is not isolated decisions, but a series of decisions cutting across issues and extending over time. Majority rule, then, is an example of what Rawls’ (1955) has labelled “the practice conception of rules”. Rules of practices are logically prior to

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<sup>16</sup> “Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist. The influences which form opinions and decide political acts are different in different sections of the country. An altogether different set of leaders have the confidence of one part of the country and of another. The same books, newspapers, pamphlets, speeches, do not reach them. One section does not know what opinions, or what instigations, are circulating in another” (Mill 1972 [1861] quoted in Kraus 2004:43)

particular cases. They are not guides to help one decide particular cases correctly as judged by some higher ethical principle; rather the rules define the practice so that “any given particular instance of a form of action specified by a practice presupposes the practice” (Rawls 1955:26 [footnote]).<sup>17</sup> In other words, the outcome of decision-making is justified with reference to the practice. “One doesn’t so much justify one’s particular action as explain, or show, that it is in accordance with the practice” (Rawls 1955:27). However, when “the challenge is to the practice, citing the rules (saying what the practice is) is naturally to no avail” (Rawls 1955:27).

The main objection to majority rule is that the procedure carries with it the risk of exclusion. In heterogeneous and divided societies, there is always the risk that some groups will continuously be denied access to power, and thus form permanent minorities. Under such conditions, Lijphart (1999:32) contends, “majority rule is not only undemocratic but also dangerous, because minorities that are continually denied access to power will feel excluded and discriminated against and may lose allegiance to the regime”. In the absence of a common identity, majority rule comes with the risk of structural minorities and the tyranny of the majority. A condition for citizens to accept the principle of majority rule as legitimate, therefore, is the expectation that majorities may (and will change), so that a current minority have a reasonable expectation of being part of a majority on other issues or at other times.

Does majority rule constitute fair procedure? As the above discussion indicates, it is a question of both normative and de facto validity. Normative validity concerns the rightfulness of majority rule. Does it respect the individuals whose votes it aggregates, their differences of opinion about justice and the common good and their political equality (cf. Waldron 1999)? De facto validity, on the other hand, concerns the applicability of the principle to a particular political association, in this case the EU. Do the members of the political association accept the procedure and believe that it is a fair method for reaching collective decisions?

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<sup>17</sup> The practice conception of rules is contrasted to the summary view, according to which rules are derived from particular cases. Rawls (1955:19) explains: “one supposes that each person decides what he shall do in particular cases by applying the utilitarian principle; one supposes further that different people will decide the same particular case in the same way and that there will be recurrences of cases similar to those previously decided. Thus it will happen that in cases of certain kinds the same decision will be made either by the same person at different times or by different persons at the same time. If a case occurs frequently enough one supposes that a rule is formulated to cover that sort of case. I have called this conception the summary view because rules are pictured as summaries of past decisions arrived at by the *direct* application of the utilitarian principle to individual cases”.



### 2.1.3 Objections to majority rule

Two headings sum up the objections to EU majority rule: the *no demos thesis* and *democracy without a demos*. Proponents of the first accept the frame of majoritarian democracy but maintain that the interests, values and opinions of EU citizens are too disparate to make majority rule acceptable. Proponents of the latter reject both the frame and its applicability, insisting that alternatives to majority rule must be established. As a result, they reach different conclusions about the viability of EU democracy. The logical conclusion of the no demos thesis is that democracy must be confined to the nation state, and that EU legitimacy therefore must be indirect. The notion that democracy must be rethought, in contrast, encourages a search for new modes of direct legitimation.

The no demos thesis is the standard critique of the standard version. Its basic assumption is that the member states, not the EU, are the source of deeper attachments, and that democracy therefore is best expressed at member state level. There are two versions of the argument, of which the ethno-cultural is best known.<sup>18</sup> However, as pointed out by Bellamy (2006a:183), the absence of a demos need not be interpreted in narrow ethno-cultural terms. What is required is not the existence of an ethnic community defining itself as such, but a people who desires to constitute itself as a political entity.<sup>19</sup> What impedes democratisation, accordingly, is not the absence of a culturally homogeneous people, but a weakly developed collective identity and low capacity for transnational discourse. In any case, the democratic deficit is seen as structurally determined, compelling advocates of the no demos thesis to conclude that the “achievement of the democratic constitutional state can for the time being be adequately realized only within the national framework” (Grimm 2004:81).

At issue, then, is not the lack of a European nation, but the absence of mediatory structures. There is no European media, no European party system; in short, there is no European public sphere. What is more, the conditions favourable to the development of such mediatory structures are absent at the EU level. Most crucially, there is no common European language. The introduction of majority rule, therefore, risks aggravating the legitimacy deficit.

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<sup>18</sup> Weiler (1995:228) has summed up the latter as follows: “*Volk*/nation are also the basis for the modern democratic State: the nation and its members, the *Volk*, constitute the polity for the purpose of accepting the discipline of democratic, majoritarian governance. Both descriptively and prescriptively (...) a minority will/should accept the legitimacy of a majority decision because both majority and minority are part of the same *Volk*, belong to the nation”. Belonging to the political community, in other words, is equal to belonging to the nation.

<sup>19</sup> “All that is necessary is for the society to have formed an awareness of belonging together that can support majority decisions and solidarity efforts, and for it to have the capacity to communicate about its goals and problems discursively” (Grimm 2004:80).

The parliamentary process requires a degree of social cohesion that is not brought about by state organs alone. “The parliamentary process instead builds on a social process of interest mediation and conflict control that partly eases the burden on parliamentary decision-making and partly patterns it” (Grimm 2004:77). What matters is not the excellence of procedures alone, but the social structures in which they are embedded. The legitimacy of a parliamentary system rests not only on the institution of elections, but also on mechanisms external to it, such as pluralism, representation, freedom, and intermediate actors such as parties, associations, civil movements and media. Where “a parliament does not rest on such a structure which guarantees constant interaction between the people and the state, democratic substance is lacking even if democratic forms are present” (Grimm 2004:78). In consequence, there cannot in the foreseeable future be a European public nor a European political discourse (Grimm 2004:80).

Democracy without a demos, on the other hand, represents a clear break with both the rationale and institutions of electoral accountability. The argument comes in different versions – of which three will be dealt with here: the regulatory approach, multi-level governance and integration through deliberation – each corresponding to a particular model of European integration and a distinct set of legitimising principles. Nevertheless, the theories share some features. For one thing, the aim is, to some extent, to legitimise what is already there. At issue is not primarily how EU decision-making can or ought to be changed in order to suit democratic standards, but how democratic standards ought to be rethought in order to suit EU decision-making. Accordingly, proposed institutional reforms are adjustments to existing practices rather than a radical overhaul: the regulatory approach proposes a further strengthening of the role of insulated regulatory agencies, the multi-level governance approach recommends improving the transparency of EU governance structures, and integration through deliberation calls for more open and more communicative constitution-making.

More important, however, is the tendency to strip democracy of its popular component (cf. Mair 2005a; Bellamy 2006b). The approaches downplay the role of elected representatives and governments in EU decision-making. Democratic decision-making, according to these models, is not something which needs to, or even ought to, be performed by elected representatives. Rather, the argument goes, electorally-mandated input may prove detrimental to the long-term interests of citizens. To the extent that independent experts or

even stakeholders are committed to realising these long-term interests, government *for* the people may prove to be as, if not more, democratic than government *by* the people.

To what extent do the approaches constitute democratic alternatives to majority rule? The discussion is structured as follows. For each approach, I present the main legitimacy claim, and explain and assess the underlying assumptions on which this claim rests. First, the model of integration which the approach attempts to justify is outlined. Second, the principles of legitimacy on which the model rests are identified and elaborated on. Finally, I ask whether, in light of its implications, the approach is compelling or convincing. The discussion starts with the regulatory model and its claim that the EU can be legitimised through a particular form of non-majoritarian democracy. I then proceed to an analysis of the multi-level governance approach and the elements of substitute democratic legitimation it proposes. Finally, I examine the notion of integration through deliberation and its corollary deliberative democracy. The concluding part sums up the debate, and asks whether the reconceptualisations substantiate democratic and/or legitimate alternatives to majority rule.

## ***2.2 Non-majoritarian democracy and the regulatory model***

The regulatory approach reverses received notions of the democratic deficit. The perceived problem is not weak parliamentarisation but excessive parliamentarisation. EU decision-making ought not to be subject to more popular input but protected from it. It ought not to be politicised but depoliticised. The standards and practices of parliamentary democracy are quite simply irrelevant for the EU. “As long as the majority of voters and their elected representatives oppose the idea of a European federation, while supporting far-reaching economic integration, we cannot expect parliamentary democracy to flourish in the Union. Economic integration without political integration is possible only if politics and economics are kept as separate as possible. The depoliticisation of European policy-making is the price we pay in order to preserve national sovereignty largely intact. These being the preferences of the voters, we conclude that Europe’s ‘democratic deficit’ is democratically justified” (Majone 1998:5 [abstract]).

To the extent that European integration is, and ought to be, non-majoritarian, the standards of legitimacy should reflect this basic fact. Thus, democracy takes on a new meaning. “Now the key issues for democratic theory are about the tasks which may be

legitimately delegated to institutions insulated from the political process, and how to design such institutions so as to make independence and accountability complementary and mutually supporting, rather than antithetical” (Majone 1998:5 [abstract]). Two interrelated features of non-majoritarian democracy are highlighted: a precise and narrow policy agenda and performance. The legitimacy of non-majoritarian institutions depends, first, on a precise definition of their purposes. “In essence, this is because accountability by results cannot be enforced when the objectives of an organization are either too vague or too broad” (Majone 1996c:294). Secondly, legitimacy denotes the ability to protect the democratically set goals of the polity against popular myopia and prejudice (Majone 2002; Moravcsik 2002), as well as the “predatory inclinations of a transitory political elite” (Everson 2000:106).

This line of thinking is embodied in the *regulatory state* (Majone 1996a), depicting integration as a relationship between the member states and their supranational agents. In the EU, the argument goes, delegation to non-majoritarian institutions is not merely an empirical fact, it is also beneficial for the member states and, more importantly, it has normative weight. This insight is translated into a model of European integration which is both elegant and parsimonious. But is it valid?

### **2.2.1 The regulatory state**

The non-majoritarian model starts from a limited notion of the public interest. Identified in the treaties as “the four economic freedoms, a system of undistorted competition, prohibition of discrimination on the basis of nationality and gender and, since the Single European Act, the protection of non-commodity values like environmental quality” (Majone 1998:23), the European public interest is narrowly defined, derived from the market, and efficiency-oriented. The task of promoting the European public interest is restricted to the correction of specific forms of market failure, such as monopoly, imperfect information and negative externalities. To manage these tasks, the member states have set up a supranational regulatory apparatus, the *regulatory state*. The non-majoritarian model spells out the factual, instrumental and normative dimensions of this regulatory apparatus.

The factual dimension consists in delegation. Delegation is a three-step process: First, areas of common concern are identified. Second, decision-making procedures are defined. Finally, policy-making powers are delegated to independent experts whose task it is to

produce output that is Pareto-efficient and consistent with the preferences of the member states. Over the years, the member states have transferred a number of specific functional tasks, such as product standard harmonisation, internal market regulation and monetary policy, from the national level to EU institutions and agencies. According to the regulatory model, however, the authority of these institutions and agencies is not evidence of any independent legitimacy but where it suits the member states to confer discretion on a supranational agent. Their authority, in other words, is contingent on member state authorisation, limited to specific policy areas, and controlled by the member states (Lord and Magnette 2004).

The instrumental dimension explains the decision to delegate. Delegation, the argument goes, is functional for the member states. Above all, delegation is effective. It reduces decision-making costs by encouraging specialisation (Moravcsik 2002). Regulation, in the sense of sustained and focused control exercised by a public agency (cf. Selznick 1985), is “not achieved simply by passing a law, but requires detailed knowledge of, and intimate involvement with, the regulated activity” (Majone 1996b:9). Universal involvement in regulatory activities, it is suggested, would impose unreasonable costs on the political system. Delegation, in contrast, allows for a more effective division of labour. It permits “efficient and consistent decision-making to occur in areas of weak or intermittent citizen involvement and interest, most importantly where scientific, legal or administrative expertise is expensive to acquire, yet expert, informed decision-making is desired” (Moravcsik 2002:614).

Moreover, delegation ensures accountability. EU decision-making, it is argued, is subject to substantive, fiscal, administrative, legal and procedural constraints. The policy agenda is restricted, and its institutional capacity “to act in new areas and new ways is constrained by a severe lack of fiscal, administrative and legal authority, thereby partially mitigating the imperative to maintain close and constant legislative scrutiny” (Moravcsik 2002:608). More specifically, administrative and oversight procedures make it possible for the member states to monitor their agents (Majone 2002; Pollack 2002; Thatcher and Stone Sweet 2002).<sup>20</sup> The procedures contribute to accountability by ensuring that “the agencies are

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<sup>20</sup> Administrative procedures define *ex ante* the scope of regulatory activity, the procedures that have to be followed, and the availability of legal instruments. Oversight procedures allow principals to *ex post* monitor and sanction agency behaviour. *Ex post* control includes a variety of positive and negative sanctions, such as budgetary controls, control over appointments, the power to override agency behaviour through new legislation and, finally, the power to revise the agency’s mandate. Control is considered important to avoid agency loss, that is, situations where the agent generates outcomes that diverge from the preferred outcomes of its principals. However, it comes at a cost. According to the logic of principal-agent models, the benefits of delegation decline the more the agent’s discretion is limited. Member state involvement, therefore, should be limited to defining the

created by democratically enacted statutes which define the agencies' legal authority and objectives; that the regulators are appointed by elected officials; that regulatory decision-making follows formal rules, which often require public participation; that agency decisions must be justified and are open to judicial review" (Majone 1996c:291). Thus, it is suggested, the principal-agent model of delegation provides both institutional checks and balances and indirect democratic control via national governments (Moravcsik 2002).

Finally, delegation enhances the credibility and consistency of public policies. It helps decision-makers overcome the inadequate technologies of commitment and time inconsistency inherent in the political process. Politicians, the argument goes, have few means of credibly committing themselves to long-term policies (Moravcsik 1993; Dixit 1996; Majone 2000). For one thing, the policies of the current majority can legitimately be subverted by a new majority with other interests and priorities, thus reducing the credibility of long-term objectives. Moreover, majoritarian decision-making provides incentives for prioritising short-term gains over long-term objectives. In order to win elections, electorally accountable policy-makers tend to privilege myopic public opinion over legal integrity and the public's long term interests. In contrast, delegation to non-majoritarian institutions insulates decision makers from the political process, thus allowing them to accept short-term losses for longer-term gains, or pursuing more ideologically controversial goals (Moravcsik 1998b). Delegation, in short, is hailed as the "means whereby governments can commit themselves to regulatory strategies that would not be credible in the absence of such delegation" (Gatsios and Seabright 1989; Majone 2002:385).

The normative dimension tells us why delegation is thought to be consistent with democratic practice. Three justifications are commonly invoked: First, protection of minority rights. Insulation, Moravcsik (2002:614) tells us, is motivated by "*the need impartially to dispense justice, equality and rights for individuals and minority groups*". This concern is not unique to the EU. In order to protect minorities from the immediate tyranny of the majority, Moravcsik (2002:614) points out, it is common to delegate responsibility for the enforcement of such rights and prerogatives to non-majoritarian institutions, such as constitutional courts, thereby insulating them from direct political contestation. Second, to provide majorities with unbiased representation. Majoritarian electoral processes, it is suggested, tend to privilege particularistic minorities with powerful and immediate interests over the "median voter", whose concerns are often diffuse, longer-term or less self-conscious. Insulation, therefore, is

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framework conditions for supranational decision-making. The member states define the ends and means of European integration, but they should not be actively involved in day-to-day policy-making.

welcomed on the grounds that it serves to redress “underlying biases in national democratic representation” (Moravcsik 2002:614). Finally, to minimise the risk of factionalism. In plural societies, where majority rule comes with the risk of factionalism and minority oppression, powers should be shared, dispersed, delegated and limited among different institutions and groups. Given that the EU is split by linguistic, demographic, ideological and geographical cleavages, Majone (1996c) explains, non-majoritarian mechanisms are essential to its progress.

Based on the factual, instrumental and normative dimensions of the regulatory state, the case is made for a reformulation of EU democracy. It is, Majone (1996c:287) complains, “surprising to see that many current proposals to increase the legitimacy of European institutions (...) all point in the direction of strengthening majoritarian features of the European political system”. The problem, in his view, is the tendency to equate democracy with majority rule. But does his non-majoritarian model constitute an alternative to parliamentary democracy? Is it, as Majone (1998) claims, an instance of non-majoritarian democracy, at par with the consociational or the Madisonian models of democracy?

### **2.2.2. Technocratic legitimacy**

The regulatory model uses the rhetoric of democracy to dress up a technocratic argument. Unlike the consociational or Madisonian models of democracy, it does not seek to establish non-majoritarian mechanisms of popular control. Rather, its aim is to protect EU decision-making from the “constant threat of politically motivated interference” (Majone 1996c:300). In contrast to other non-majoritarian schemes attempting to define functionally or culturally appropriate majorities in order to secure either a threshold voice for a given group or a degree of proportionality in decision-making (cf. Bellamy 2006b), the ambition of the regulatory model is to minimise popular input. “Because of their insulation from partisan politics”, the argument goes, independent experts “would seem to be in a better position than government departments to satisfy the new demands of the electorate” (Majone 1996c:299). In other words, the regulatory model echoes Plato’s (2000) contention that knowledge (episteme) not opinion (doxa) should steer the ship of the state (cf. Weale 1999).

Three features of the model point to its technocratic roots: First, the notion of pre-political common interests. All technocratic models assume the existence of a uniquely

determined public good that can be identified and defended through rational argument. Though the nature of the public good is disputed, the various definitions share a similar logic. The public interest is portrayed as consistent, stable and exogenous to decision-making, and therefore clearly identifiable. Moreover, all assume that there are issues on which right and wrong answers can be identified, and thereby also optimal and sub-optimal courses of action. As a result, technocratic decision-making is, in Weber's (1978) terminology, *zweckorientiert*, guided by aims, rather than *wertorientiert*, guided by values.

In the regulatory model, market regulation represents the apolitical public interest. Majone (1996c) makes a distinction between redistribution and regulation. Redistribution, he points out, is value-allocative and attends to particular interests. It is a question of who gets what, when and why (cf. Lasswell 1958); a zero-sum game that enhances the welfare of specific groups at the expense of other groups. Regulation, on the other hand, is described as apolitical. Provided that the right solution is discovered, Majone argues, it can be thought of as a positive-sum game where everyone can gain. Given the circumstances, the expertise of decision-makers will be more important than their political accountability. What matters is not that procedures are fair, but that the outcome is right.

Knowledge is the second feature of technocratic models. Arguments for technocracy typically rely on a large factual dimension, that is, propositions about a person's expertise, knowledge or nature. "These propositions, which in principle are supportable by evidence of what is indeed the case, establish (claim to establish) differences or inequalities that are the basis of the distinction between those who possess authority and those who do not. These inequalities are a distinctive feature, perhaps the distinctive feature, of authority of this type" (Flathman 1995:114). Authority, in brief, is substantive; to enjoy authority is to be *an* authority, an expert in a particular field or area.

However, substantive authority is also a relation between the authority and other members of society. "The latter must recognize, accept, accede to, that relationship" (Flathman 1995:114). What is required is not merely the existence of inequalities, but also the recognition that these inequalities are relevant for authority. Consequently, descriptive accounts of inequality must be supplemented with arguments for basing authority on inequality. These arguments are predominantly instrumental. Substantive authority is legitimate to the extent that it contributes to some end or value which is of sufficient importance to justify what would otherwise be objectionable aspects of authority relations (Flathman 1995).



Implicit in this definition is the understanding that legitimacy is contingent on performance. And indeed, performance is the third feature of technocratic models. Citizens' allegiance to the system, in this view, is and ought to be based on its ability to meet their needs. The system, in other words, is legitimated by its output. This implies, first, that its legitimacy depends on experts' ability to "engender and maintain the belief that they are the most appropriate ones for the functions entrusted to them" (Majone 1998:22). Moreover, citizens' willingness to obey the law is, and ought to be, a property of each collective decision considered in isolation. Their obedience is to particular laws, and is conditional on its being optimal or Pareto-efficient. Accordingly, the justification for regulatory decision-making resembles Rawls' (1955) notion of a *general* rule.<sup>21</sup>

The emphasis on common interests, knowledge and performance distinguishes the regulatory model from other non-majoritarian schemes. The non-majoritarian designs, to which the regulatory model refers, advocate non-majoritarian decision-making where interests are too divergent for majority rule to apply; that is, in cases where majority rule risk producing structural minorities and "unholy alliances" of several dominant groups (Abromeit 2002). In heterogeneous and divided societies, they contend, the democratic challenge is to guarantee the inclusion of minorities while, simultaneously, respecting the principles of popular control and political equality (cf. Lijphart 1999). The regulatory model, in contrast, "assumes that all concerned have common interests, but that, for one reason or another, the judgements of ordinary people or those of their chosen representatives are suspect" (Bellamy 2006b:736). The notion that decision-making needs to be protected from popular input, that ordinary citizens cannot be trusted to deal intelligently with issues affecting their own lives, unequivocally places the regulatory approach in the technocratic tradition. This raises the issues of whether the EU can be thus legitimised.

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<sup>21</sup> "One is pictured as estimating on what percentage of the cases likely to arise a given rule may be relied upon to express the correct decision, that is, the decision that would be arrived at if one were to correctly apply the utilitarian principle case by case. If one estimates that by and large the rule will give the correct decision, or if one estimates that the likelihood of making a mistake by applying the utilitarian principle directly on one's own is greater than the likelihood of making a mistake by following the rule, and if these considerations held of persons generally, then one would be justified in urging its adoption as a general rule" (Rawls 1955:23).

### 2.2.3 The public interest as a rational fiction?

The case for the regulatory state rests on the validity of the redistribution/regulation dichotomy. Majone (1996c:296) insists “on the possibility of separating efficiency and redistributive concerns because such a separation is crucial to the substantive legitimacy of regulatory policies”. If the efficiency/redistribution dichotomy is unsound, then so is the notion of an apolitical and pre-political public interest. And, if there is no apolitical and pre-political public interest, then democratic processes of public opinion formation cannot be legitimately bypassed. Unless a public interest can be clearly identified, popular input is required. The question, then, is whether the dichotomy holds.

European integration is not limited to regulation. As Føllesdal and Hix (2006) convincingly argue, EU policies, like domestic policies, can be located at different positions on an efficiency/redistribution continuum. Some policies, such as consumer protection, come fairly close to the efficiency-end of the continuum. Other policies, such as the construction and regulation of the internal market, display a mix of Pareto-improving and redistributive elements. Finally, some policies, such as the common agricultural policy, are obviously redistributive. Therefore, Føllesdal and Hix (2006:543) conclude, “at an empirical level, Majone’s argument that EU policy-making is or should primarily be about Pareto-improving outcomes is (...) either implausible, or requires a drastic reversal of many competences back to the Member States.”

Proponents of public interest-oriented approaches make two responses to this sort of critique: First, reference is made to the extensive use of non-majoritarian bodies in democratic states. The “growing importance of such institutions in all democratic countries shows that for many purposes reliance upon qualities such as expertise, professional discretion, policy consistency, fairness or independence of judgement is considered to be more important than reliance upon direct political accountability” (Majone 1996c:285-6). Also at the national level we are witnessing the rise of the regulatory state.<sup>22</sup> Judicialisation, expert decision-making

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<sup>22</sup> Indeed, as Scott (2000:44) notes, we “are said to live in the age of the regulatory state”. “During the past half-century”, Thatcher and Stone Sweet (2002:1) explain, “states, executives, and parliaments have empowered an increasing number of non-majoritarian institutions (NMIs) to make public policy. In the fields of utility regulation, telecommunications, antitrust, and media pluralism, and even in the provision of health and welfare benefits, myriad independent regulatory bodies have been created and become the loci for making new rules, or applying existing ones to new situations, at the national level”. The rise of the regulatory state is commonly explained in terms of a functionalist logic. Scott (2000:44), for instance, see delegation to regulatory bodies partially as a response “to the recognition that ‘total control’ models of state activity fail to deliver desired outcomes”. Others dispute functionalist explanations, instead describing the rise in regulatory agencies in terms of their legitimising and symbolic properties (McNamara 2002; Wilks and Bartle 2002).

and a reliance on non-majoritarian institutions have gained saliency in European politics, with ever more tasks being delegated from elected governments to non-elected independent bodies. The logic of public interest-oriented approaches is that, if “a similar institutional adaptation is widely accepted in existing democratic systems”, then “this is one reason to believe that a similar grant is legitimate” in the EU context (Moravcsik 2004:347).

However, there are important differences between non-majoritarian mechanisms at the national and the supranational level. The democratic structures within which national regulatory bodies operate are largely missing at the EU level. As a result, mechanisms of control are weaker at the EU level than in the member states. According to Bellamy (2006b), two factors limit member state control over EU agencies: First, the plurality of principals, combined with the Commission’s ability to develop a complex network of overlapping agencies, reduces the influence of principals and increases the likelihood of conflicting loyalties. Second, whereas domestic regulators are subject to diffuse public pressure from the media and other organs of the national public sphere, the absence of a pan-European public sphere virtually gives EU regulators a free reign. As a result, national governments have few means of holding their supranational agents to account.

What is more, even where they do exercise control over their agents, it cannot automatically be assumed that the governments of the member states pursue the interests of EU citizens. As Lord (2004:220) points out, proponents of principal-agent analysis “typically ask the wrong question”. If national governments are the main beneficiaries of delegation of power to the EU, the crucial question is not whether governments can control EU institutions but whether citizens can “control all those, their governments included, who combine to exercise the powers of the EU” (Lord 2004:220). The problem, in other words, is that whereas the regulatory state assumes a match between citizens’ interests and EU decision-making, EU decision-makers are given no “incentive to respond to the needs of the public rather than powerful sectoral interests or fashionable economic theories” (Bellamy 2006b:739). As a result, a mechanism hailed as a means of insulating long-term interests against short-term popular myopia or prejudice, may equally well prove to be a means of evading political responsibility for poor or contentious decisions (Bellamy 2006b).

The second response of the regulatory model enters here. The issues in which the EU specialises, they argue, lack salience in the minds of European voters. Trade liberalisation, the removal of non-tariff barriers and technical regulation in environmental and other areas, fail to excite ordinary citizens. In fact, Moravcsik (2002:615) tells us, “EU legislative and regulatory activity is inversely correlated with the salience of issues in the minds of European

voters, so any effort to expand participation is unlikely to overcome apathy”. The argument, however, misinterprets the relationship between issue saliency and the political process. Issue saliency is not exogenous to the political process; it results from it. A policy issue does not become subject to political debate because it is salient, it becomes salient because it is subject to political debate. Schattschneider (1960) called this the “mobilisation of bias”, explaining voter apathy by the lack of political debate and articulation of positions of several sides of the debate (cf. Føllesdal and Hix 2006). Thus, the assumption may be reversed: Low issue saliency does not favour technocratic decision-making; rather low issue saliency results from technocratic decision-making.

Low issue saliency, therefore, should not be cited in support for the existence of a European public interest. Preferences are not exogenous to the political process. Interests, values, opinions, as well as potential trade-offs, are defined and redefined through processes of political deliberation and contestation. Even where citizens recognise certain policy objectives – such as environmental protection, price stability and high levels of employment – to be in their interest, they may nevertheless disagree as to how these policy objectives are to be weighted. As a consequence, the policies emanating from a technocratic process need not be consistent with the preferences of citizens after an informed debate. In other words, the enlightened interests of citizens, so esteemed by proponents of technocracy, might well differ from those assumed by experts.

Whereas the regulatory model assumes an ideological consensus on the rules, functions and advantages of delegation, issues of efficiency are, in fact, highly contested (Thatcher and Stone Sweet 2002; Bellamy 2006b). All regulatory policies attend to specific interests, and may prove detrimental to other interests. Trade liberalisations are a case in point. Though they are beneficial for the export industry, they may have adverse effects for private producers for the domestic market (Frieden and Rogowski 1996). Other regulatory policies require a balancing of different policy objectives. For example, the anti-inflationary policies of independent central banks, which privilege price stability over other considerations, may lead to higher levels of unemployment. Hence, delegation of monetary policy to independent central banks, like all forms of delegation, involves trade-offs, and these trade-offs result in partisan politics (McNamara 2002).

To sum up the critique: There are good reasons to believe that the efficiency/redistribution dichotomy, on which the regulatory state is premised, is but a rational fiction. If this is so, the notion of apolitical and pre-political interests, so crucial to the theory, must be discarded. EU policies, whether regulative or not, are partisan. They favour

certain interests at the expense of others. This, as McNamara (2002:67) notes, “is not surprising or wrong, indeed it is the meat and potatoes of politics, but it is often obscured both in the academic and policy making discussion”. By implication, any theory of European integration must take disagreement over values and interests into account.

### ***2.3 Substitute democratic legitimacy and multi-level governance***

The governance approach discusses how divergent interests can produce legitimate outcomes. How can the interests of various actors in the integration process be transformed into a European public interest? The EU, according to the governance view, must confront tendencies towards social fragmentation. To achieve this, political resources must be distributed to ensure that no single group or faction dominates policy-making. At the same time, decisional dead-lock must be avoided. The challenge, therefore, is to develop a system of institutional checks and balances which not only prevents any faction from controlling decision-making, but also compels the various factions to enter into a process of constructive deliberation or bargaining.

The central premise of the approach is the rejection of parliamentary democracy as a model for EU democracy. Given “that there is no agreement among the member states on a straightforward parliamentarisation of the European Union”, the argument goes, “there is no good reason to use this normative standard as *the* measuring rod for assessing the democratic substance of the European polity” (Héritier 1999:269). The EU is a “composite democracy”, drawing on sources as diverse as parliamentary representation, executive representation, horizontal mutual control, associative and expert representation, and individual rights-based legitimacy (Héritier 2003). The call is for a measuring rod “which is sufficiently abstract to be applicable to all different notions and institutional specifications of democracy” (Héritier 1999:278). To this effect, proponents of governance suggest, a patchwork of legitimising principles is required.

This patchwork, they claim, is inherent in the practice of multi-level governance. However, the concept of multi-level governance is both elusive and ambiguous. It varies both according to context and according to who uses the term. The following account, therefore, is but one attempt to synthesise different contributions to the debate, and ask whether the implicit assumptions hold. The discussion has three parts: First, a discussion of the concept of

multi-level governance itself. Second, an overview of the legitimising principles invoked. And, finally, a discussion of whether its assumptions hold.

### 2.3.1 Multi-level governance

What, more precisely, is governance, and how does it relate to government? Despite a growing number of studies devoted to it, the concept of governance remains notoriously slippery (Pierre and Peters 2000; Kohler-Koch and Rittberger 2006). Does it refer to empirical manifestations of the unravelling of central state control or to a theoretical representation of the co-ordination of political systems? Is it an alternative to hierarchical government or does it refer to policy networks nested in formal government institutions? There are numerous definitions of the term,<sup>23</sup> and while some of them overlap others do not. The uses of governance are more than “slightly confusing” (Pierre 2000:3), and risk turning the concept into an empty signifier. Indeed, it has been suggested that its conceptual vagueness is the “secret of its success” (Schneider 2004:25).

Similarly, multi-level governance stands accused of being “a concept with no more profound substance other than that there are multiple actors and levels in the European integration process” (Mörth 2003:268). Nevertheless, the EU is increasingly depicted as an instance of multi-level governance. As such, the EU can be characterised as follows: First, authority is reallocated upward, downward, and sideways from central states (Marks, Hooghe and Blank 1996). Second, the process of governing is no longer conducted exclusively by the state but involves “all those activities of social, political and administrative actors that (...) guide, steer, control or manage society” (Kooiman 1993:2). Governance, then, concerns the move from centralised authority to multiple centres of authority, resulting in a “diffusion of authority” (Hooghe and Marks 2003), an “erosion of traditional bases of political power” (Pierre 2000), “hollowing-out” of state authority (Rhodes 2000), and “growing or changing societal interdependencies” (Kooiman 2000). As summarised by Hix (1998:54), the general idea is that “the EU is transforming politics and government at the European and national levels into a system of multi-level, non-hierarchical, deliberative and apolitical governance, via a complex web of public/private networks and quasi-autonomous executive agencies,

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<sup>23</sup> Rhodes (1996) has identified six separate uses of *governance*: the minimal state, corporate governance, new public management, ‘good governance’, socio-cybernetic systems, and self-organizing networks.

which is primarily concerned with the deregulation and reregulation of the market”. Resulting from this is an entity *sui generis*, a fragmented polity of overlapping authority and multiple loyalties.

Three features of governance are thought to contribute to legitimacy. The first is transparency. Although transparency is still highly problematic (European Commission 2001; Dehousse 2003), important improvements have been made (Joerges and Neyer 1997; H eritier 1999). As the Commission (2005b) itself points out, a broad range of concrete measures increasing transparency has been put in place. Among the initiatives, two are highlighted: First, access to information provisions, providing a framework for access to information about the implementation of EU policies, the rights of citizens and concerned interests, as well as the unpublished documents of EU institutions and bodies. Second, consultation of stakeholders and in-depth impact assessments in order to “ensure that the concerns of the citizens and all interest parties are properly taken into account” (European Commission 2005b:2).

Transparency, in this view, serves two purposes. First, it is seen as conducive to accountability. Transparency, it is claimed, will increase citizens’ understanding of EU decision-making, thereby making it easier for them to control and accept as legitimate (Naurin 2004). Second, transparency is promoted on the grounds that it generates support for EU policies. H eritier (1999:272) explains: “Clearly the instrument of offering information about the nature of European policies is increasingly used to bridge the gap between the Brussels administration and member state citizens, in the hope that pointing out the merits of European legislation will help to generate popular support for these measures”. As summed up by the European Council (2006:13): “Providing citizens with firsthand insight into EU activities is a pre-requisite for increasing their trust and confidence in the European Union”. It ensures that EU decision-making is responsive to the interests and opinions of EU citizens and concerned interests, while, at the same time, making citizens and concerned interests aware that it is so.

Control through mutual distrust is the second element of substitute democratic legitimation. Multi-level governance involves a great number of different actors: representatives of national governments, bureaucrats, corporate actors, experts, various organised interest groups. At each step of the EU policy process, H eritier (1999:274) contends “policy-making is characterized by a distrustful and circumspect observation of the mutual policy proposals made by the involved actors”. As a result, she continues, there is a wide distribution of political resources, “preventing the domination of one particular influence in the shaping of policies and securing a balanced structure of power” (H eritier 1999:274). EU

decision-making, in short, is characterised by bargaining, distrust and mutual horizontal control.

Mutual distrust is held to be conducive to accountability. Two mechanisms ensure accountability: redundancy and interdependence (Scott 2000). Redundancy refers to the existence of two or more accountability mechanisms. The mechanisms are independent of each other and where one fails, the other is still sufficient to ensure accountability. In a multi-level system such as the EU, redundancy is ensured by the presence of similar accountability mechanisms at multiple levels, so that accountability mechanisms at the local, national and supranational levels complement one another. Interdependency describes a situation where the actors are dependent on each other in the realisation of their goals. Authority and key resources are dispersed among the actors so that “each of the principal actors has constantly to account for at least some of its actions to others within a space, as a precondition for action” (Scott 2000:50). In such a system, actors have to give accounts not so much at the pains of losing office, but of diminished cooperation with others (cf. Lord 2004). Accountability in multi-level governance, then, is an internal process where the actors enforce agreed standards on themselves. The idea is, in other words, that distrust and mutual control are believed to compensate for weak external accountability in EU decision-making (Héritier 1999).

The third element of democratic legitimation is interest group pluralism. The decision-making pattern, as Héritier (1999) notes, is familiar. A Commission Green Paper initiates a process of consultation, round-tables and conferences bringing together stakeholders and concerned interests, and a working group is instructed to submit a policy proposal which then serves as a basis for future EU legislation. These structures, Héritier continues, constitute supportive networks for the Commission in its role as policy-maker. By means of such networks, and the consequent use of compromises, compensation payments and package deals, the Commission seeks to rally concerned interests behind its policy proposals. Consequently, despite the Commission’s repeated references to citizen participation, the reliance on supportive networks indicates that European governance, at least in its present trappings, is directed towards sectoral actors (Magnette 2003). It can be argued, therefore, that European governance is a continuation of the practices inherent in the Community method, the aim of which was to engage economic elites in building transnational coalitions in support of European policies (Smismans 2004b).

The governance approach makes use of well-known concepts in political science, such as output (responsive) democracy, accountability and interest-group pluralism, seeking to reinvest them with new legitimacy. There is, it is claimed, no one-to-one relationship between



various principles of legitimacy and the empirical characteristics of the EU as a political system. Therefore the EU need not rely on one set of legitimising principles, but can draw on several sources of legitimacy. Indeed, it is this plurality of sources that contributes to its legitimacy. And, as Kohler-Koch and Rittberger (2006) testify, the notion of governance is gaining ground (see for example Jachtenfuchs 1995; Marks, Hooghe and Blank 1996; Joerges and Neyer 1997; H eritier 1999; Smismans 2004b). But does governance contribute to democratic legitimacy?

### 2.3.2 How democratic is it?

Is governance democratic, or does it have a democratic potential? Originally conceived as a threat to democracy or a means of sidestepping it, governance is increasingly portrayed as a means of resolving issues of democracy (Hirst 2000). Integration research is no exception. Increasingly, EU scholars are discussing the legitimising potential of governance. Two approaches have gained salience: deliberative supranationalism (see Joerges and Neyer 1997) and functional participation or associative democracy (see Smismans 2004b).<sup>24</sup> However,

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<sup>24</sup> Arguing that “some core institutional features of the EC should be read as supranational versions of deliberationist ideals”, deliberative supranationalism seeks to demonstrate that supranational deliberative democracy “represents not merely some Utopian vision but finds its expression in real-world institutional structures and practices” (Joerges and Neyer 1997:610). Attention is directed at the practice of comitology. In comitology, Joerges and Neyer (1997:620) maintain, “emphasis is on the development of co-ordinating capacities between the Commission and member state administrations with the aim of establishing a partnership which relies on persuasion, argument and discursive practices rather than on command, control and strategic interaction”. In such a system, preferences cannot merely be stated or aggregated; they have to be backed up by persuasive and plausible arguments. EU decision-making, therefore, is best understood as a structurally deliberative undertaking (Neyer 2004:26); it has “at its very heart the establishment of conditions facilitating mutual reflection about preferences, and social integration by means of discourse” (Joerges and Neyer 1997:621). Because comitology provides a framework for such deliberation, the argument goes, it carries the seed for a democratic EU.

However, deliberative supranationalism largely ignores questions of representation. It assumes that national delegates “slowly proceed from being representatives of national interests to being representatives of a Europeanized inter-administrative discourse” (Joerges and Neyer 1997:620), but is silent as to how representative this discourse is of public opinion. As pointed out by de la Porte and Nanz (2003:465), what “is missing from the committee model in order to be responsive in a ‘democratic’ sense is a mechanism that links expert deliberation with the concerns of affected citizens”. For one thing, it is difficult to see how actors within comitology are accountable to the citizens. Whereas the experts may deliberate in manner responsive to EU citizens, the same citizens have few opportunities of sanction if the experts act in a manner inconsistent with their interests, opinions or wishes. Consequently, comitology is at best governance for the people (cf. Weiler 1999b). “The issue is that, whilst comitology appears as an alternative paradigm to democratic representation, it has not substantiated procedural alternatives to representation” (Closa 2003:550). In conclusion, insofar as democracy presupposes some form of popular control and political equality, deliberative supranationalism does not qualify as democratic.

whereas in principle the processes of governance are open to everyone, in practice citizens have few opportunities of participating. According to H eritier (1999), therefore, the institutions and practices of EU governance are not democratic in a strict sense; rather they amount to substitute democratic legitimacy. EU policy-making, she argues, is characterised by a mix of legitimising principles. These derive, first, “from measures promoted by the Commission to compensate for the slow and incremental nature of democratization” in the EU, and, secondly, from “components of European policy-making inextricably linked to the diversity of the European polity” (H eritier 1999:270). More specifically, EU policies and governance structures can draw on elements of output democracy and interest group pluralism.

Output democracy, or responsive democracy, looks at the legislation and regulations that emerge from political processes and asks whether they are consistent with the preferences of the median voter (Crombez 2003). Are voters’ preferences reflected in the output? This question, according to proponents of output democracy, lies at the very heart of democracy. Consequently, “the distance between the median voter and the outcome of a political process can be considered a reasonably good measure of the democratic deficit of the process” (Crombez 2003:104). To put it succinctly, performance determines legitimacy. Political systems derive legitimacy from their “capacity to solve problems requiring collective solutions because they could not be solved through individual action, through market exchanges, or through voluntary cooperation in civil society” (Scharpf 1999:11).

From this, two implications derive: First, output democracy is government *for* the people. What matters is that decision-makers have incentives to be responsive to the people. Citizens need not participate in decision-making, but they must be able to observe what goes

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What is missing from the approach, it has been suggested, is a concept of citizen participation (Dehousse 1999; Smismans 2004b). Citizens affected by comitology decisions ought to be given an opportunity to express their opinions on the issues at stake. To this effect, Dehousse (1999) advocates extensive dialogue between decision-makers and various segments of civil society. In a similar vein, Smismans (2004b) suggests that interest group participation – functional representation – may be an additional source of democratic legitimacy. Again, issues of representation are raised. How representative are interest groups of EU citizens? Though this is ultimately an empirical question, two general claims can be made: First, civil society organisations, let alone interest groups, represent themselves. If they are to be democratic, the average citizen must be represented. To quote Walzer (2000 [1971]:460): “Non-participants have rights; it is one of the dangers of participatory democracy that it would fail to provide any effective protection for these rights. But non-participants also have functions; it is another danger that these would not be sufficiently valued”. Second, there is a tendency to privilege certain interests over others. Even if, as its proponents claim, EU governance provides diffuse interests with multiple points of access to the policy process (Pollack 1997; H eritier 1999), it is, in its present trappings, primarily directed towards sectoral actors. In its White Paper on Governance (2001), the Commission makes no attempt to define or operationalise civil society participation. With the exception of stakeholders and the “actors most concerned”, civil society actors are “confined to non-binding procedures” (Magnette 2003:149-50). In this light, it can be argued that governance does not, to any appreciable extent, broaden the limited and elitist conception of citizenship inherent in the Community (Monnet) method.

on in the political process. Therefore, decision-making processes must be transparent. Citizens must have access to information, and the process itself must not be too complicated (Crombez 2003). Second, output legitimacy is interest based. Whereas output legitimacy presupposes the existence of an identifiable constituency, this constituency need not claim the exclusive or even primary loyalty of its members. The challenge is to define the appropriate constituency for the collective resolution of certain classes of common problems. Consequently, “output-oriented legitimacy has no difficulty in allowing for the coexistence of multiple, nested or overlapping, collective identities defined by specific classes of problem-solving concerns, and organized according to territorial as well as functional criteria” (Scharpf 1999:11). Common interests, not common identity, define the constituency.

Interests are also an important component of pluralist democracy. Here, however, emphasis is on conflict of interests rather than on common interests. Pluralists maintain that conflict between different interest groups, or factions, is an inevitable and enduring fact of social life (Dahl 1967; 1990). Therefore, the overriding aim of democratic politics should be to regulate conflict (Cunningham 2002).<sup>25</sup> The question, accordingly, is how conflict among society’s interest groups can generate legitimate policies. Pluralists argue that democracy is a method for managing conflict and counteracting factionalism. By distributing political resources so that all factions have access to the political process and no faction has the means of controlling it, the political apparatus (the “state” or “government”) becomes an arena within which conflict is accommodated, contained and regulated. Thus, political stability is promoted through a system of checks and balances where power is controlled by counter-power.

Democracy, in this view, is a process of interest group competition. Interest groups are important for three reasons (Dahl 1982; Eisenberg 1995): First, when given freedom, individuals tend to organise themselves into groups. Hence, unless individuals are coerced to abandon their chosen associations, interest groups are an inescapable fact of social life. Second, interest groups are a means of acquiring political power. Through participation in organised groups, citizens are given the chance to promote their interests. Finally, groups are centres of human interaction, and therefore conducive to individual identity and development. These reasons, Eisenberg (1995) contends, partly explain why political pluralism places such importance on groups.

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<sup>25</sup> This line of thinking can be traced back to Madison, who in his contributions to *The Federalist Papers* described factional conflicts as the principal challenge to democracy. Unlike Madison, however, pluralists adopt a more benign view of conflict (Cunningham 2002).

However, she continues, “pluralism is not the same as group theory. The political significance of groups in pluralist theory is contained in two additional elements. The first element is that *many* groups coexist in society. The second element is that individuals have *multiple* affiliations and memberships” (Eisenberg 1995:4). Pluralism of this kind is a condition for a healthy political process (Dahl 1982). The active participation of many interest groups is the means of avoiding centralised political power. Interest group pluralism is conducive to mutual deliberation and negotiation between representatives of different interests, thus fragmenting political power. As summed up by Dahl (1982:32) “In large political systems independent organizations help to prevent domination and to create mutual control. The main alternative to mutual control in the government of the state is hierarchy. To govern a system as large as a country exclusively by hierarchy is to invite domination by those who control the government of the state. Independent organizations help to curb hierarchy and domination.”<sup>26</sup>

The pluralist model is sometimes extended to encompass consociational democracy (cf. Cunningham 2002). Though not a variant of classical pluralism, the similarities between them are sufficient for pluralists such as Dahl (1989) to appeal to it.<sup>27</sup> Consociationalism is an example of what Keating (2001b) labels “conflict studies”. It starts with the observation of competing claims in heterogeneous and divided polities, and asks how these can be converted into bargainable stakes. More specifically, consociationalism asks how the negative effects of social segmentation, hereunder the disintegrative effects of linguistic diversity, can be overcome through institutional design. The answers it comes up with draw heavily on the experience of divided societies such as the Netherlands and Switzerland, and include power

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<sup>26</sup> It enables “subjects to raise the costs of domination. To begin with, it is virtually impossible for a single actor or a unified team to acquire a complete monopoly over all resources. Consequently, its subjects can sometimes cooperate, combine their resources, and thus increase the costs of control. (...) One could easily multiply historical examples showing how members of a weaker group have combined their resources, raised the costs of control, overcome domination on certain matters important to them, and acquired some measure of political autonomy. Often what results is a system of mutual controls. Thus, after parliament gained independence from the monarch, for a long time neither could dominate the other; each party controlled the other in important ways. Later, mutual controls developed between cabinet and parliament; later still, between parliament and electorate. And even later, the rise of trade unions helped to bring about mutual controls between unions and employers” (Dahl 1982 34-6).

<sup>27</sup> Cunningham (2002) points to important similarities between the two models: For one thing, they agree that the role of the state is to accommodate and regulate unavoidable conflicts. Moreover, maintaining peace and stability is the overriding goal of both theories. They also conceive of political leadership in a similar fashion, stressing the role of political leaders in promoting the special interest of their constituents while, at the same time, negotiating with one another to uphold peace and stability. Finally, both theories emphasise the importance of multiple group membership, or, in Lijphart’s (1977) terms, “cross cutting cleavages”. There are, as Cunningham remarks, also important differences. Most notably “the ‘groups’ consociational- democratic theory addresses (...) are larger and less internally homogenous even with respect to their group-specific interests than prototypical pluralist interest groups” (Cunningham 2002:83).

sharing arrangements, such as a proportional electoral system, a grand coalition cabinet, several veto points and federalism (Steiner 1998). These institutional arrangements, it is pointed out, are designed to make decision-making more inclusive and consensual, thereby facilitating the accommodation of national, cultural, religious and linguistic diversity.

Finally, interest group pluralism is seen as conducive to bargaining democracy. Because decision-making brings together a number of actors with different interests, and because there is a predilection for consensual decision-making, bargaining is a central aspect of EU policy-making. “Consensus is achieved through negotiating in the course of which compromises are formulated, compensation payments made, and package deals struck” (Héritier 1999:275). In addition to the usual suspects – the representatives of national governments in the Council, elected and non-elected national officials in comitology – bargaining democracy includes interest groups and stakeholders in policy-making. Interest group participation is structured in fixed patterns in which some groups, most notably those that form around socio-economic functions, are given a privileged position (Smismans 2004b). The idea is that this form of interest group participation will generate policies that are “more responsive and consensual” (Taylor 1996), and, at the same time, create output legitimacy “by distributing benefits and regulatory advantages to the actors in the network” (Héritier 1999:278).

This system of interest group negotiation is sometimes referred to as corporatism (see for example Magnette 2003). In being systems of interest and/or attitude representation, the two share a number of basic assumptions (cf. Schmitter 1974). But the European system of interest group bargaining differs from corporatism in one important respect. Whereas the former is open to a wide range of interests, corporatism is a closed system. To be specific, corporatism is “a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports” (Schmitter 1974:93-4). In comparison, interest representation in the EU is more “pluralist” than corporatist: “more organizationally fragmented, less hierarchically integrated, more internally competitive, and with a lot less control vested in peak associations over its affiliates or in associations over its members” (Streeck and Schmitter 1991:136). Accordingly, (neo)corporatism cannot be a model for the European political economy.

Nevertheless, the comparison with corporatist systems is interesting. When the corporatist and the pluralist models are juxtaposed, the dilemma of EU interest group representation appears more clearly. In both systems legitimacy stems from efficiency and a particular conception of fair procedure. Consulting “concerned interests”, the argument goes, could improve the quality of decisions and make them more acceptable to those on whom they would be imposed (Magnette 2003). Compliance, in other words, is sought by negotiating policies directly with those whose compliance is needed (Lord and Magnette 2002). However, interest group representation is also defended on the grounds that it contributes to fair decision-making practices. The argument, as summed up by Lord and Magnette (2002:5), is that “those exposed to the concentrated effects of public policy should have special rights in the decision-making process”. By implication, the more interest groups are included the fairer the procedure. Evidently, then, a balance needs to be struck between efficiency and fairness. In corporatist systems, the conflict between efficiency and fairness is resolved by limiting the number of participants. Thus, corporatist structures are a means of co-opting, controlling or coordinating influential factional interests (Schmitter 1974). Interest group pluralism, in contrast, is open to a wide range of interests.<sup>28</sup> In such a system, interest groups “compete for attention with national states, subnational regions, large firms, and specialized lobbyists, leaving their constituents with a wide range of choices among different paths of access to the Community’s political center and enabling them to use threats of exit to coerce their representatives into pluralist responsiveness” (Streeck and Schmitter 1991:159). The inclusiveness of the system, in other words, risks reducing its efficiency.

The attempt to reconcile incompatible or conflicting sources of legitimacy is a general problem with the governance approach. The patchwork of legitimising principles may capture “the diverse notions of democracy held and the different goals pursued by member state actors with respect to the future development of the European polity” (Héritier 1999:277), but it cannot provide legitimacy for the EU as a whole. The problem, more specifically, is the tension between output and input legitimacy. Output (responsive) democracy is premised on the existence of a range of common interests, pluralism denies the existence of such interests; output democracy sees conflict as detrimental to legitimacy, pluralism sees conflict as an essential part of democracy; output democracy concerns obedience to particular laws

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<sup>28</sup> “Pluralism can be defined as a system of interest representation in which the constituent units are organized into an unspecified number of multiple, voluntary, competitive, nonhierarchically ordered and self-determined (as to type or scope of interest) categories which are not specially licensed, recognized, subsidized, created or otherwise controlled in leadership selection or interest articulation by the state and which do not exercise a monopoly of representational activity within their respective categories” (Schmitter 1974:96).

(“orders”), pluralism concerns the acceptance of the procedures of law-making in general; output democracy denies the need for popular input, pluralism emphasises the need for such input. The challenge of the governance approach, therefore, is to present us with the means of reconciling input and output legitimacy in the absence of a demos. The answer its proponents have come up with is more transparency.

### **2.3.3. Will transparency do the trick?**

In debates on EU governance, transparency to a large degree has replaced popular input as the source of democratic control. As pointed out by Naurin (2004), however, it is less clear what transparency is expected to do for the EU. Though commonly invoked as a source of legitimacy (see for example Joerges and Neyer 1997; Dehousse 1999; H eritier 1999; Smismans 2004b), few dwell upon its expected benefits. Nevertheless, two arguments can be identified in the discourse: First, the claim that transparency will contribute to public legitimacy, and, second, that it is a substitute for electoral democratic control. Though essential for democratic control, there are nevertheless reasons to doubt whether transparency fulfils its promise.

The public legitimacy argument concerns both process and output. As we have seen, transparency is expected to generate public support for EU institutions, actors and policies by ensuring some form of accountability and, at the same time, making citizens aware of the benefits of European integration. The argument has some merit. For one thing, transparency certainly is a necessary condition for democratic control. Unless citizens know how the system works and are aware of the decisions it produces, they have little motivation or opportunity to hold decision-makers to account. However, it is not a sufficient condition. Accountability, Behn (2001:3) reminds us, “means punishment”. In order to exercise democratic control, citizens need not only be made aware of political processes and policies, they must also be given the opportunity to sanction bad performance and reward good performance. Information alone cannot redress the democratic deficit. The transparency debate, however, fails to address the institutional dimension of democratic control. Regardless of the degree of transparency, neither the Council nor the Commission can be held collectively accountable by EU citizens or their representatives. It is problematic, therefore,

that discussions on transparency have tended to side-step issues of institutional reform, instead feeding into a debate on public “alertness” (Lodge 1994).<sup>29</sup>

What about public support for EU policies? Based on Eurobarometer polls, Bellamy (2006a:183) argues that the policy areas enjoying high Euro-legitimacy are those where “Pareto-efficient improvements can be made through cooperation in order to resolve collective action problems, protect against negative externalities and gain the full advantages of positive externalities”. By implication, the assumption that information about EU policies will generate public legitimacy is not reasonable. Eurobarometer polls, however, tell a different story. As Naurin (2004) points out, public support for EU membership has fallen nine percent from 1993 to 2004. In this period, citizens’ access to documents has been radically improved and the availability of information about EU policies and institutions has increased dramatically. The explanation, Naurin hints, could lie in the consensual nature of EU decision-making. Sometimes negotiations behind closed doors may make compromise easier. Particularly in plural societies, Norman (2001:91) explains, political leaders “must be masters at finding compromises while appearing to be guided by unwavering principles, and then selling these compromises to diverse constituencies in order to ‘reconcile the solitudes’” (cf. Taylor 1993). Increased transparency, in other words, may make political compromises harder to sell.

Nevertheless, its proponents argue, transparency is a substitute for popular control. Transparency compels decision-makers to argue in terms of the public interest. Because decisions are taken in the public realm, decision-makers are forced to make decisions which can withstand public scrutiny. Thus, the argument goes, transparency contributes to legitimacy by enhancing the responsiveness of political leaders, their willingness to take the interests, values and opinions of the citizenry into account. Again, empirical studies suggest that the case for transparency may be somewhat overstated (Eliasoph 1998; Naurin 2004). Both Elisaph and Naurin found that the actors, civic group activists and European lobbyists respectively, were more likely to argue in terms of the common interest backstage than frontstage. The issue is that whereas interest group representatives, civic groups and national experts may negotiate agreements, they do not represent or attempt to represent the public interest. Rather, they represent specific constituencies that want their representatives to voice

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<sup>29</sup> “The post-Maastricht debate underscored concern over the implications of interinstitutional reform for the polity being created. It also posed fundamental questions about the Union’s political culture. However, the response to creating an open, democratic polity was diverted into strategies to open up supranational administrative practice in respect of policy-making without addressing the central problem of the Council’s position and practices” (Lodge 1994:345).



their specific concerns, interests or values. Rather than compelling decision-makers to argue in the general interest, transparency may therefore have a politicising effect. In consociational democracies, where depoliticisation and neutralisation of sensitive issues are part of the game, secrecy is a most important rule (Lijphart 1968). In other words, if the aim is to induce interest groups and national representatives to argue in terms of the common good, then transparency may be self-defeating.

The debate on transparency illustrates a general problem of the patchwork approach: the difficulty of combining output and pluralist democracy. Output democracy is premised on the existence of a collective public interest, pluralist democracy maintain that this interest can never be more than the sum of individual interests. As we have seen, it is unlikely that more transparency will help EU governance overcome this tension. The question is whether the notion of a common European will nevertheless can be sound, and, if so, through what processes such a will can come about.

## ***2.4 Deliberative democracy***

Proponents of deliberative democracy claim that a European consensus can be constructed through communicative practices. What is needed, it is argued, is “a conceptual framework which is not solely based on power and self-interest, but which complements such by acknowledging the role of deliberation and arguing in the establishment and validation of rules and by recognizing the potential for consensus formation among parties with conflicting interests and values” (Eriksen and Fossum 2000b:16). Deliberation, according to this view, serves three purposes: First, it is a means of forging a common European identity. Second, it endows EU policies and institutions with legitimacy. Third, it enables EU citizens to define the conditions for democratic citizenship.

Great store, in other words, is set by the binding force of words. At issue is “how deliberation under conditions of freedom, equality and fair play can transform preferences and foster cooperative dispositions” (Chambers 1998:157). Two elements are central to the deliberative model: First, the notion of integration through deliberation. Arguing, it is suggested, is the glue of the integration process. “A deliberative perspective posits that co-operation comes about when the process of reason giving generates a capacity for change of viewpoints” (Eriksen and Fossum 2000a:257). Second, deliberative legitimacy, the notion that

“legitimacy in complex modern democratic societies must be thought to result from the free and unconstrained public deliberation of all about matters of common concern” (Benhabib 1994:26).

The question is whether the deliberative model overstates the positive effects of arguing. Whereas lack of realism is a common objection to deliberative democracy, there are also grounds for questioning the ideal itself. When applied to the EU, three problems become evident: EU law is illegitimate, consensus is equated with truth, and, the model conflates premises and conclusions. The discussion consists of three parts: The first part introduces the idea of integration through deliberation and its corollary constitution-making through conversation. The second part presents the elements of deliberative legitimacy. The final part argues that a model based on negotiation and compromise is more normatively compelling and more suited to the EU polity than the deliberative model.

#### **2.4.1 Integration through deliberation**

The standard version of the democratic deficit and the deliberative model face a similar challenge, namely how to forge stronger links between the EU and its citizens. Both approaches emphasise the notion of identity-formation through practice. Here, however, the similarities end. Where the standard version emphasises the need for a mobilisation of bias, the deliberative model emphasises the need for communication. Whereas the concern of the standard version is the legitimacy of EU policy-making, the deliberative model concentrates on the process of constitution-making. Constitutional politics, the argument goes, differs from “normal” politics, in that the aim of the former is to “clarify which kinds of agreements and common understandings on issues, goals and procedures that are necessary for log-rolling, bargaining, voting, and so forth to come about. As such, this perspective compels the analyst to pose ‘deeper questions’. Questions pertaining to justice and identity require deliberation to be properly dealt with” (Eriksen and Fossum 2000a 257-8). A central premise of the deliberative model is therefore that the EU “needs a constitution” (Habermas 2004 [2001]).

According to the deliberative model, constitution-making through conversation offers a procedural method for overcoming deep diversity (Chambers 1998). In heterogeneous and divided societies, the argument goes, agreement on constitutional issues cannot be reached through reference to tradition, power or instrumentality, nor is it given that a constitutional

agreement worked out among elites will be endorsed by the citizenry. Rather, the constitution must be anchored in the beliefs, attitudes and convictions of the citizens. The question, then, is what kind of constitution can be endorsed or agreed to by the various and diverse groups within the EU. How can a constitution be entered into and consented to when its citizens and member states disagree on the goods to be secured by political association?

The answer, integration through deliberation suggests, lies in a constitutional model based on conversation rather than contract. Chambers (1998:143-4) explains: “a model based on maintaining a conversation over time rather than on concluding a contract is a more realistic approach to constitution making, especially in multicultural societies as well as a better articulation of the conditions of democratic legitimacy in the late twentieth century”. A two-stage model of constitution-making is proposed: In the first stage, “participants try to understand where they are each coming from by listening and responding to each other as well as by trying to see the world from each other’s point of view” (Chambers 1998:156).<sup>30</sup> In the second stage, this understanding forms the basis of a constitutional settlement. The aim, here, is to find solutions to constitutional issues that can be endorsed by all participants in the constitutional conversation.

The task, it is argued, may prove less overwhelming than one would initially assume. “For the challenge before us”, Habermas (2004 [2001]:19) explains, “is not to *invent* anything but to *conserve* the great democratic achievements of the European nation-state, beyond its own limits”. These achievements, he continues, include both political and civil rights, and a level of social welfare, education and leisure. There is, in other words, a sense of political and social justice which transcends the nation. “During the third quarter of the past century, Eric Hobsbawm’s ‘Golden Age’, the citizens of Western Europe were fortunate enough to develop a distinctive form of life based on, but not exhausted by, a glistening material infrastructure. Today, against perceived threats from globalization, they are prepared to defend the core of a welfare state that is the backbone of a society still oriented towards social, political and cultural inclusion. This is the orientation that is capable of embedding economic arguments for an ever-closer Union into a much broader vision” (Habermas 2004 [2001]:22). The deliberative model assumes, then, that there is in Europe a sense of common purpose on which EU institutions, actors and policies can draw, a sense of purpose which does not go against, but rather builds on, the experiences of its member states.

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<sup>30</sup> Thus understood, the constitution is not merely a fixed set of rules or a principle for the regulation of common affairs, it is a self-correcting learning process, a “project that makes the founding act into an ongoing process of constitution-making that continues across generations” (Habermas 2001a:768).

Second, constitution-making through conversation will contribute to the construction of a European demos through praxis (Closa 2004). It is “a political act of foundation” that has the “power of symbolic crystallization” (Habermas 2004 [2001]:20). A European constitution, it is suggested, will help generate a political community founded on *constitutional patriotism*; A political culture that is constitutional, in the sense that it is founded on rights, and patriotic, in the sense that it generates support for, and gives meaning to, the political community (Habermas 1998). The underlying assumption is that the conditions for a common European identity are present, but that the formation and consolidation of this identity hinges on the “catalytic effect of a constitution” (Habermas 2004 [2001]:27). A constitution, in other words will not only merely the necessary impetus to the reform process, it will also spur a process of collective political self-identification and self-definition and provide authoritative answers to the challenge of democracy and legitimacy (cf. Weiler 2003; 2005; Walker 2006a).

Finally, in addition to allowing EU citizens to forge a common will, constitution-making through conversation will provide them with the instruments for realising this will. Two features of the constitutional debates are important in this respect: democratic rights and transnational discourse. The constitutional conversations allow EU citizens to specify their rights and obligations *qua* citizens, thereby permitting the transition from subject to citizen. “For the peoples of Europe to become citizens (who see themselves not only as the subjects of the law, but also as its authors), they must be equipped with political rights and other requisite resources” (Eriksen and Fossum 2004:446). The constitution specifies the rights and principles for which citizens can claim protection, as well as the procedures through which these rights and principles can be defined and redefined. In short, it endows citizens with the political, civil and social rights that are a prerequisite for popular sovereignty.

Moreover, the making of a European constitution represents “in itself a unique opportunity of transnational conversation” (Habermas 2004 [2001]:28). Not only will the adoption of a European constitution arouse a European-wide debate (Habermas 2004 [2001]), both the constitutional debates and the constitution itself create arenas for public debate on the ends and means of European integration. The constitutional conversation could therefore be a first step towards the formation of a European-wide public sphere. Such a sphere is seen as an absolute condition for deliberative democracy. “Democratic legitimacy”, the argument goes, “requires mutual contact between, on the one hand, institutionalized deliberation and decision-making within parliaments, courts and administrative bodies and, on the other, an inclusive process of informal mass communication” (Habermas 2004 [2001]:28). Accordingly, the legitimacy of EU institutions, actors and policies hinges on their ability to

reflect not only the preferences and priorities of the electorate, but also the process of justification that goes on in the public sphere (Blichner 2000). A European public sphere provides the necessary infrastructure for this communication to take place, thus giving “citizens of all Member States an equal opportunity to take part in an encompassing process of focused political communication” (Habermas 2004 [2001]:28).

Presently, it is conceded, such an infrastructure exists only within the confines of the nation state. Consequently, the main challenge for the EU is to develop a European-wide public sphere that fulfils the conditions of freedom, inclusion, equality, participation and an open agenda (Eriksen and Fossum 2004). The task, it is acknowledged, is formidable. Different developments, experiences, histories, traditions and languages are seemingly insurmountable obstacles to the development of a European public sphere (Eriksen and Fossum 2004; see also Grimm 2004). Nevertheless, proponents of integration through deliberation see signs that a common space for deliberation is emerging. Particular attention has been devoted to the convention method. The shift from the intergovernmental method of treaty reform to the more inclusive convention method has been lauded for improving “the EU’s constitutional politics by introducing a more representative body in the preparatory stages as well as deliberative procedures that enhance the search for a common ground and shared understanding in a more efficient form than traditional [intergovernmental conferences]” (Closa 2004:204). It is credited with sparking “an authentically European-wide debate among the organizations of civil society” (DeSchutter 2001:156), and portrayed as “the first clear reflection of the EU’s recognition of the need for a broad popular debate on its institutional and constitutional essentials” (Eriksen and Fossum 2002:418). Even though there is some ground left to cover before the method satisfies the criteria for deliberative legitimacy, the convention method is nevertheless seen as a sign that deliberative publics are emerging in the EU.

In sum, the case for a European constitution can be recapitulated as follows: First, it helps EU citizens establish a common ground. At issue is “how deliberation under conditions of freedom, equality, and fair play can transform preferences and foster cooperative dispositions” (Chambers 1998:157). Second, it contributes to the formation of a European political identity. Finally, it provides the citizens with the instruments for democratic participation and control. However, the benefits of the constitution are closely linked to the method through which it comes about. As summed up by Chambers (1998:161): “The heart of constitutional politics does not reside in a privileged contractual or founding moment but in sustaining conversation over time. This conversation involves a commitment to talk to each

other, respond to each other's claims and grievances, consider new options, and reevaluate old ones. Rather than a means of arriving at a settled-once-and-for-all constitution, the commitment to ongoing conversation must be the essence of the constitution". Inherent in the notion of constitution-making as conversation, then, is a commitment to deliberative legitimacy.

#### **2.4.2 Deliberative legitimacy**

Deliberative democracy is the process of articulating good reasons in public (Benhabib 1996). Through deliberation problems are detected, identified, analysed and acted upon. "The basic idea behind this model", Benhabib (1994:31) explains, "is that only those norms, i.e., general rules of action and institutional arrangements, can be said to be valid which would be agreed to by all those affected by their consequences, if such agreement were reached as a consequence of a process of deliberation". According to the deliberative model, the legitimacy of political decisions rests on three principles – reciprocity, publicity and accountability – each addressing an aspect of the reason-giving process (Gutmann and Thompson 1996).

The principle of reciprocity regulates the *kind* of reasons that should be given. It "asks us to appeal to reasons that are shared or could come to be shared by our fellow citizens" (Gutmann and Thompson 1996:14). A legitimate political decision or constitutional arrangement is, accordingly, one that represents an impartial standpoint said to be in the interest of all (Benhabib 1996). It embodies a universal and general principle and can therefore not be the expression of particular interests. As defined by Habermas (cited in Chambers 1996:140), the principle of universality demands that "*all* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests". Thus, reciprocity demands that the actors assume the role of the "generalised other", that they tone down their individual differences and emphasise their commonality as rational beings with equal rights and duties (Benhabib 1987).

By implication, reciprocity regulates not only content but also procedure. If the aim is to establish universal principles, the procedural rules must meet the requirements of universality and generality. The procedures shall guarantee open and unrestrained deliberations, in the sense that all affected parties shall have the right to participate, to offer

their opinions and to be heard (Chambers 1996). The ideal speech situation implies that the actors must refrain from any use of power, manipulation or other forms of coercion; the only accepted form of coercion is “the power of the better argument” (Elster 1992:15). Reciprocity, then, “can help citizens resolve moral conflict with fairness and, when they cannot resolve it, enables them to work together in a mode of mutual respect” (Gutmann and Thompson 1996:94).

Next, the principle of publicity specifies the forum in which reasons should be given. It tells us that the reasons “that officials and citizens give to justify political actions, and the information necessary to assess those reasons, should be public” (Gutmann and Thompson 1996:95). Though proponents of deliberative democracy vary in their defence of publicity, three justifications are recurrent (cf. Chambers 2004): First, publicity is believed to have a civilizing effect on decision-makers. Drawing on the ideas of Bentham, deliberative models embrace publicity on the grounds that it exposes injustice, corruption and other undesired practices that would otherwise go unnoticed. Second, a connection is made between publicity and rationality. Deliberation in public contributes to rationality by inviting participants to examine a matter from different angles and to critically examine their preferences and values (Benhabib 1994; Jacobsson 1997). Finally, publicity forces each participant in the discourse to focus on what constitutes good reasons for all others involved. “Nobody”, Benhabib (1994:33) reminds us, “can convince others in public of her point of view without being able to state why, what appears good, plausible, just and expedient to her can also be considered so from the standpoint of all involved”.

Finally, accountability identifies the agents to whom and by whom reasons should be given. In a deliberative forum, Gutmann and Thompson (1996) explain, each is in principle accountable to all. “Citizens and officials try to justify their decisions to all those who are bound by them and some of those who are affected by them” (Gutmann and Thompson 1996:128). Accountability, in this context, necessarily means something other than punishment or the possibility of kicking the rascals out of office. Instead, it is associated with mechanisms for ensuring free and unconstrained public deliberation on matters of common concern. Deliberative accountability, then, is contingent on the following features (Benhabib 1994): First, participation in deliberation is governed by the norms of equality and symmetry. All participants must have the same opportunities to initiate speech acts, to question, to interrogate, and to open debate. Second, all must have the right to question the agenda, and to introduce new issues. Finally, all must have the right to question the procedures and the way

in which they are applied or carried out. Accountability, in short, collapses into deliberative legitimacy.

Based on the above discussion, three conclusions can be drawn: First, deliberative models are concerned with the representation of arguments rather than the social characteristics or interests of groups and individuals. Representation, accordingly, is inclusive to the extent that all relevant arguments are represented. Hence, all need not participate in decision-making, but the outcome must represent the will of all.<sup>31</sup> Moreover, deliberative representation is consensual. Given that collective decisions are “the outcome of a procedure of free and reasoned deliberation among individuals considered as moral and political equals” (Benhabib 1994:27), proponents of deliberative democracy maintain that they are in everyone’s interest. Thus, deliberation does away with the “forceful and vivid disjunction between rationality and legitimacy, between the articulation of the common good and people’s sovereignty” (Benhabib 1994:30). It is the means by which “the will of all”, i.e. what specific individuals under concrete circumstances believe to be in their best interest, is transformed into “the general will”, i.e. a collective good that is said to be equally in the interest of all (Benhabib 1994:28). Finally, deliberative legitimacy is a property of each collective decision considered in isolation. Although insisting on the procedural aspects of deliberative democracy, legitimacy is ultimately assessed in terms of substance. By “legitimate decisions”, Eriksen and Fossum (2004:445) explain, “we mean that people accept the results because they find them right or worthy of respect”. In short, universal and consensual representation produces legitimate outcomes.

### **2.4.3 The case for negotiation and compromise**

Deliberative models are often portrayed as unrealistic. The notion of open, endless and power-free discourses is, critics point out, far removed from real-world political processes (see for example Moravcsik 2004). The standard response of deliberative democrats is that the ideal speech situation is a normative ideal which real-world democracies should strive for, not a description of actual political processes. However, they fail to recognise the extent to which

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<sup>31</sup> Political “authority (...) is legitimate if, and only if, its decisions reflect or mirror the dispositions (values, interests, norms, knowledge) of the constituent parts of the society in a way that the reason for these decisions (can be understood) to meet the uncoerced (and rational) consent of all those concerned” (Schmalz-Brunz 2005:73).



ideal itself may be problematic. When applied to the EU, the shortcomings of the deliberative model become evident: First, it compels us to conclude that EU law has no legitimacy. Second, its equation of truth with consensus is questionable. Finally, it builds its conclusions into its premises.

First, when evaluated from the vantage point of deliberative democracy, EU law is illegitimate. It is neither generated through discourses nor by popular consent, and is, therefore, manifestly in breach of the principles of deliberative legitimacy. Even the convention method, the stated aim of which is to provide an institutionalised forum for discussion, “falls well short of the ideal requirement of accountability; that all those potentially affected would be able to have their say” (Eriksen and Fossum 2002:418). The method may represent “an important break with the EU’s executive driven approach to constitution-making” (Eriksen and Fossum 2002:418), but the outcomes of the Convention on the Charter of Fundamental Rights and the Convention on the Future of Europe do not amount to a deliberative consensus. On the contrary, they reflect “the best deal that élites representing different national and European interests could negotiate in present circumstances” (Bellamy 2006b:735). They are the result of time-bound compromises rather than a timeless consensus, a status, Bellamy reminds us, that substantially weakens the claims that can be made for EU law. Weinberger (1999) takes the argument one step further, pointing out that if deliberative legitimacy is the measuring rod not only is there a legitimacy deficit in the EU, there is in fact no legitimacy at all.

The deliberative model does not offer a constructive response to the problem of illegitimacy. “Evidently”, Weinberger (1999:348) argues, “it would be inappropriate to declare as illegitimate all legal rules that were not generated in the defined process of discursive norm generation”. However, he continues, the notion that a norm is valid if it *could* result from a deliberative process does nothing to address the problem. His argument is worth quoting in full: “But to presuppose the contrary to fact that the rule could have been accepted is not a procedural justification at all, and the thesis that law could be justified in a rational discourse is a rather problematical assumption. As in all argumentations which are based on unreal discourses and supposes only that a thesis would be accepted the reasons adducted must be so strong that it seems impossible not to assent. The acceptance of legal rules depends on moral and political value standards. Here the supposition of possible acceptability is therefore an extremely weak form of argument” (Weinberger 1999:348).

Second, the model rests on a dubious consensus theory of truth. Proponents of deliberative democracy set great store by the force of the better argument, arguing that it “will

sway people to harmonize their action plans” (Eriksen and Fossum 2000b:3). Two assumptions are implicit in the argument: First, because better arguments are more likely to convince participants in discourse, the outcome of the discourse is more likely to be right, good, rational or legitimate.<sup>32</sup> Second, deliberation will produce consensus, and this consensus will, in turn, be made universal. Both assumptions are questionable. For one thing, consensus “is no proof of truth, no guarantee of a sound conception” (Weinberger 1999:340). In actual discourses valid “arguments may fail to convince, and invalid arguments may *de facto* have rather strong convincing effects” (Weinberger 1999:337). What is more, it is not clear that deliberative processes will produce consensus. Why, Weale (1999:142) asks, “should we assume that the higher the level of discussion the greater the level of consensus? It would be just as possible to argue the other way and say that discussion provides the catalyst for people to realize how much they are in disagreement”. In other words, it cannot be assumed *a priori* that deliberation is conducive to consensus. Consequently, the claim that deliberation will entail a step-by-step approximation to the truth is problematic (Weinberger 1999).

However, the consensus theory is not only “logically problematical” (Weinberger 1999:341), it may also prove detrimental in practice. Two features of the theory are particularly problematic: the predilection for justice-based claims and the notion that the actors in discourse perceive of one another as the “generalised other”. A central premise of the deliberative model is that, in deliberation, justice has priority over the common good (Chambers 1996). Given the conditions of deep diversity, the argument goes, conflicts can only be resolved through the identification of a perspective which is independent of competing visions of the good. To this effect, participants in discourse are asked to appeal to universally valid normative principles. They are, in brief, expected to argue in terms of justice. The problem is that an emphasis on justice might reduce the scope of compromise. Norman (2001:106) talks about the “uncompromising nature of justice claims”, warning that framing political issues in terms of justice raises the stakes, thereby making it more difficult for participants in the discourse to discover a common ground.

Furthermore, the belief in the “generalised other” has implications for participation. As Smismans (2004a) points out, the focus on the communicative character of decision-making tends to overshadow the question of who is actually supposed to participate. Two interrelated

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<sup>32</sup> As argued by Benhabib (1994:33), “if a large number of people see certain matters a certain way as a result of following certain kinds of rational procedures of deliberation and decision-making, then such a conclusion has a presumptive claim to being rational”. This claim rests on two assumptions (cf. Weinberger 1999): the notion that discourses are power-free, unlimited and open to all, and the view that discursive processes by their very nature improve knowledge.

factors explain why issues of participation and representation are ignored: The first is the model's insistence that a common will is discovered through deliberation. To the extent that the communicative character of decision-making enables participants to transcend individual interests, thereby ensuring that the outcome is impartial and in everyone's interest, the question of who actually participates becomes secondary. The second is the model's assertion that a common will is forged through constitutional conversations. Emphasis on democracy's constitutional elements, Mair (2005a) explains, is likely to result in a downgrading of the popular element. When the constitutional and popular elements of democracy are no longer bound together, the risk is that the latter is perceived as an impediment to democracy rather than a condition for it. Instead, the safeguarding of the constitutional element comes to be considered essential for the survival of democracy. Thus, failure to operationalise participation may be considered a by-product of the deliberative model.

Finally, the deliberative model assumes a considerable degree of social coherence. Two features of the deliberative model can be cited in favour of this claim: First, the model ignores the extent to which manifestations of cultural diversity represent impediments to deliberation. For one thing, deliberative democracy has surprisingly little to say about the communicative modalities of deliberation in culturally differentiated and multinational contexts (Kraus 2004). However, the task of creating an encompassing discursive frame for the definition of a common political identity may, Kraus reminds us, very well conflict with the task of promoting (linguistic) diversity.<sup>33</sup> Second, the model overstates the extent to which EU citizens agree on substance. Social justice is a case in point. EU citizens, Habermas explains, are "prepared to defend the core of a welfare state". However, Scharpf (2002:666) counters, European welfare states differ "not only in levels of economic development and hence in their ability to pay for social transfers and services but, even more significantly, in their normative aspirations and institutional structures". Given the differences in taken-for-granted normative assumptions, he continues, it is unlikely that EU citizens will agree on a European social model. On the contrary, "uniform European solutions would mobilize fierce opposition" (Scharpf 2002:651). In other words, rather than transcending culturally-based identities, arguments for social justice could equally well be regarded as an integral part of these identities. Both in terms of procedure and substance, then, the deliberative model assumes a greater level of social homogeneity than its proponents like to admit.

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<sup>33</sup> It is telling, therefore, that when the conditions for transnational communication are specified, proponents of deliberative democracy tend to revert to Mill's assumption that a democratic public must be a linguistically integrated public. Habermas' optimism, for instance, when assessing the likelihood that a European public sphere will emerge, Kraus explains (2004:44), is premised on the existence of a "common linguistic medium."

Thus, the argument for integration through deliberation is circular. The model conflates premises and conclusions, making a presumed European consensus both the starting-point and end-point of deliberation. It “makes an assumed European demos the pretext for attempting to bring it into existence” (Bellamy 2006b:735). The presumed effect of deliberation is not to create a European identity where there previously was none, but to help citizens identify what they already have in common. What is more, any “failure for this putative *demos* to emerge gets attributed to shortcomings in the current ground rules” (Bellamy 2006b:735). Put alternatively, if EU citizens do not succeed in identifying a common identity, this does not mean that such an identity is non-existent but rather that the citizens are not given adequate instruments for identifying it. Paradoxically, then, the deliberative vision of a non-majoritarian, non-demos based form of democratic legitimation ends up assuming a greater level of consensus and homogeneity than the model it seeks to replace.<sup>34</sup>

In fact, the justification for deliberative democracy may equally well constitute a justification for compromise. Whereas deliberative democrats reduce compromise to an expression of narrow or special interests, compromise may equally well “indicate a laudable willingness to see another’s point of view, thereby showing a decent respect for difference. If there are divergent and competing views and interests, each of which is well-founded, then, if a collective agreement is necessary, it seems both prudent and justified to seek an accommodation between them” (Bellamy and Schönlau 2004a:58). Or, as Weale (1999:183) puts it: “Having to negotiate with the interests of others and come to some compromise is one way by which people can come to see that there are points of view other than their own, and it is in just such contexts that an attitude of toleration is likely to be developed.” This is an alternative conception of reciprocity. Rather than a deliberative consensus on justice, reciprocity is understood in terms of respect for and accommodation of diverging conceptions of what is good, right or just. It is closer to Tully’s (1995) notion of constitutionalism as a “form of accommodation” of cultural diversity.<sup>35</sup>

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<sup>34</sup> Majority rule does not compel us “to pretend that there is a consensus where there is none – whether because any consensus is better than none, or because the view that strikes *some* of us as right seems so self-evidently so that we cannot imagine how anyone would hold to the contrary” (Waldron 1999:111). Rather, one of the merits of majority rule is that a minority may lose the vote without having to admit to losing the argument (Weale 1999).

<sup>35</sup> “A constitution should be seen as a form of activity, an inter-cultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity” (Tully 1995:30).

## ***2.5 From one democratic deficit to multiple legitimacy deficits***

There is a tendency in integration theory to dissociate output and input legitimacy, and to give precedence to the former. There are two explanations for this: First, growing unease with the standard version of the democratic deficit has spurred a search for alternatives to electoral accountability. Second, debates on EU legitimacy occur within a general process of rethinking and rearticulating the value and practices of democracy. Both in theory and practice, Mair (2005a [abstract]) explains, we “see an emerging notion of democracy that is being steadily stripped of its popular component – a notion of democracy without a demos.”<sup>36</sup> Attempts at redefining EU democracy, therefore, should be “conceived as an outcome, or as the consequence of a longer developmental trajectory, in which the democratic process grows and mutates, and in which the mechanisms that allow democracy to function change and adapt” (Mair 2005b:4).

Thus, it can be argued that legitimacy rather than democracy is the primary concern in debates on the democratic deficit. The claim is based on the following observation: the interest in the meaning and value of EU democracy is not matched by a corresponding interest in the instruments and conditions for popular control. On the contrary, as evidenced by the theoretical contributions discussed in this chapter, great effort is made to redefine democracy in such a way that it does not privilege mass engagement. A great effort is being made to establish interest group pluralism, technocratic and even international (indirect) legitimacy as democratic alternatives to electorally-based representation (see for example Majone 1996c; Joerges and Neyer 1997; Héritier 1999; Moravcsik 2002; Eriksen and Fossum 2004). The issue, therefore, is whether we should accept conceptualisations of democracy that divest democracy of its popular content. Is government *for* the people democratic in the absence of government *by* the people?

Proponents of the regulatory state, multi-level governance and integration through deliberation suggest that we should. All are instances of “democracy without a demos”. This is most evident in the case of the regulatory state, where citizen participation is downright discouraged. In multi-level governance and integration through deliberation the shift from

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<sup>36</sup> The “renewal of interest in democracy and its meaning at the intellectual and institutional levels is not intended to open up or reinvigorate democracy as such, but is rather intended to redefine democracy in such a way that it can cope more easily with, and adapt to, the decline of popular interest and engagement. Rather than being an answer to disengagement, the contemporary concern with renewing democracy is about coming to terms with disengagement. In other words, what we see here is a wide-ranging attempt to define democracy in a way that does not require any substantial emphasis on popular sovereignty – at the extreme, it is an attempt to redefine democracy in the absence of the demos” (Mair 2005a:4-5).

popular democracy to democracy without a demos is more subtle. Both theories appear to set great store by participation. On closer inspection, however, it becomes evident that enhanced citizen participation is not their main concern. Rather, emphasis is on stakeholder involvement or the communicative elements of collective decision-making. One can only agree with Mair's (2005a:4) assertion that "far from seeking to encourage greater citizen participation, or trying to make democracy more meaningful for the ordinary citizen, many of the discussions of institutional reforms, on the one hand, and of democracy, on the other, seem to concur in favouring options that actually discourage mass engagement".

To justify weak popular input, attention is directed at the output-side of collective decision-making. Democracy is taken to mean something other than a collection of political institutions of a certain sort. The worth of democracy, it is implied, "must refer to other widely approved goods and values (...) that are supposedly given currency by democratic institutions" (Bellamy and Castiglione 2000b:70). The challenge for EU democracy, then, is to develop democratic political institutions that attend to these goods and values. Again, this tendency is most explicit in the case of the regulatory state, whose argument is premised on the existence of a European consensus on the public good. The multi-level governance approach does not explicitly mention a European consensus, but given its insistence on output legitimacy some notion of an uncontroversial and uniquely determined common good is implicit in the model. In a similar vein, proponents of the deliberative model assume a European consensus, or that open and unrestrained deliberation will produce such a consensus. Thus, the reconceptualisations of democracy "attempt to overcome the weaknesses of democratic legitimacy within the EU by positing an EU consensus that can be arrived at by a 'non-political' democratic procedure" (Bellamy 2006b:742).

The emphasis on substance has implications for procedure. Whereas majority rule is an example of the "practice conception of rules", the regulatory state, multi-level governance and integration through deliberation are more reminiscent of the "summary conception" (cf. Rawls 1955). Majority rule implies that it is the procedure itself that provides the reason for accepting the result as legitimate. People may disagree with a political decision, but nevertheless abide by it because they recognise the legitimacy of the procedure through which it was reached. In other words, the practice is logically prior to rules. According to the summary conception of rules, on the other hand, decisions made on particular cases are logically prior to rules. Rules, in this view, "are formulated to serve as aids in reaching (...) ideally rational decisions on particular cases" (Rawls 1955:23). By implication, no distinction is made between justifying a practice and justifying actions falling under it. To paraphrase

Rawls (1955:28): According to the regulatory state, multi-level governance and integration through deliberation rules are regarded as guides whose purpose it is to indicate the ideally rational decision on the given particular case which the flawless application of the technocratic, pluralist or deliberative principle would yield.

The problem, I have argued in this chapter, is that the assumption of a European consensus is unconvincing. Notions of a European public good or consensus are at best a rational fiction, and cannot therefore be invoked in order to legitimise democracy without a demos. European integration is political. There are no objectively right or good solutions. EU decision-making, like national decision-making, is subject to reasonable disagreement and the burdens of judgement. Accordingly, there are no definite answers, no decisions that can unequivocally be classified as “good” or “bad”, “right” or “wrong”. Output legitimacy cannot alone legitimise EU institutions, actors and policies. In addition, some form of popular input is required.

At the same time, output-oriented models ought not to be dismissed altogether. Even though democracy, in the sense of government *by* the people, is a condition for legitimacy, other modes of legitimation may also play a role. As we have seen, the regulatory state, multi-level governance and integration through deliberation direct attention at specific areas of European integration – regulation, policy networks and constitution-making respectively – and discuss issues of legitimacy in respect to these specific areas. Hence, they raise the question of whether different modes of legitimation can be invoked at different times and for different issues or functions. This is the argument of Lord and Magnette (2004). The EU, in their view (2004:199), “does not rest on a single principle of legitimacy, but on several. Itself the product of a compromise between numerous foundational visions, it rests on a plurality of ideas about the rightful exercise of political power”.<sup>37</sup> The main challenge, they conclude, is therefore the management of conflicts or contradictions between the various principles of legitimacy.

The boundaries of the principles and the relationship between them must be established. When and under what circumstances do the principles come into play; when do they reinforce one another and when do they pull in opposite directions, when do they conflict and when can they be reconciled? In order to answer these questions, a combination of normative and empirical investigation is called for. Legitimacy, in short, must be studied in

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<sup>37</sup> “In large measure” they (2004:199) continue, “that also goes for national democracies which have, particularly in the last half century, incorporated into the ‘democratic idea’ a variety of notions about the legitimacy of expertise, of judicial control, and of corporate participation. In this respect, the EU appears more like a laboratory for changes that are more or less present elsewhere than as a *sui generis* system”.

context. To this effect, this study asks how issues of legitimacy are framed by political actors, i.e. the European Parliament, at two critical moments in the post-Maastricht integration process: the BSE crisis and the post-Nice constitutional debates. The first is a case of market regulation and crisis management, the latter a case of constitution-making.

The cases are interesting because they allow us to critically examine the assumptions on which claims to legitimacy are based. In the preceding chapter, I identified the empirical assumptions of the regulatory state, multi-level governance and integration through deliberation respectively. The first is premised on the possibility of distinguishing regulation from redistribution, the second on mutually distrustful actors functioning as a substitute for electoral accountability, and the third on a distinction between constitutional and “normal” politics. These empirical assumptions, I argue, also indicate the boundaries of the legitimacy claims. If the distinction between regulation and redistribution becomes blurred, if the actors are not mutually distrustful or do not apply standards of accountability to themselves, or if constitutional politics collapses into “normal” politics, then the respective legitimacy claims no longer apply.

In chapter 4, I analyse the European Parliament’s framing of the BSE crisis. The crisis has been cited in support of both the regulatory and the governance model. According to Majone (2000), the BSE crisis is evidence of a “crisis of credibility” caused by excessive politicisation and parliamentarisation. To Neyer, it illustrates both the capability for crisis management of EU governance structures (Neyer 2000) and the need to enhance the transparency of the same structures (Joerges and Neyer 1997). The European Parliament, predictably, dismisses these framings of the crisis, insisting instead that the problem lies in weak or absent political structures. This position may reflect, and most likely reflects, institutional self-interest. Nevertheless, the arguments are instructive in that they illustrate the relationship between technical support and political structure (cf. Jacobsen 1964), between administration and elected representatives. The BSE crisis, in short, tells us something about the changing roles and problems of the administrative apparatus and its relation to representative institutions.

Chapter 5 deals with the constitutional debates from the failure of Nice to the draft Constitutional Treaty. It asks how issues of constitution-making, democracy and legitimacy are framed by the members of the European Parliament. Three positions are identified: the no demos thesis, constitutional tolerance, and constitutional patriotism. The frames are different, but, I argue, two features are shared: an emphasis on output and a failure to specify the conditions for more and better citizen participation. Two explanations are suggested: First,



attention to the constitutional elements of democracy is at the detriment of the popular element (cf. Mair 2005a). Second, to the extent that the members of the European Parliament seek to define the end-state of European integration, they simultaneously fix the political agenda prior to democratic debate (cf. Castiglione 2004), thereby reducing the citizens to fictitious actors. Before entering into the case studies, however, I will present the methodological framework.



### 3. RESEARCH DESIGN

The alternatives to the standard version all claim to have identified more suitable standards of EU legitimacy. As we have seen in the preceding chapter, their claim to represent democratic alternatives to electoral accountability is questionable. The question remains, however, whether they offer more constructive descriptions of the legitimacy deficit. The issue is not merely whether the regulatory state, multi-level governance and integration through deliberation offer better solutions to the challenge of EU legitimacy, but whether they offer more accurate and hence more useful definitions of the legitimacy deficit.

As regards the question of what kind of legitimacy the EU has or can have, the jury is still out. In the late 1990s, Majone (1998) pointed out that debates on EU legitimacy were in the standard setting phase. Ten years on, the discourse still revolves around the question of standards. Arguments have been honed, and positions refined, but the question remains the same: How is the EU best described as a polity, and how can it be legitimated as a regime? The EU, it seems, is not merely an “unidentified political project” (Delors in Chambers 1999; Schmitter 2001), but also an “essentially contested project” (Bankowski and Christodoulidis 2000). At issue, in other words, is not merely how to legitimise, but also what to legitimise.

Could empirical study contribute to the debate on EU legitimacy? The issue is whether the validity of legitimacy claims can be studied empirically. There is an empirical dimension to legitimacy, namely the issue of *de facto* validity. If the law is not supported, it will be invalid in practice. What kind of political project citizens and political elites envisage or desire ought therefore to be an integral part of the discourse on EU legitimacy. However, the validity of legitimacy goes beyond “belief in legitimacy” (Schaar 1969; Pitkin 1972). Legitimacy is “a normative evaluation of a political regime: the correctness of its procedures, the justification for its decisions, and the fairness with which it treats its subjects” (Grafstein 1981:456), and, as a result, legitimacy cannot be reduced to manifestations of consent.

Nevertheless, empirical analysis might inform normative debate. For one thing, the discourse on EU legitimacy is dominated by a number of theoretical programmes. In addition to particular legitimacy claims, each programme includes an overall interpretation of European integration, as well as assumptions about actors, processes and systems (cf. Andersen 2003). Both could be the object of empirical study. Whereas the tricky question of “the nature of the beast” has received considerable attention in integration studies (Abromeit

2002),<sup>38</sup> it is more rare for assumptions about actors, processes and systems to be questioned.<sup>39</sup> When subjected to empirical testing, however, one might find that theoretical assumptions are misleading.<sup>40</sup> One of the ambitions of this study is, therefore, to examine the empirical implications of theoretical formulations. Do the assumptions of the regulatory state, multi-level governance and integration through deliberation stand up to empirical scrutiny?

Another ambition is to explore general norms in a specific context. What happens when normative principles are invoked in political debates? The theories apply general theoretical concepts to a particular empirical setting, namely European integration. But, as Keating (2001b) reminds us, it is very difficult to start from general principles and work to individual cases. Sometimes theoretical problems are resolved politically, through bargaining and compromise. At other times, theoretical models or concepts might offer pragmatic solutions, only to discover that political debate focuses on highly abstract, doctrinal, ideological or symbolic issues (cf. Keating and Bray 2006). Finally, empirical analysis could shed light on problems or tensions in theoretical arguments. Invoking general principles in a particular context might give rise to unintended consequences. Theoretical arguments might be distorted, used strategically, or simply prevent political actors from addressing – or giving them an excuse for avoiding – more problematic aspects of the issue at hand. Studying legitimacy in context may, in brief, reveal the extent to which issues or problems are under-described, wrongly described or whether there are unintended consequences of theoretical arguments.

In order to explore issues of legitimacy at an empirical level, this study asks how such issues are framed in political debates on European integration. From the universe of possible texts debating EU legitimacy, I have selected texts produced by the European Parliament as part of its management of the BSE crisis, as well as its post-Nice constitutional debates. In

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<sup>38</sup> The main problem with “nature of the beast” arguments, Andersen (2003:23) explains, is that “theoretical explanations are too general; i.e. empirical implications are consistent with, but not unique to, the empirical pattern that is explained.” Consequently, he continues, the challenge is to formulate middle range theories and concepts, which in turn can help formulate more precise questions to be pursued in empirical studies (see also Hooghe 2001).

<sup>39</sup> The problem, it should be noted, is not a lack of empirical research. A wealth of empirical studies has been conducted, mapping actors, processes and structures. It is rare, however, for these studies to be linked to wider theoretical frames. As a result, explanations tend to be too specific; “i.e. detailed empirical patterns are explained, but without reference to the wider theoretical framework” (Andersen 2003:23). Again, the key challenge for EU research is to combine overall theory with detailed empirical knowledge.

<sup>40</sup> For example, in her study of preference formation in the European Commission, Hooghe (2001) finds that the unitary actor assumption, which assumes that the Commission and its employees are united in favour of deeper integration, is misleading. The opinions of Commission officials differ along a number of dimensions, such as supranationalism versus intergovernmentalism or regulated capitalism versus market liberalism, and these diverging opinions and values result in different views on what, more precisely, makes European integration legitimate.

subsequent chapters, I examine how normative arguments are invoked and discussed by the members of the European Parliament, and what their framing can tell us about normative theory. This chapter, however, asks why it makes sense to look at the debates of the European Parliament, why the cases have been selected, and, finally, how frames can be identified and made accessible for analysis.

### ***3.1 Why study the European Parliament?***

The European Parliament is not only an important institution in the EU institutional architecture; it is also the only institution in the EU to have been directly mandated by EU citizens. What is more, the European Parliament is the institution most commonly associated with the democratic deficit (Warleigh 2003), and is habitually portrayed as both its source and its solution. Its reports, deliberations and resolutions are all in the public domain. And the European Parliament has long pressed for the democratisation and constitutionalisation of EU decision-making. Ostensibly, the European Parliament is an ideal object of study, particularly when issues of democracy and legitimacy are at stake.

However, some caveats are in order. Though its role in EU decision-making has been greatly enhanced over the years, the European Parliament is still relatively powerless compared to its national counterparts. Its legislative and budgetary powers are limited, it has virtually no say in the important areas of intergovernmental cooperation or EU agricultural policy, and, most importantly for my purposes, it has no formal role in EU constitution-making. Furthermore, its representativity is called into question. Elections to the European Parliament are typically fought as “second-order national contests” (Reif and Schmitt 1980). Not only do they revolve around national rather than European issues, they also tend to be expressions of citizens’ satisfaction with the performance of their respective governments not EU policy making. To add insult to injury, turnout is low and steadily decreasing.<sup>41</sup> Finally, Schmitt and Thomassen (2000) find, the members of the European Parliament are much more European-minded than their voters regarding issues such as the abolition of border controls and the elimination of national currencies in favour of a common European currency. It seems reasonable to assume, therefore, that the same is true for issues of EU democracy and legitimacy.

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<sup>41</sup> In 1999 the turnout was 49, 3%, compared to a 63% turnout in 1979.

So why study the European Parliament? Above all, this is an arena where issues of legitimacy and democracy are debated. The European Parliament has long taken an interest in the democratisation and constitutionalisation of the EU. In 1984 a large majority in the European Parliament adopted the Draft Treaty establishing the European Union, known as the Spinelli Report, stating among other objectives the “need to redefine the objectives of European integration, and to confer on more efficient and more democratic institutions the means of attaining them” (European Parliament 1984: preamble). It has also been a strong advocate of the convention method. Registering already in its resolution on the Treaty of Amsterdam the need to depart from the “methods of classical diplomacy” (European Parliament 1997k), it pressed for the European Convention to be set up in 2001. Throughout the work of the Convention, moreover, issues related to its deliberations were regularly debated in the European Parliament plenary.

Equally important, its interest in EU democracy and legitimacy is not restricted to the constitutional arena. As evidenced by its parliamentary inquiry into the BSE crisis, there is a constant attention to democratic and institutional reform in the European Parliament. In addition to its creative use of its powers and prerogatives, cases, such as the BSE crisis, demonstrate the European Parliament’s determination to put issues of democracy and legitimacy on the EU agenda. Thus, in choosing (the debates of) the European Parliament as the object of study, the opportunity arises to study not only how such issues are framed in a constitutional setting but also how they emerge and are dealt with in the more mundane setting of EU policy-making.

What is more, there is a rich selection of written sources. Its reports, resolutions, votes, and verbatim reports of its plenary sessions are posted on its web page, and are made available in all of the EU’s official languages. As a result, not only the end result, but also the process itself is made public. This entails that, in addition to the official view of the European Parliament as an institution, minority views are also reported. The European Parliament is not a unitary institution. Its members represent different party groups, and these groups, in turn, are composed of delegations of national parties with strong ties to party leadership at the domestic level (Hix, Noury and Roland 2005). Hence, there is always the potential for disagreement: between various national positions, ideological conflicts, and conflicts over more or less integration. Furthermore, cleavages within the European Parliament are non-overlapping, resulting in a wealth of possible coalitions and salient dimensions of conflict. Given the diversity of the European Parliament, with members of different national, cultural, social and economic backgrounds, it is reasonable to assume that many, if not all, arguments

will be present in the debates. Even though the representativity of the European Parliament can be called into question, the expectation is that its reports, debates, votes and resolutions will nevertheless reflect the articulation of positions on several sides of the debate.

But would not the position of the European Parliament merely be a reflection of its institutional self-interest? That the European Parliament is motivated by, and acts on, institutional self-interest cannot be denied. On repeated occasions, it has demonstrated its creative talent in furthering its own interests. The resignation of the Santer Commission and the “Buttiglione affair” both represent instances where the European Parliament has used and interpreted its powers ingeniously in order to further increase its powers and prerogatives. As noted by Burns (2002:69), the European Parliament has frequently “taken initiative to establish informal practices that enhances its influence, many of which have subsequently been given formal recognition in the Treaty.” There is, consequently, no reason to assume that it has acted devoid of self-interest in the case of BSE or the Constitutional Treaty.

Regardless of institutional self-interest, studying the debates of the European Parliament makes good sense. For one thing, the fact that the debates are in the public domain should compel the participants to argue in terms of democracy and representation. As the legitimacy of the European Parliament is closely linked to its being democratic and representative of EU citizens, it cannot motivate its actions by self-interest alone but has to justify its propositions with reference to their contributions to EU democracy. Second, as discussed above, the European Parliament is not a unitary actor. For every argument or proposition there is likely to be at least one counter-argument or counter-proposition. Finally, the European Parliament does not operate in isolation from the other participants in the discourse on EU democracy. It cannot, therefore, discount influential frames simply because they go against its institutional self-interest. As Kohler-Koch (2000) explains, a proposal which has gained a high profile in the public debate cannot easily be ignored even by those who would rather not take notice of it. In other words, even though it can reasonably be assumed that the European Parliament, as an institution, is motivated by self-interest, it will have to respond to those of its members expressing minority views, as well as the proposals of other actors in the political, and possibly also in the academic, debates.

All in all, the debates of the European Parliament provide a good basis for examining issues of legitimacy at an empirical level. The European Parliament might not be a disinterested actor or representative of public opinion. Nevertheless, its framing of issues of democracy and legitimacy is interesting because it represents an arena where these issues are detected, identified, discussed and possibly resolved. In order for its contribution to be

relevant, moreover, the European Parliament has to respond to the proposals of other actors, on the one hand, and theoretical contributions to the debate, on the other. Therefore, even though the conclusions and arguments of the European Parliament are limited to a particular framing of EU democracy, alternative arguments and opinions will, at least indirectly or implicitly, be present in the debates.

Given the ambitions of the study, the European Parliament's deliberations are analysed with two questions in mind: First, do the assumptions of the regulatory state, multi-level governance and integration through deliberation hold? Of course, the design of the study means that the assumptions cannot be tested directly. It is the European Parliament's interpretations of events, and not the events themselves, that are the object of study. The exercise is nevertheless interesting. Not only is the European Parliament an important actor, it is also a knowledgeable actor. It is not unreasonable to assume, therefore, that its analyses carry some weight. Even though its interpretations are not empirical tests as such, they might provide new and interesting insight into the cases. Second, how are normative arguments affected by political use? Here, the European Parliament is a more obvious object of study. On the one hand, its legitimacy hinges on the wider legitimacy of EU actors and processes. On the other hand, the discourse on legitimacy provides it with an opportunity to strengthen its position in EU decision-making. As a result, its debates are a good starting point when analysing normative arguments in a political context.

### ***3.2 The cases***

Next, the question is how the cases can contribute to our understanding of EU legitimacy. The constitutional debates appear to be an obvious choice. The Constitutional Treaty was a first (Norman 2003): both the number of participants and the openness of its procedures were unprecedented. It has been the object of intense political and academic interests. EU scholars have analysed the motives for setting up a convention, the process, the text itself, why it failed, et cetera. And EU political leaders have attempted to salvage a lion's share of the text, while downplaying its constitutional aspect. The question, therefore, is not why the constitutional debates are important, but what could possibly be the added value of having one more go at them. As concerns the BSE crisis, the opposite is true. Although most would agree that it was a major crisis for the EU, and one that directly and visibly affected the everyday



life of ordinary citizens, a connection with the concurrent debate on democracy and legitimacy is only exceptionally made. And, when it is, the crisis is an illustration of more general theoretical points rather than the object of study. To the extent that the crisis has been the object of more thorough analysis, the main interest has been its effect on risk perception and risk regulation. In the case of BSE, then, the question is why and how it can enhance our understanding of EU democracy and legitimacy.

### **3.2.1 The BSE crisis**

On 20 March 1996, the BSE crisis hit the EU like a bombshell. The British government had just announced that Bovine Spongiform Encephalopathy (BSE), a neurological disease affecting cattle, could possibly explain the occurrence of a new version of Creutzfeldt-Jakob disease (CJD), a fatal neurological disease affecting humans, in England. Beef consumption plummeted all over Europe. European consumers were upset by the thought that something as mundane as beef-eating could be lethal, and appalled by the way beef was being produced (Vos 2000). However, in contrast to other food scares in the 1990s, the crisis affected not only consumer behaviour but also had a profound effect on EU politics and policy.

The crisis affected the relationship between the British government and the other member states, between EU institutions and the member states, as well as between the EU institutions themselves. In response to the crisis, the Commission put an all-encompassing embargo on British beef produce and living animals. The embargo was the start of an open conflict between the British government, on the one hand, and the Commission and other member states, on the other. The first insisting that the ban on beef export was an exaggerated and disproportionate response, and the others arguing that protective measures of this nature were urgently required. In July 1999, when the Commission decided to lift the ban, France, Austria and Germany protested but were unable to reverse the Commission's decision. Finally, the crisis affected the relationship between the European Parliament and the Commission relationship. In 1997, the European Parliament, in response to the report from its temporary committee investigating alleged contraventions and maladministrations in the management of BSE, passed a conditional censure of the Commission, insisting that it adopt a number of measures to improve EU food regulation.

Thus, the European Parliament put pressure on the Commission to reform EU food policy. In response to the European Parliament's demands, the Commission launched a comprehensive reform programme, the aim of which was to establish a genuine EU food policy emphasising consumer health and safety. The BSE crisis, the Commission (1997) admitted, "has highlighted the need for a European food policy centred on the requirement that only foodstuffs which are safe, wholesome and fit for consumption be placed on the market. Health protection in relation with consumption of foodstuffs is to be an absolute priority at any time and not only something to be looked into in emergency situations". In addition to the establishment of an EU food policy, the reform programme consisted in far-reaching reforms of the administrative apparatus, including reform of comitology, of the use of scientific information, and, finally, the setting up of a new regulatory agency, the European Food Safety Agency. In short, the crisis had a profound effect on the content and instruments of EU food policy.

This study asks how issues of democracy and legitimacy were framed in the European Parliament's inquiry. How did it back up its criticisms and proposals for reform, and what understanding of democracy and legitimacy are inherent in their proposals? The parliamentary inquiry into the BSE crisis spanned three years and resulted in the setting-up of two temporary committees of inquiry, three reports, five resolutions, and a conditional censure. The wheels were set in motion by the Commission's inability to satisfactorily account for its information policy on BSE. And, after a debate, vote and resolution on the information policy (European Parliament 1996a; 1996b; 1996c), the members of the European Parliament decided to pursue the matter further and set up a temporary committee of inquiry (European Parliament 1996d; 1996e). After an extension of its term of office (European Parliament 1996f), the Temporary Committee of Inquiry into BSE presented its report on 7 February 1997 (European Parliament 1997a; 1997b; 1997c). Its findings were debated in the European Parliament plenary later that month (European Parliament 1997d; 1997e), and the subsequent European Parliament resolution (European Parliament 1997f) contained severe criticisms of the Commission, the Council and the UK government. That same year, the European Parliament set up a temporary committee to follow-up the recommendations of the first committee, and on 14 November 1997 the committee submitted its report (European Parliament 1997g). Again, the report was debated in the European Parliament plenary (European Parliament 1997h; 1997i), and the ensuing resolution instructed the European Parliament's standing committees to monitor the Commission's implementation of the parliamentary inquiry's recommendations (European Parliament 1997j). The report, debate and resolution on the Commission's second bi-annual

follow-up report marks the end of the parliamentary inquiry (European Parliament 1999a; 1999b; 1999c).

There are a number of reasons why the European Parliament's inquiry into BSE is an interesting case study, most obviously, because it was a crisis. As such, it invited concerned parties to critically examine the events leading up to the crisis, as well as the processes and structures that might have contributed to it. The BSE crisis, in other words, spurred a principled debate on EU food regulation, in particular, and EU decision-making, more generally. Secondly, the BSE crisis concerned a particular type of policy, i.e. regulation. Of the theories discussed in chapter 2, the two approaches most concerned with regulation – the regulatory state and multi-level governance – also represent the most radical departure from electoral accountability. The regulatory state and multi-level governance might therefore not be the most appealing approaches for elected representatives, such as the members of the European Parliament. In choosing a case which explicitly touches on issues of regulation, the hope is that the regulatory state and multi-level governance will nevertheless be brought up for discussion. Finally, it is important that BSE was a crisis of EU policy-making rather than constitution-making. This allows us, on the one hand, to establish the extent to which issues of legitimacy penetrate the cut and thrust of everyday politics, and, on the other, to examine whether issues of legitimacy are treated differently in a policy-making context as opposed to an explicitly constitutional context.

### **3.2.2 The constitutional debates**

The post-Nice constitutional debates are but the latest in a succession of constitutional debates. Since the early 1990s, treaty reform has been a more or less permanent feature on the EU agenda from the Maastricht Treaty, via Amsterdam and Nice, to the signing of the Constitutional Treaty in 2004. In addition to the long-awaited institutional reforms, two concerns were central to the debates (European Council 2001): the need to bring the EU closer to its citizens and the introduction of a new method of treaty reform. Based on the experience of drawing up the Charter of Fundamental Rights, and due to growing pressure from the Commission and the European Parliament, the European Council decided that the next intergovernmental conference should be preceded by a Convention for the Future of Europe. Convened by the Laeken European Council, the Convention consisted of

representatives of national governments, national parliaments, the European Parliament, and the Commission, with representatives of the Economic and Social Committee, as well as the Committee of the Regions and the European ombudsman, invited as observers. It soon became clear that the Convention interpreted its mandate in constitutional terms, and after well over a year of deliberations, it presented its draft Constitutional Treaty to the Tessaaloniki European Council on 20 June 2003. On 29 October 2004, the Constitutional Treaty was finally signed in Rome. After it was rejected in the French and Dutch referendums, the EU institutions called for a “period of reflection” (European Council 2005; Fontelles, Juncker and Barroso 2005), at the end of which, the member states agreed on the convening of an intergovernmental conference in order to draw up a Reform Treaty amending the existing treaties (European Council 2007).<sup>42</sup>

When deciding to convene the Convention on the Future of Europe, the Laeken European Council (2001) stressed the need for the EU to “become more democratic”. The debates, of course, were not restricted to democratisation. The process was initiated for a number of reasons, of which democracy was but one. Even so, the need for democratisation was accentuated. According to the Laeken European Council, the EU derives its legitimacy from the democratic values it projects, and, as argued by one member of the European Parliament: “the fact that the European institutions are democratic does not just strengthen our Europe of principles; with the prospect of enlargement, it is the sine qua non for its very existence. If the gap between the institutions and our citizens get any wider, the time will come, sooner rather than later, when they turn their backs on us” (European Parliament 2002b: Tsatsos, PSE, Greece). The idea is, in other words, that, the EU must be recognised as democratic if it is to be recognised as legitimate. One issue is, therefore, to what extent the debates on democracy actually address the challenge of democratisation.

Consequently, and in contrast to the BSE case, the post-Nice constitutional debates are invariably analysed from the vantage point of EU legitimacy. Some have examined the nature of the debate (Eriksen, Fossum and Menéndez 2002a; Bellamy and Schönlaui 2004a; Magnette 2004). Was the organisation and execution of the constitutional process conducive to legitimacy? Others have focused on its results (Grimm 2004). Did it result in a treaty or a constitution, and what kind of legitimacy does it bestow upon EU institutions, actors and policies? I ask how issues of democracy were framed by the members of the European

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<sup>42</sup> On 19 October 2007, the Reform Treaty was agreed in Lisbon. If it is ratified, the Lisbon Treaty will come into force in December 2009.

Parliament. How did they reason about the possibility and institutionalisation of EU democracy, and what does their use of legitimacy claims tell us about normative theory?

In order to explore these questions, I examine the contributions of the European Parliament to the post-Nice constitutional debates from its resolution on the Treaty of Nice in May 2001 to its evaluation of the draft Constitutional Treaty in September 2003. In this period a series of reports, debates, votes and resolutions were produced on a wide range of issues: the Treaty of Nice (European Parliament 2001a; 2001b; 2001c; 2001d), Council reform (European Parliament 2001e; 2001f; 2001g; 2001h), the Laeken European Council and the Commission White Paper on Governance (European Parliament 2001i; 2001j; 2001k; 2001l; 2001m; 2001n), relations between the European Parliament and national parliaments (European Parliament 2002a; 2002b; 2002c; 2002d), the legal personality of the EU (European Parliament 2002e; 2002f; 2002g; 2002h), division of competences between the EU and the member states (European Parliament 2002i; 2002j; 2002k; 2002l), typology and hierarchy of acts (European Parliament 2002m; 2002n; 2002o; 2002p), the Charter of Fundamental Rights (European Parliament 2002q; 2002r; 2002s; 2002t), the role of regional and local authorities (European Parliament 2003a; 2003b; 2003c; 2003d), and the draft Constitutional Treaty (European Parliament 2003e; 2003f; 2003g; 2003h).

The post-Nice constitutional process has been the most important arena for the discussion of EU legitimacy in recent years. It is also the EU's most ambitious attempt at treaty reform. It is therefore interesting in itself. At the same time, the constitutional case is very different from the BSE case, making a comparison between the two interesting. Although issues of legitimacy are raised in both cases, it can reasonably be assumed that the constitutional setting will affect the nature of the debate. In academic and political debates alike, the constitution has been embraced both as a public blueprint for a just society, and as a social technology through which that blueprint might be realised (Walker 2006b:18). From this, two consequences derive: First, it invites the participants to develop a comprehensive view of EU legitimacy, and to examine legitimacy from different angles. Second, it asks participants not simply to argue in terms of a particular view of legitimacy, but also to show us how general principles can be translated into viable institutional structures and processes. Thus, compared to the BSE crisis, the constitutional debates should entail a wider scope, as well as a more thorough evaluation of possible solutions and their institutional and political implications. In sum, the constitutional process is interesting in its own right. The combination of the two cases, however, should provide an even fuller and richer picture of contemporary political debate on EU legitimacy.

### ***3.3 Identifying and analysing frames***

The empirical part of the study focuses on the use of normative arguments in a political setting. Two questions guide analysis, and thereby also research design: When general and abstract principles are invoked in political debates, do the theories' empirical assumptions hold? Second, what effect does political use have on normative arguments? In order to investigate these issues, a three-step approach is pursued: First, the question is how the legitimacy deficit is constructed. How are issues of legitimacy framed by the members of the European Parliament? Second, normative theory guides the selection and organisation of the data. The standard version of the democratic deficit, the regulatory state, multi-level governance and integration through deliberation, in other words, structures the analysis. Finally, normative theory is evaluated in light of the case studies.

Identifying the participants' frames is the first step. Framing is a way of sorting information about complex problems. It is a "way of selecting, organizing, interpreting, and making sense of a complex reality to provide guideposts for knowing, analysing, persuading and acting. A frame is a perspective from which an amorphous, ill-defined, problematic situation can be made sense of and acted on" (Rein and Schön 1993:146). Frames integrate facts, values, theories and interests, define what is problematic about a situation, and suggest available and appropriate courses of action (Rein and Schön 1993). They can be subjective or inter-subjective. Yet, they are rarely made explicit or analysed by the actors themselves. The question, therefore, is how frames can be rendered visible and, thus, accessible for analysis.

The task is to detect argumentative structures in text.<sup>43</sup> This raises the issue of what, more precisely, constitutes an argument. Simply put, an argument counts in favour of something by giving a reason for it (Scanlon 1998).<sup>44</sup> Toulmin (2003) describes a substantive

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<sup>43</sup> Framing is commonly associated with discourse analysis. The term *discourse* is used in various ways in the literature, ranging from dialogue and discussion to social practice (Bacchi 1999; Titscher et al. 2000). Two major schools can be distinguished: the Habermasian approach and the Foucaultian approach. To Habermas, a discourse is the process through which validity criteria are discovered, discussed, questioned, and eventually agreed upon. The emphasis is on the continuity of discourse, the ideal speech situation and moral learning permitting the participants to discover valid arguments and hence reach a consensus. Foucault, in contrast, sees the discourse as a rule-governed behaviour leading to a chain or similarly interrelated system of statements. His emphasis is on discontinuity, the maintenance and change of the underlying power structures which determine what we say (Titscher et al. 2000). For my purposes, however, a discourse is merely the process of recognition through concepts and thinking in concepts (Eisler in Titscher et al. 2000:25). It is text in context, and, hence, evidence which can be described empirically (van Dijk 1977). Discourse analysis, accordingly, is simply analysis aimed at detecting and analysing argumentative structures in text (Hajer 1993).

<sup>44</sup> "I will take the idea of a reason as primitive. Any attempt to explain what it is to be a reason for something seems to me to lead back to the same idea: a consideration which counts in favor of it. "Counts in favor how?"

argument as a move from data to a claim. According to his layout of arguments, an argument consists of the following components: the claim (C) or conclusion whose merits are sought established; data (D) are the facts appealed to as a foundation for the claim; warrants (W) are the rules, principles, inference-licences and the like which demonstrate that the step from data to conclusion is legitimate; modal qualifies (Q) indicating the strength of a warrant; rebuttal (R) indicating the exceptional conditions which might be capable of defeating or rebutting the warranted conclusion; and, finally backing (B) which establishes the general conditions which give authority to the warrants. Taken together, these components should enhance our understanding of the structure and content of arguments.

Can the Toulmin model enhance our understanding of ill-structured or ill-defined problems,<sup>45</sup> such as EU democracy? The model helps isolate lines of argument, but provides little information concerning the problem-solving process itself. However, Voss (2005) finds, the contents of the problem-solving structure constitute an argument. “Specifically, the solver is faced with a question or problem and the representation phase essentially involves an analysis aimed at providing a statement of the cause(s) of that problem, with problem history often being part of this analysis. A solution is then proposed (...) and the remainder of the solution phase consists of justification of that solution. Thus the solution is the claim, the datum consists of the causal factors, and the solution development constitutes backing” (Voss 2005:328).

This notion of the problem-solving structure comes close to the idea of framing as the process of discriminating between competing frames. As explained by Kohler-Koch (2000:515): “Framing is seen as a sequential process; a first situational cue may already entice actors to focus on one particular ‘salient’ definition of what they are up to. This initial frame

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one might ask. “By giving a reason for it” seems to be the only answer. So I will propose the idea of a reason” (Scanlon 1998:17).

<sup>45</sup> Drawing on the work of Simon (1973), Voss (2005) lists 7 features of ill-structured problems: 1. The goal is vaguely stated, and needs analysis and refinement in order to make the particular issue tractable. 2. The constraints of the problem typically are not in the problem statement. 3. It may be approached in different ways, according to the problem-solver’s knowledge, beliefs and attitudes. 4. Solutions are typically not right or wrong, and not valid or invalid; rather, they are regarded in terms of plausibility or acceptability, and the plausibility or acceptability of any solution will, in turn, depend on the knowledge and belief of those evaluating it. 5. The solution process is rhetorical in nature in that it is usually justified by verbal argument that indicates why the solution will work as well as providing a rebuttal by attacking particular constraints or barriers to the solution. 6. Solutions are not “final” in the sense that, although the solver may identify a solution, this solution would have to be implemented and then evaluated in order for us to know that it would in fact work. 7. The size of the database required for most ill-structured problems and the difficulties in accessing it make simulation difficult. The ill-structured problem can be compared to Kohler-Koch’s (2000) representation of the EU as an ill-defined problematic situation characterised by: 1. A situation that is open to competing interpretations of what decision-making is about. 2. The ambiguity as to the present and future nature of the EU. 3. The inadequacy of existing concepts and analytical models. 4. The realisation that systematic processing of information and deliberation will not reduce the ambiguities in the definition of the situation.

helps to interpret an undetermined complex reality and by doing so channels the selection of subsequent frames that may orient the choice for action". Two features allow for a comparison of the models: First, there is an overlap in concepts. Kohler-Koch's situational cues largely correspond to Voss' data, and the 'salient' definition to the claim. Second, the models recognise the complex structure of problem-solving whereby the claim of one argument can serve as the datum of another, the backing of a given argument can itself be an argument, and, finally, that the datum and claim are held together by a warrant (Voss 2005). Hence, the models attach importance to the first situational cue. It will, the argument goes, "trigger the selection process of 'salient frames'" (Kohler-Koch 2000:515), thus producing a chain of arguments and argument continuity.

The challenge is to identify the claims, data and warrants which structure the participants' framing of the problem. In the case of the BSE crisis, the claims are the institutional reforms regarded as necessary to avoid similar crisis in future. Descriptions of events make up the data. How, according to the members of the European Parliament, did actors and structures contribute to the crisis? The representatives' arguments for why proposed institutional reforms will prevent similar crisis in future constitute backing. Thus, categorising the claims, data and backing allows us to identify the various interpretations of the nature of the crisis. Is the BSE crisis depicted as a crisis of regulation, of member state compliance, of confidence, or as a different crisis altogether? In the case of the constitutional debates, the claims pertain to the type of constitutional architecture that European integration warrants, the data are the representatives' characterisations of the legitimacy deficit, and the backing tells us how a particular constitutional approach will contribute to legitimacy. In this case, the claims, data and backing reveal the representatives' understandings of the "nature of the beast" and the nature of EU legitimacy and democracy.

Next, the discussion is structured according to the concepts and assumptions of normative theory. Of all the possible frames that can be detected in the debates of the European Parliament, only a certain kind of frames is relevant for the study. The frames that are included are those which might illuminate theory. This is not to say that only frames which reproduce the arguments of normative theory are presented and analysed. Equally important are the frames that question or problematise normative theory. The first task, therefore, is to discern the normative concepts invoked in the course of the debates. A number of concepts are suggested in the literature: federalism, parliamentarism, consociationalism, corporatism, pluralism, technocracy, deliberation, majority rule, responsiveness, efficiency, representation, participation, accountability, transparency, consensus, conflict, the public



interest, and so on. The question is whether these concepts are recognisable in the debates of the European Parliament.

Second, the manner in which the representatives construct the relationship between the concepts is examined. The literature on EU legitimacy provides suggestions as to how the concepts are related. The standard version of the democratic deficit, for instance, tells us that legitimacy stems from a combination of majority rule, citizen representation and control, and accountability in the form of the parliamentary chain of government. The notion of deliberation through integration, in contrast, informs us that legitimacy results from deliberative procedures, a representative system whereby the European Parliament, as a strong public, deliberates on behalf of EU citizens, as well as a consensus on fundamental rights and constitutional essentials. In a similar vein, the regulatory model and the multi-level governance approach describe their take on the relationship between various concepts of legitimacy. Do the members of the European Parliament make similar assumptions about the relationship between the concepts, or do they construct the relationship in a different manner? At this stage, a second selection is made. Only frames that accept the theoretical accounts of the relationship between normative concepts, criticise how this relationship is constructed, or further develop it are included in the study.

The third and final step is to compare the representatives' frames with the theoretical frames. Do the members of the European Parliament accept the claims and assumptions of the standard version, the regulatory state, multi-level governance and integration through deliberation? If they do, what part of the models do they find particularly appealing? If they do not, what part of the models do they reject? Again the distinction between claim, datum and warrant is helpful. Take the regulatory state, for instance. Majone makes the claim that EU regulation ought to be depoliticised, that is, insulated from the influence of elected officials. This claim is based on the observation that the EU is a "glorified regulatory agency" (cf. Føllesdal and Hix 2006), whose task it is to produce outcomes that are Pareto-efficient and consistent with the mandate bestowed upon it by the member states. In order to back up his claim, Majone introduces the notion of credible commitments, and explains how delegation to independent experts will enhance the credibility and consistency of EU regulatory policies. The question, then, is what parts of this argument the members of the European Parliament agree or disagree with, and why.

Ultimately, the aim of this exercise is to evaluate models of EU legitimacy. This begs the question of whether the validity of normative claims can be verified empirically. The simple answer is that they cannot. The fact that political actors subscribe to particular

legitimacy claims is no proof of normative validity. At best, their use of legitimacy is an indication of the norms' *de facto* validity in the society in question. Yet, the ambition of this study is not to map the actors' beliefs in legitimacy, but to assess theoretical models. What is more, the models are assessed on the basis of empirical work. How is this possible? The first answer is that the models are more than a set of normative claims. Included in the models are assumptions about the nature of European integration, as well as its actors and processes. Comparing the European Parliament's data and backing to the data and backing of the theoretical models should allow for an evaluation of the models' empirical assumptions. The second answer is that context matters. When applied in a particular context, normative arguments may appear more or less appealing, or more or less suitable. The models of legitimacy assume that legitimacy is used in a particular way. In practice, however, legitimacy claims may be used differently or with different implications. Consequently, although the normative validity of the claims cannot be established empirically, empirical analysis may nevertheless tell us whether a given standard of legitimacy is conducive to good reasoning in a particular context. Studying legitimacy at an empirical level might therefore contribute to the further development of theories of EU legitimacy.

The remainder of the thesis deals with these issues. Chapters 4 and 5 examine the uses of legitimacy at an empirical level, starting with the BSE crisis. The overall question is how the crisis is defined by the members of the European Parliament, and what the definitions tell us about theory. The discussion is structured by three of the theoretical frames: the regulatory state, multi-level governance and the standard version of the democratic deficit. Chapter 5 deals with the constitutional debates. Three positions are identified and analysed: the no demos thesis, constitutional tolerance and constitutional patriotism. In addition, the debates are examined against the backdrop of deliberative democracy. Hence, two questions guide analysis: First, how are notions of democracy translated into institutional structures and processes, and, second, to what extent is the distinction between constitutional and normal politics upheld in the debates? Finally, chapter 6 sums up the findings. The members of the European Parliament, I argue, are prone to use the language of democracy to dress up proposals whose democratic credentials are at best uncertain. Whereas the representatives might be guided by strategic motives, part of the blame also lies with the theoretical models of EU legitimacy. As argued in chapter 2, these models have sought to develop notions of democracy that do not include popular control and electoral accountability. As a result, they do not provide the necessary corrective to the European Parliament's use of democracy.

## 4. THE BSE CRISIS

The BSE crisis has been described as a “seminal event in the history of European integration” (Chambers 1999:96). As is the case for all events of some importance, however, there are different opinions as to what, more precisely, makes it so. Chambers emphasises its institutional aspects, how the European Parliament used the crisis to gain influence over EU agricultural policy and to strengthen its position vis-à-vis the Commission. Because of its impact on the institutional balance, he suggests, the BSE crisis is comparable to the French “empty chair” policy of the late 1960s. Others discuss the effects of the crisis on EU food regulation and, in particular, the system of comitology (see for example Hellebø 1999; Vincent 2004). In general, however, EU scholars are less concerned with the effects of the crisis and more with what it tells us about the nature and function of European integration. The crisis, accordingly, was seminal because it revealed the “nature of the beast”.

Thus, the debate on the BSE crisis is related to the wider debate on EU democracy and legitimacy. The arguments are well known. According to Majone (2000), the crisis exposed the fragility of the EU regulatory regime. It is, in other words, indicative of a more general credibility crisis of European regulation. It demonstrated that the “present system – with its heavy concentration on rule making and weak control of the enforcement process – is no longer able to cope with the regulatory challenges of globalized markets” (Majone 2002:386). The problem, Majone contends, is that the lack of control allows member states to implement EU regulations selectively. The solution, he concludes, may be found in more far-reaching delegation to networks of independent national and European regulators.

When viewed from the governance perspective, the BSE crisis resulted from capture. Lack of transparency in EU governance, particularly in comitology, allowed national and sectoral interests to manipulate decision-making. The secrecy and opacity of governance structures reduced the effectiveness not only of regulation but also of governance (cf. Joerges and Neyer 1997; Dehousse 1999). Notwithstanding, proponents of governance maintain that processes of governance allow for effective and efficient implementation of EU policies. EU governance, the argument goes, is a “deliberative mode of interaction that rewards an orientation towards collective problem-solving and is hostile to self-centred power play” (Neyer 2004:35). Because it relies on participation, publicity and legal procedures, it is capable of transforming strategic bargaining into deliberative problem-solving (Joerges and

Neyer 1997; Neyer 2004). According to this perspective, then, the BSE crisis revealed weaknesses in the present system of governance, but not any inherent problems with governance itself.

This chapter argues that the BSE crisis was seminal because it gave expression to a shift in EU problem structure. Unquestionably, the quality of regulation and the transparency of decision-making procedures are of utmost importance. Most significant, however, was the symbolic dimension of the BSE crisis. It signalled a shift from the market to the consumer, and, in the last instance, the citizen. The internal market had been set up with the aim of securing the free flow of goods between the member states, and its institutional and regulative structure reflected this priority. As a result, EU institutions, actors and policies were unable to respond to changed perceptions of the nature, function and legitimacy of European integration. In short, the BSE crisis not only produced a shift in problem structure, it was also the product of such a shift.

According to this interpretation, defining BSE as a legitimacy crisis served several functions (cf. Jacobsen 1964). First and foremost, it declared a state of emergency. The internal market in foodstuffs could not function properly, nor would citizens' trust be restored before the crisis had been effectively dealt with. Second, it lent legitimacy to reform proposals. Whether it pertained specifically to EU food policy or to the institutional architecture more generally, the extent to which a proposal could be construed as a response to the BSE crisis would affect its chances of success. Third, it provided an opportunity for the EU to demonstrate its willingness to address the concerns of its citizens, thus hopefully breaking down anti-EU sentiments among its citizenry. Fourth, it provided an opportunity to voice demands for greater citizen influence and a more prominent role for their representatives. The underlying logic of this crisis definition is, in other words, that to the extent that the EU and its internal market could be blamed for the crisis, it is evident that it should also intervene to correct it. The question is what kind of legitimacy the EU has or needs for this kind of political intervention.

The argument is developed in three steps: First, the regulatory account of the BSE crisis is presented and discussed. According to Majone, the crisis resulted from the member states' non-implementation of EU food regulation, and the mismatch between the EU's regulatory tasks and its administrative resources. The European Parliament, I find, agrees that non-compliance was a major factor contributing to the crisis, but, in contrast to Majone, its members maintain that regulation is political and therefore must be subject to democratic control. Second, the governance approach is examined. Whereas the members of the

European Parliament agree that there is a political dimension to administration, and that more transparency is called for, they do not accept that horizontal mechanisms of accountability can substitute democratic control. Finally, the crisis is discussed from the vantage point of parliamentary democracy. More than anything, the members of the European Parliament agree, the BSE crisis was the product of non-democratic decision-making. EU citizens, they argued, must be given a voice, and this means more powers to the European Parliament.

#### ***4.1 The parliamentary inquiry***

It seems reasonable to date the crisis to the announcement of 20 March 1996 and its immediate aftermath. On that date, the British authorities admitted that, contrary to prior assurances that BSE posed no risk to humans, there was a potential link between BSE and Creutzfeldt-Jakob disease (CJD). The result of the announcement was a political and economic crisis with repercussions far beyond the British borders. Reactions to the announcement were prompt. As a response to plummeting beef consumption, several private firms and countries put an embargo on British beef. And, within a week, the Commission had introduced an all-encompassing ban on British beef produce and living animals. The ban resulted in open conflict between the British government and the other member states, with the British government threatening to boycott EU decision-making.<sup>46</sup> The “beef war” ended at the intergovernmental conference in Florence in late May that same year, where agreement was reached on measures to fight the BSE epidemic. This marked the end of the British policy of obstruction, and could also be interpreted as ending the crisis.

Most, however, associate the crisis with its prelude and postlude. Two questions sum up the debate: What had been done to prevent the crisis? What ought to be its consequences? Three inquiries into BSE have sought to answer these questions: The French parliamentary inquiry into BSE (see Rapport d'information, no. 3291 Assemblée Nationale 1997), the European Parliament inquiry into alleged contraventions and maladministration in the implementation of Community law in relation to BSE (see European Parliament 1997a), and

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<sup>46</sup> “Without progress towards lifting the ban”, John Major stated in the House of Commons on 21 May 1996, “we cannot be expected to co-operate normally on other Community business (...) the European Union operates through good will. If we do not benefit from good will of the partners, clearly we cannot reciprocate. Progress will not be possible in the intergovernmental conference or elsewhere until we have agreement on lifting the ban on beef derivatives and a clear framework in place leading to lifting of the wider ban” (Agence France 25.05.1996).

the inquiry into BSE and variant CJD in the United Kingdom (see BSE Inquiry 2000). Though their assessments of the crisis and the conclusions they draw from it differ, these inquiries query the causes of BSE – the outbreak and spread of the disease, how and whether the actions or inactions of the relevant authorities contributed to the crisis – and ask what ought to be done to prevent similar crises from happening in future.

This study examines the inquiry of the European Parliament. In June 1996, the European Parliament set up a temporary Committee of Inquiry into BSE whose mandate was to “investigate alleged contraventions or maladministration in the implementation of Community law in relation to BSE” (European Parliament 1996e). The committee examined witnesses: five members of the Commission, two former Commissioners for agriculture, the President-in-Office of the Council, the Permanent Secretary from the British Ministry of Agriculture,<sup>47</sup> as well as officials from EU institutions and national administrations. After six months and 16 sessions of evidence, the committee presented its report on 7 February 1997. Its findings were debated in the European Parliament plenary that same month.

Its conclusions were damning. The European Parliament did not hesitate to pass judgement on the UK government, the Commission and the Council for what it considered to be instances of grave maladministration. The UK government was not only criticised for its failure to prevent the spread of the epidemic and misinforming about the disease, it was also charged with disloyalty. As concluded by the Committee of Inquiry (European Parliament 1997a), “the attitude of successive British governments may often be interpreted as a refusal to ‘play the game’ of the proper and transparent cooperation which must govern relations between the Member States, even beyond the terms of the Treaty”. The Council and the Commission were accused of passivity and secrecy, for giving priority to economic interests over health and consumer safety, and for not implementing the necessary measures to stop or hinder the spreading of the disease.

Based on the committee’s conclusions, the European Parliament adopted a resolution demanding that immediate measures be taken to improve health and consumer protection within the internal market. To back up its demands, it informed the Commission that, had the recommendations not been carried out “within a reasonable deadline and in any event by November 1997”, a motion of censure would be tabled (European Parliament 1997f).

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<sup>47</sup> The European Parliament had requested the presence of Douglas Hogg, the then British Agriculture Minister, but he refused to attend, sending instead his Permanent Secretary. This infuriated the European Parliament, which, in its resolution on the work of the temporary committee (1997f), condemned both “the behaviour of the UK government and its mismanagement of the BSE crisis” and “the refusal of its Minister of Agriculture to attend and give evidence to the Committee, despite the agreement of all Member States to cooperate fully with the work of the Committee”.

Constitutionally nonsense, the conditional motion of censure nevertheless had a huge political impact. More specifically, it allowed the European Parliament to exercise influence in areas where it formally has no powers. The threat of censure, Schackleton (1998:125) argues, “certainly concentrated minds in the Commission and showed how the right of inquiry can be exercised in conjunction with the other powers that the Parliament has to bring about changes which the Commission might well not have otherwise conceded”.

The second stage of the inquiry was initiated on 23 April 1997, when the committee to follow up the recommendations on BSE was set up. On 14 November 1997, the report of the committee was submitted to the European Parliament plenary, where it was debated four days later. A majority of its members concluded that “the work of the Temporary Committee of Inquiry into BSE and the Temporary Committee instructed to follow up the recommendations on BSE have led to the Commission taking considerable steps toward making the action to combat BSE transparent through information measures”, and, moreover, that the work of these committees “has given a new quality to [the European Parliament’s] institutional position with respect to the Commission, thereby facilitating effective control of the executive branch” (European Parliament 1997j).<sup>48</sup> Finally, the standing committees of the European Parliament were instructed to “monitor, according to their respective competences, the future implementation of the recommendations of the Temporary Committee of Inquiry into BSE by the Commission based on the half-yearly progress reports the Commission has promised to present” (European Parliament 1997j). The Commission, in keeping with its promise, delivered two progress reports on BSE, the first bi-annual BSE follow-up report (COM (98) 282) and the second bi-annual BSE follow-up report (COM (98) 598), of which only the latter was debated in the European Parliament.<sup>49</sup>

From the point of view of the European Parliament, the parliamentary inquiry was a success. It was the first temporary committee of inquiry to submit a report after the Maastricht Treaty had given the European Parliament the right to set up such committees,<sup>50</sup> and thereby also the first committee of inquiry to have its report debated in the European Parliament plenary. More importantly, it provided the European Parliament with an opportunity to assert

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<sup>48</sup> The members of the European Parliament are not the only ones reaching this conclusion (see for example Chambers 1999). Others, however, have expressed doubts as to the effectiveness of the European Parliament’s strategy (see Joerges and Everson 2000).

<sup>49</sup> Wednesday 14 April 1999 (European Parliament 1999a).

<sup>50</sup> Article 138c of the Maastricht Treaty gives the European Parliament the right to set up temporary committees of inquiry to investigate “alleged contraventions or maladministration in the implementation of Community law”. The committee of inquiry, however, was no invention of the Maastricht Treaty. Since 1979, committees of inquiry had been set up by the European Parliament. Nevertheless, the treaty provided a legal base for such committees, and specified the procedures governing their work (Schackleton 1998).

itself, even in areas where its formal competences are limited (Chambers 1999). Through creative use of its powers – i.e. the conditional censure of the Commission – the European Parliament provoked a number of specific changes in EU food regulation and was also given a say in the broader debate on the future shape of the Common Agricultural Policy. Finally, the parliamentary inquiry brought the work of the European Parliament to the attention of a wider audience. The work of the Committee of Inquiry got substantial coverage in the press, so much that *European Voice* concluded that it enhanced “the Parliament’s reputation as a responsible body which can play a useful role in highlighting deficiencies in the EU’s internal procedures – and a constructive one in suggesting ways in which they can be remedied” (quoted in Schackleton 1998:124).

This chapter examines the inquiry in light of the wider debate on EU legitimacy. As Schackleton (1998:125) convincingly argues, it “served as [a sounding board] for more general policy debates about the development of the EU”: It was set up to examine a relatively limited domain, but its work was brought to bear on a much wider territory. The European Parliament did not see the crisis as an isolated event, but as a product of European integration. The question, then, is what features of the EU can explain the crisis. Based on the contributions of integration theory, three explanations are discussed: the crisis as a result of capture, of non-compliance and, finally, of non-democratic procedures. First, however, I will present the European Parliament’s recapitulation of the events.

## ***4.2 From veterinary problem to legitimacy crisis***

Implicit in the European Parliament’s discussion is a three stage interpretation of the BSE crisis. BSE, it is suggested, was the veterinary problem that became a potential health problem, which, in turn, was mismanaged and resulted in citizens’ loss of confidence. The first stage – the veterinary problem – spans the period from 1986, when BSE was first identified, to sometime in the early 1990s, when it became evident that BSE had crossed the species barrier. At this stage BSE ought to, according to the European Parliament, have been treated as a potential health hazard. The announcement on 20 March 1996 made evident to a larger public that the issue had been mismanaged, and this date, therefore, marks the start of the legitimacy crisis.



The first known case of BSE was “Cow 142” from Pitsham Farm, which, in September 1985, was diagnosed with “sponge-like” pathological changes in the brain. In 1986, the disease was identified as bovine spongiform encephalopathy (BSE). BSE belongs to the family of transmissible spongiform encephalopathies (TSE), which in animals include scrapie of sheep and goats and CJD in humans. All variants of TSE affect the brain, and all are fatal. When BSE was first identified, the assumption was that it was a matter of scrapie in cows (Aldhous 2000; BSE Inquiry 2000). Contaminated meat and bone meal was identified as the source of infection. The hypothesis was that scrapie-infected meat had been used in the production of meat and bone meal, and that this contaminated meal had later infected cows. In 1988, in response to this information, the British authorities introduced a ruminant feed ban coupled with a slaughter and compensation policy.

In the EU a similar ban was not declared until 1994.<sup>51</sup> Until the early 1990s, the disease had only been identified in two countries outside the UK, namely Ireland and Switzerland, and only in very limited numbers.<sup>52</sup> BSE, therefore, was first and foremost considered to be a British problem to be handled by the British (cf. European Parliament 1997a). The only significant measure to stop the spread of BSE to other member states was the decision of July 1989 to ban the export of live cattle born in the UK before the ruminant feed ban. There was little control, both from UK and EU authorities, of the export of animal feed from the UK. As a result, meal containing ruminant-derived proteins continued to be exported in large quantities from the UK in spite of the ban on its use within the UK.

In this period, BSE was thought to be a veterinary and animal health problem, a variant of scrapie. Although scrapie has been known for more than 250 years, and is endemic in the UK, there are no known cases of transmission to humans. Given the relatively high incidence of the disease, and the length of time it has been affecting flocks and herds, scrapie is not believed to pose a danger to humans (cf. European Commission 1998). This is recognised by the European Parliament, whose Committee of Inquiry emphasises that, on the basis of the parallel with scrapie – “an illness which was well-known and considered harmless to humans – it was supposed that BSE was an animal health matter alone” (European Parliament 1997a).

Nevertheless, the European Parliament finds faults with the management of BSE in this period. In particular with the British response. First, the UK government stands accused

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<sup>51</sup> Commission Decision 94/381/CE of 27 June 1994

<sup>52</sup> By the end of 1990, 26 cows had been diagnosed with BSE in Ireland and 1 in Switzerland.

of failure to regulate the rendering industry and its production of meat and bone meal.<sup>53</sup> Second, it waited too long before taking action to combat the spread of the disease.<sup>54</sup> The brunt of the problem, however, lies in failure to implement measures to fight BSE. All in all, the Committee of Inquiry concludes, “the UK authorities have introduced a considerable amount of legislation covering the various aspects of protection against possible BSE risks. The problem, therefore, lies not in any lack of appropriate legislative measures, but in the attitude of the government, which has failed to ensure the proper application of those measures and has not carried out the necessary checks” (European Parliament 1997a).

The second stage – the potential health problem – spanned from early 1990 to March 1996. In the early 1990s, perceptions of the problem changed. Scientists became increasingly aware of the possibility of BSE crossing the species barrier. A number of studies had looked at the possibility of transmission between different animal species, and scientists had succeeded in transmitting BSE to sheep, mice and pigs. In addition, domestic cats had been diagnosed with the disease, and it was believed that they might have contracted the disease by consuming contaminated meal. Based on scientific evidence, the Spongiform Encephalopathy Advisory Committee (SEAC), an advisory body to the British authorities, changed its perception of the disease, and by 1994 it evaluated the risk of transmission to humans as remote only because precautionary measures had been put in place (BSE Inquiry 2000).<sup>55</sup> Given the changed nature of the problem, the European Parliament (1997a) concludes, there ought to have been a corresponding change in the response of responsible authorities.<sup>56</sup> However, it finds, such a change did not occur.

The European Parliament finds the UK government, the Council and the Commission guilty of serious omissions and instances of mismanagement. The UK government is singled

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<sup>53</sup> “BSE stemmed from the introduction from the United States of the ‘Carver-Greenfield’ system of manufacturing meat-and-bone meal. The UK Government, unlike those of other Member States, authorized the change in the system for manufacturing meat-and-bone meal. This led to the emergence of BSE. It also created conditions favourable to the spread of other diseases. In other states, when the processes was changed, the introduction of a sterilization period was required” (European Parliament 1997a).

<sup>54</sup> “In June 1987, British ministers were already aware of the existence of BSE and of the fact that scientists could not determine whether it could or could not be transmitted to other species or to humans. However, they decided to do nothing until 18 July 1988 when the ban on cattle feed was applied (this ban did not affect existing stocks)” (European Parliament 1997a).

<sup>55</sup> This, however, was not communicated to the public, who therefore took the British authorities’ reassurances that British beef was safe as evidence that BSE could not be transmitted to humans. In this light, the BSE Inquiry (2000) concludes that the “impression thus given to the public that BSE was not transmissible to humans was a significant factor leading to the feeling of betrayal when it was announced on 20 March 1996 that BSE was likely to have been transmitted to people”.

<sup>56</sup> Once “it began to look increasingly certain that BSE was a phenomenon different from scrapie, which could, in addition, jump the species barrier (having also been detected in cats), the matter took on a new dimension: it was no longer merely a veterinary and animal health problem, and the protection of consumer health became the first priority” (European Parliament 1997a).

out as the main culprit. A number of specific criticisms are directed at it: It put pressure on the Commission not to include anything related to BSE in its general inspections of slaughterhouses; it used its positions in the BSE subgroup of the scientific veterinary committee to influence the Commission's response to the disease; it made a partial and biased reading of scientific advice; it did not honour its undertakings made at the extraordinary Council meeting of July 1990; it did not implement legislation by which bovine animals should have been identified and branded and their movements registered; it failed to implement the provisions concerning veterinary checks in intra-Community trade. All in all, the Committee of Inquiry states, the UK government did its utmost to protect the beef industry from action by the EU or its member states, including a strategy for "avoiding Community inspections and preventing publicization of the extent of the epidemic, since this would have provoked unilateral action by some Member States on public health grounds" (European Parliament 1997a).

The finger was also pointed at the Council and the Commission. The Council's responsibilities should, it is argued, be considered both in relation to its own actions and those of the Standing Veterinary Committee. The Standing Veterinary Committee is made up of representatives of the member states and acts, in a certain sense, by delegation to the Council. According to the Committee of Inquiry, this committee "should have, on certain occasions, called for the debate on the subject to be transferred to the Council, in view of its major political significance, going well beyond purely technical considerations" (European Parliament 1997a). More damning, however, is the fact that, between June 1990 and July 1994, there were no discussions of BSE in the Council, and this at a time when the disease peaked in the UK. The absence of debate in Council, the Committee of Inquiry concludes, "either to examine the state of affairs or to verify compliance with the June 1990 conclusions,<sup>57</sup> in view of their importance, may be considered to imply neglect by omission on the Council's part; or it may be interpreted as an abandonment of its duties by the institution which led it to delegate its responsibility to the Standing Veterinary Committee" (European Parliament 1997a). All in all, the European Parliament finds that the actions and

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<sup>57</sup> In response to import bans on British beef imposed by France, Austria, West Germany and Italy, the Agricultural Council met on 6 and 7 June 1990 to discuss a common European response. The result was an EU-wide ban on the export of bone-in beef from holdings where BSE had been confirmed in the previous two years. Thus, the committee of inquiry notes, "it enabled the UK to continue exporting meat which had not been deboned from herds which had been free of BSE for the previous two years and boned meat from which the nervous and lymphoid tissues had been removed in the case of animals from infected herds" (European Parliament 1997b).

inactions of the Council amount to “tacit support (...) to the UK Government’s lack of action and transparency” (European Parliament 1997f).

Of the two institutions, it is the Commission that receives the brunt of the critique. A number of specific criticisms are voiced in the report of the Committee of Inquiry: The Commission gave priority to the management of the market over public health; it tried to downplay the problem, possibly through a policy of disinformation; it relied on partial and biased scientific advice; it made no efforts to adapt its staffing policy to the needs arising from the establishment of the internal market; it carried out no BSE-related veterinary inspections in the UK between June 1990 and May 1994; it did not coordinate the work of its veterinary legislation unit with that of its inspection unit; it failed to guarantee the proper functioning of veterinary controls within the internal market; its endeavours to regulate the problem of meat and bone meal came too late, and were ineffective and contradictory; it did not act on the mandate given it by the Council on 6 and 7 June 1990 to carry out a wide-ranging programme of research; it did not take account of the European Parliament’s expressions of concern; and, finally, it did not adopt additional protection measures following identification of the cases of infected animals born subsequently to the ruminant feed ban. All in all, the report of the Committee of Inquiry concludes, the Commission’s actions “may be explained in view of the huge economic interests at stake in the meat, feeding stuff and animal residue processing industries, but, in terms of principles, it cannot justify the management of the BSE crisis” (European Parliament 1997a, emphasis removed).

The third stage – the legitimacy crisis – resulted from the passivity and lack of transparency of the main actors. The announcement of 20 March 1996, “caused major public alarm which was widely disseminated in the media and unleashed what might be called the ‘mad cow’ crisis” (European Parliament 1997b). Although the EU is no stranger to crises, the BSE stands out from other crises such as the empty-chair crisis or the turbulence surrounding the adoption of the Maastricht or Nice Treaties. BSE directly and visibly affected the daily life of EU citizens. For most citizens, the crisis impacted on food consumption, but for some it even affected their livelihood. For the EU, the crisis shed doubt on the capacity of the internal market to guarantee adequate food regulation and control, and the fear of a re-nationalisation of these competences loomed on the horizon.<sup>58</sup> As noted by the Committee of Inquiry: “Since the beginning of the European Community, no debate has affected the daily life of individuals

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<sup>58</sup> The importance of an adequate food safety regime cannot be overestimated. As Elvbakken (1997) explains, securing safe food and adequate food supply is also to secure order, and, consequently, food regulation and control are essential tasks for any state, regardless of state form or political system.

as much as this one. We must not underestimate the damage that the BSE crisis is causing amongst the general public, in particular the questioning of the food chain; and the eventual number of deaths remains an unknown quantity” (European Parliament 1997a).

In response to the crisis, a number of measures were discussed and adopted, and new scientific evidence emerged. On 22 March 1996 the Scientific Veterinary Committee analysed the situation, and a number of member states and third countries reacted by closing their borders to British beef. Five days later, the Commission responded by adopting the so-called “embargo decision”.<sup>59</sup> A World Health Organization (WHO) report of 2 and 3 April 1996 identified ten UK patients as suffering from new variant CJD.<sup>60</sup> In addition, SEAC had established that the incidence of classical CJD in cattle farmers was significantly higher than the national average. The Council meeting of 1, 2 and 3 April recommended the adoption of a series of measures to combat BSE, including the slaughter of all British cattle over 30 months old, as well as the establishment of procedures for eliminating and treating carcasses at EU level. On 21 and 22 June, at the Florence summit, the member states agreed to selective culling, as well as certain conditions and requirements for the future lifting of the embargo. And, on 24 June, the Commission approved the BSE eradication programme of the UK government.

In spite of these measures, however, the European Parliament finds the response of EU institutions lacking. The UK government is accused of taking a blocking attitude within EU institutions, of putting undue pressure on the Commission to lift the embargo, of not displaying sufficient zeal in monitoring the maintenance of the embargo, of not abiding by the timetable of the Florence summit, and of refusing to cooperate with the Committee of Inquiry. The main criticisms of the Commission can be summed up in two points. First, that it exerted political pressure and gave in to manipulation by the industry in favour of a partial lifting of the embargo. Second, that it has pursued a strategy of blame avoidance by confusing the nature of the problem. Based on these criticisms, the European Parliament proposed measures to restore confidence in the markets and prevent similar crises from happening in future (European Parliament 1997a; European Commission 1998; Vincent 2004).

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<sup>59</sup> Commission Decision 96/365 of 11 June 1996.

<sup>60</sup> Stephen Churchill, who died on 21 May 1995, was the first recorded victim of this new variant of the disease. Unlike classical CJD, the new variant affects younger people. Patients contracting new variant CJD had an average age of 26. Classical CJD, in contrast, only exceptionally affects people under the age of 60. Moreover, both the long development of the disease – 13 months on average as compared to the 4-6 months of classical CJD – and the clinical signs and lesions of the central nervous system distinguished the new variant from classical CJD.

In the wake of the crisis, and at the insistence of the European Parliament, the Commission launched a comprehensive programme of reform of EU food policy. The aim of which was to establish a genuine European food policy emphasising consumer health and food safety: “The BSE crisis has highlighted the need for a European food policy centred on the requirement that only foodstuffs which are safe, wholesome and fit for consumption be placed on the market. Health protection in relation with consumption of foodstuffs is to be an absolute priority at any time and not only something to be looked into in emergency situations” (European Commission 1997). The reforms consisted in a reorganisation of the scientific committees, changes in the competences and fields of responsibility of the general directorates, and changes in food law and consumer safety regulation. In addition to a general strengthening of health and consumer protection, the reforms aimed at securing the independence of scientific advice, separate control and legislative authority, minimise the impact of industry and agriculture on health and consumer legislation, and, finally, to secure greater openness and transparency in risk regulation (Hellebø 1999; Veggeland 1999). In November 1997, the Commission presented a report on the reforms documenting that the demands of the European Parliament had been met. By this time, BSE was still relatively high on the European agenda, but the level of conflict had decreased.

However, this was not the end of the European Parliament’s inquiry into BSE. On 23 April 1997, it had decided to set up a temporary committee to follow up the recommendations on BSE. The report of the committee was submitted to the plenary of the European Parliament on 14 November 1997, and was debated there four days later. A majority of members concluded that “the work of the Temporary Committee of Inquiry into BSE and the Temporary Committee instructed to follow up the recommendations on BSE have led to the Commission taking considerable steps toward making the action to combat BSE transparent through information measures”, and, moreover, that the work of these committees “has given a new quality to [the European Parliament’s] institutional position with respect to the Commission, thereby facilitating effective control of the executive branch”.

Although interesting in itself, most observers see the parliamentary inquiry into BSE as part of a larger picture. Some look at the institutional aspect of the inquiry, with particular emphasis on how it changed or redefined the European Parliament’s role within the EU institutional structure (see for example Chambers 1999; Vincent 2004). Others are more interested in the lessons to be learnt from it. The BSE crisis, it is argued, highlighted institutional and other weaknesses of the EU regulatory regime and of EU decision-making in general (see for example Joerges and Neyer 1997; Dehousse 1999; Majone 2000; Neyer

2000). In this chapter, I argue that the context is as important as the crisis itself. From 1986, when BSE was first identified, to 1996, when the issue hit crisis point, European integration was both widened and deepened. In this period, five new member states were admitted, the internal market came into force, and the Maastricht Treaty established the European Union. At the same time, important challenges lay ahead. The Economic and Monetary Union was underway, and the EU was preparing its biggest enlargement so far, the Eastern enlargement. Moreover, the epoch of the permissive consensus had come to an end, meaning that the European political elite could no longer rely on the tacit support of public opinion in the member states. Maastricht put issues of legitimacy on the European agenda, providing a framework within which the differing claims and expectations about European integration could be identified and discussed (cf. Schmitter 2003; Føllesdal 2004). It is within this context that the parliamentary inquiry should be analysed.

The question is what the parliamentary inquiry can tell us about EU democracy and legitimacy. To what extent does the European Parliament's framing of the crisis correspond to the assumptions of integration theory? Based on the theoretical contributions, three interpretations are identified and discussed. First, the BSE crisis as a credibility crisis. The inadequate administrative infrastructure of EU regulation, it is suggested, allows the member states to pursue strategies of selective implementation or even non-compliance. Second, the BSE crisis as a result of capture. Consistent with the governance perspective, this interpretation identifies the root problem as the opacity and secrecy of comitology. Finally, the BSE crisis as a product of changed expectations and problem structures. In this interpretation, the BSE crisis is a political crisis which must be dealt with politically. The issue is what kind of legitimacy political intervention can and should have. The rest of the chapter examines these interpretations in light of the discussions of the European Parliament.

### ***4.3 The credibility crisis of EU regulation***

According to Majone, the BSE crisis exposed the fragility of EU regulation. "The BSE crisis not only revealed the failure to establish a stable and internationally credible community of scientific experts on food safety, but also exposed serious shortcomings in the overall co-ordination of European policies on agriculture, the internal market and human health (Majone 2000:282). Two features of EU decision-making contributed to this crisis: the mismatch

between the EU's highly complex and differentiated regulatory tasks and the available regulatory instruments, and the problem of credible commitment caused by the increased level of parliamentarisation and politicisation of EU decision-making. The solution to both problems, Majone tells us, may be found in the delegation of regulatory powers to networks of independent regulators.

The "credibility crisis" rests on certain assumptions: First, the BSE crisis is seen as a result of non-compliance. The member states tend to implement EU legislation selectively, and there are few provisions or mechanisms in the EU regulatory apparatus that prevent them from doing so. There are, in other words, reasons to doubt whether the EU can actually ensure compliance with its decisions, and this naturally diminishes the credibility of its commitments. Second, food regulation, like regulation more generally, is understood to be a technical rather than a political issue. Provided that the right solutions are discovered, it will contribute to the general welfare without making some better off at the expense of others. Third, to the extent that it is a matter of efficiency rather than redistribution, responsibility for food regulation ought to be delegated to independent experts. Ultimately, then, regulatory legitimacy is framed in terms of effective and efficient administration devoid of political considerations. Whereas the political level should define the goals of the regulatory agencies and the procedures according to which these goals are pursued, it should under no circumstances interfere with the agencies' work.

To what extent does the European Parliament agree with this framing? The parliamentary inquiry shares Majone's concern for non-implementation or selective implementation. Rather than an absence of legislative measures, the parliamentary inquiry finds, the problem is the actors' reluctance to implement or enforce these measures. Measures to control and monitor the spread of BSE were adopted. The UK authorities, it is pointed out, have "introduced a considerable amount of legislation covering the various aspects of protection against possible BSE risks" (European Parliament 1997a). The Council mandated the Commission to adopt a number of measures in response to the BSE epidemic. And, the Commission did, in fact, present such measures, including the decision that bovine animals should be identified and their movements registered, restrictions on the export of meat from herds where BSE had been detected, as well as a decision to ban the use of meat and bone meal in animal feed. There was, in other words, no lack of initiatives. "Measures were taken, but they were not implemented" (European Parliament 1997d: Graefe zu Baringdorf, Verts/ALE, Germany). The question is why.



Consistent with Majone (2000), the parliamentary inquiry identifies a mismatch between regulatory tasks and administrative resources. As one member of the European Parliament put it: “We have the research to show us the problem; we have the meetings which take place to decide what the problem is but we do not have anybody at the end to check that it is actually happening” (European Parliament 1997c: Teverson, ELDR, UK). Rather than a lack of knowledge, the parliamentary inquiry finds, certain features of its administrative apparatus explain the failure of the EU to address the problem at an early stage.<sup>61</sup> Reviewing the effectiveness of administrative checks was a priority for the inquiry (cf. European Parliament 1996e), and its findings can be summed up under two headings: inadequate administrative infrastructure and politicised regulation. Consistent with Majone’s claims, therefore, the European Parliament emphasises that non-compliance reduced the effectiveness of measures to combat the disease, and recognises that political pressure prevented the adoption of necessary measures. On closer inspection, however, there is more that divide than unite the two. In contrast to Majone, the members of the European Parliament insist that food regulation, like all regulation, is political and therefore must be subject to democratic control. In the following, I will expand on this argument.

#### **4.3.1 The administrative infrastructure**

The administrative infrastructure is found lacking in two respects: unclear distribution of responsibilities and lack of resources. As concerns the first problem, the parliamentary inquiry argues that uncertainties as to who should act, when and how, not only prevented the actors from taking appropriate action but also allowed them to shift the blame from themselves to other actors. At the same time, the response of EU actors, in particular the Commission, was hampered by a lack of political, financial and legal resources. In part, the Commission’s inability to attend to its tasks as guardian of the Treaties and Community regulator can be explained by its lack of sufficient political, legal and financial resources. The parliamentary inquiry concedes that the inability of the EU to respond to the BSE epidemic in part can be explained by the shortcomings of its administrative apparatus.

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<sup>61</sup> “You tell us, Mr Santer, that it could not be known at the time how dangerous the BSE disease was. It this was not known at the time, then no measures would have been taken, and we would have had to say: we do not know this, or we take a different view. But that did not happen. Measures were taken, but they were not implemented” (European Parliament 1997d: Graefe zu Baringdorf, Verts/ALE, Germany).

To a considerable degree, the parliamentary inquiry observes, failure to address the BSE issue can be attributed to the vague distribution of responsibilities between the participants in EU decision-making. First, the distribution of responsibilities between the EU and its member states is unclear. At the heart of the problem, it is ascertained, lies the principle of subsidiarity. Veterinary inspections, or, in the case of BSE, the lack thereof, is a case in point. Invoking the principle of subsidiarity, the UK veterinary services argued that Commission inspectors had no authority to investigate BSE matters, and that BSE was a technical and not a political matter. The Commission acquiesced, and between 1990 and 1994 it suspended all BSE-related inspections to the UK. This interpretation of the subsidiarity principle, it is pointed out, is wrong. Although “the responsibility for implementing Community legal provisions lies with the Member States”, it is the responsibility of the Commission to “supplement them by monitoring their activities and in particular to monitor recognized problem areas” (European Parliament 1997g).

The parliamentary inquiry suspects the UK authorities of invoking the principle of subsidiarity in order to prevent other actors, the Commission and the member states, from gaining an understanding of the scope of the problem (European Parliament 1997a). To a large degree, it points out, this strategy was successful. For one thing, the Commission ignored obvious breaches of the feed ban and the export ban. The “simplest explanation for this”, a member of the parliamentary inquiry points out, “is that they failed to carry out inspections and could not have seen what was going on” (European Parliament 1997c: Voggenhuber, Verts/ALE, Austria). In other words, the effect of this interpretation of subsidiarity was that one member state was permitted “to deceive the others and to ignore Community legislation concerning human health” (European Parliament 1997d: Myller, PSE, Finland).

The Commission is accused both of weakness and of indifference. It is a sign of political weakness, the Committee of Inquiry states, that the Commission so easily caved to British pressure. As the committee’s rapporteur rhetorically asks: “Does the Commission think it is unable to confront a Member State politically or does it think that a Member State, given its relative importance within the Community, will have the support of the whole Council” (European Parliament 1997c: Medina Ortega, PSE, Spain)? At the same time, it is suggested, leaving the management of the BSE issue in the hands of the British was convenient for the Commission. There was, it is concluded, “an attitude of ‘benign neglect’ of the issue (a willingness to let a British problem be dealt with by the British) on the part of the

Commission, and through the veterinary committees, by the other Member States” (European Parliament 1997a).

In future, the parliamentary inquiry concludes, responsibilities must be more clearly defined. In particular, the nature and content of the subsidiarity principle must be more clearly defined. It must be specified that the Commission has legislative authority to go into the member states and carry out inspections. It should not be possible for one member state to invoke subsidiarity in order to oppose the development and application of EU measures which are necessary to protect the health and safety of consumers. “The EU must be able to ensure the safety of products which circulate freely within the EU which does not in any way compromise the principle of subsidiarity. The unwillingness of a Member State to allow Commission inspectors to verify veterinary standards (because a health problem is considered to be political rather than technical, for example) must not be allowed to happen in the future” (European Parliament 1997a, emphasis removed).

An additional problem is the vague distribution of responsibilities between EU actors and institutions in the field of health and consumer protection. Competences, the parliamentary inquiry finds, are compartmentalised between several Commission departments. The BSE issue has been handled variously by the General Directorates for Agriculture, Industry, Health and Safety, as well as the Consumer Protection Service. “This compartmentalization has hampered the coordination and efficiency of the services concerned, has facilitated the shifting of responsibility for maladministration between the various services of the Commission, and points up the lack of an integrated approach, a phenomenon exacerbated by DG VI’s [Agriculture] arrogating primary management of the BSE issue to itself” (European Parliament 1997a). Thus, one member of the European Parliament concludes, “in the implementation of Community policies, there are grey areas in which the responsibility for taking action is poorly defined. This ultimately results in each institution passing the buck to the other institutions, or to the Member States, in a show of total incompetence” (European Parliament 1997d: Pasty, UPE, France).

What is needed, the parliamentary inquiry concludes, is better coordination. “We need to see a structural change in the internal organization of the competent Directorates-General: we therefore welcome the plan to create a single unit for the protection of public health which will undertake the functions previously entrusted to various administrative personnel, between whom there was absolutely no coordination” (European Parliament 1997d: Viola, PPE, Italy). The Public Health Protection Unit “should be responsible for the accountable coordination of powers and ultimately for measures relating to food law, food quality and hygiene, human and

animal health protection and consumer protection. The Public Health Protection Unit's task must be to assess Community policies in relation to the protection of human health, and it must be possible for it to draw up relevant legislative proposals or establish priorities in work programmes" (European Parliament 1997a). Provided it is backed up by the necessary resources, such a unit is seen not only as a means of coordinating EU action in the field of public health, but also as an effective instrument in securing member state compliance.<sup>62</sup>

Another weakness of existing structures is the lack of resources. The Commission, it is noted, lacks necessary economic, legal and political resources to fulfil its role as guardian of the treaties (cf. European Parliament 1997c: Medina Ortega, PSE, Spain). For one thing, the legal framework is insufficient. Although member state compliance, or rather the lack thereof, is a major impediment to the efficient functioning of the internal market (cf. European Parliament 1997g), the Commission has few legal instruments at its disposal. "States can declare that they do not think about applying the standard which should be applied to animal meat, for instance. The Commission has to fall back on lengthy breach of treaty proceedings. What matters here is that we in Parliament enable the Commission to react faster, to take the appropriate actions for people's health" (European Parliament 1997h: Graefe zu Baringdorf, Verts/ALE, Germany). The European Parliament, therefore, recognises that the Commission is in need of more effective legislative instruments, and calls "on the Commission to submit to the next intergovernmental conference practical proposals to strengthen the Commission's opportunities to intervene in treaty infringement proceedings, [and] to speed up the associated procedures" (European Parliament 1999a).

In addition, it is recognised that the Commission lacks financial and administrative resources. In EU food regulation there is, simply put, a discrepancy between the objectives and resources of EU food policy and control. The finger is pointed at the Council, "which calls on the Commission to be more active in carrying out checks, but refuses to provide the legal framework and the staff and financial resources necessary" (European Parliament 1997a). Thus, the critique of the European Parliament echoes that of Majone (2000), who points to the unwillingness of member states to provide the resources necessary for the effective fulfilment of the Commission's tasks. However, the Commission does not escape criticism. Although the entry into force of the internal market entails a substantial increase in

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<sup>62</sup> "Despite the fact that the Commission has recently submitted a number of directives, some of them now adopted, concerning the strength of the Community's health protection powers, if this objective is to be effectively ensured cooperation or coordination between the Member States' activities will not suffice. It should be recommended that the EU equip itself with a suitable administrative structure conceived as a powerful Public Health Protection Unit, encompassing both human and animal health" (European Parliament 1997a, emphasis removed).

its workload, the Committee of Inquiry is not impressed by the Commission's efforts to adapt its staffing policy to the needs arising from the establishment of the internal market (European Parliament 1997a).

In conclusion, the parliamentary inquiry acknowledges, the administrative infrastructure can to some extent explain the failure of EU institutions to respond effectively to the BSE epidemic. The Commission was not adequately equipped to manage the issue, and the lack of resources was exacerbated by the vague distribution of responsibilities between the member states and the Commission, on the one hand, and between the Commission's General Directorates and offices, on the other. At the same time, the inquiry finds, the main actors seemed more interested in exploiting weaknesses in the administrative apparatus than in remedying or minimising them. This, the inquiry ascertains, suggests that political motivations underlie the poor management of the crisis.

#### **4.3.2 Politicised regulation**

Above all, the parliamentary inquiry argues, political priorities explain the failure to address the BSE epidemic. With "most BSE-related action from June 1990 up to 1994, there exists a silence and a passivity which, given the findings unearthed by the present committee, cannot be considered accidental" (European Parliament 1997a). All actors, it observes, had an interest in keeping BSE off the agenda. The UK government did its utmost to keep "the matter within the national orbit" (European Parliament 1997a). Its concern, it is suggested, was to prevent "publicization of the extent of the epidemic, since this would have provoked unilateral action by some Member States on public health grounds" (European Parliament 1997a). To this effect, it exerted massive political pressure on the Commission.<sup>63</sup> The Commission and the Council, in turn, stand accused of deliberately choosing a minimalist response to the BSE epidemic in order not to disrupt the internal market. As a result, they failed to take adequate measures to manage the epidemic. The Commission, in particular, "has given priority to the management of the market, as opposed to the possible human health risks existing in the light of the numerous scientific uncertainties concerning the possible effects of

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<sup>63</sup> "Behind everything else (...), one senses the urgent desire of one Member State to play down the BSE problem, even to the extent of blackmailing the other institutions" (European Parliament 1997d: Myller, PSE, Finland).

BSE on humans, and has neglected the principle of preventive action” (European Parliament 1997a).

Three aspects of the management of the BSE crisis are cited in evidence of this conclusion. First, the UK government, the Council and the Commission made a partial and biased reading of scientific evidence. The UK government is singled out as the main culprit. Its measures to fight BSE, the inquiry contends, were not based on independent scientific advice. Rather, “decisions were taken on the basis of biased recommendations, and studies were commissioned and paid for by the industry itself” (European Parliament 1997d: Vandemeulebroucke, ARE, Belgium). Moreover, it is implied, the absence of scientific findings is in itself proof that independent scientific evidence was neither sought nor encouraged. “Research”, it is pointed out, “can be carried out when some stimulus exists, in other words where there is a problem and when there is sufficient raw material to carry out such research, in this case the organs of deceased animals. Although both these conditions were present in the UK during the years when the disease was at its height, no scientific findings were made” (European Parliament 1997a). The absence of scientific findings, in other words, is taken as evidence that the UK government was more interested in covering up the problem than actually dealing with it.

However, the Commission and the Council do not fare much better. Neither, the Committee of Inquiry establishes, sought independent scientific advice. For one thing, “Community veterinary inspectors were never invited to publish the results of the inspections they carried out in the UK or their conclusions, either before the Council or before the Standing Veterinary Committee” (European Parliament 1997a). Moreover, the Commission has neither “encouraged the expression of the views of those scientists who, on the basis of the most recent research findings available at the relevant time, drew conclusions which diverged from the views held by the majority of the members present in the Scientific Veterinary Committee” nor instigated independent research (European Parliament 1997a). The results of veterinary inspections and the scientific evidence obtained from research, the Committee of Inquiry points out, are the main sources of information. The fact that both were cut off, it concludes, suggests that neither the Council nor the Commission were interested in a thorough investigation of the matter.

Second, the parliamentary inquiry establishes, the actors have deliberately chosen a minimalist approach to the BSE issue. The Commission’s lack of determination in managing BSE may serve as an example. Had the Commission been determined to eradicate BSE and minimise the damages, it would have used its limited resources more effectively. Money

could have been spent differently. Why were more funds not allocated to the management of BSE? “Over the same period we have seen with the issue of fraud throughout the European Union, that there has been no problem in committing funds when something is regarded as important and seen as a priority. We also have a description here of the thousands of man-hours spent at meetings, at huge expense, and also the huge travelling expenses of these people. So I ask myself: do we not really come down here to the priorities? Is this something really that could not have been fixed at the time” (European Parliament 1997c: Teverson, ELDR, UK)?

The absence of BSE-related veterinary inspections is a case in point. “Just think for one moment: twelve inspectors working 200 days each means 2400 days of inspections, and out of that number, for three years in succession, not one inspection was carried out in the country where the greatest crisis and the worst disease in EU history had broken out! It is as if a fire crew had decided not to go to a burning house, because there was a risk of fires breaking out somewhere else in the mean time” (European Parliament 1997c: Voggenhuber, Verts/ALE, Austria). Yet, rather than investigating UK slaughterhouses, the Commission deployed its inspectors elsewhere. At “a time when BSE was wiping out the herds of the United Kingdom, 34 of the 40 inspectors – and be reminded of the Commission’s claim that it is short of inspectors – spent a long time in Greece. Why were they there? They were investigating swine fever. And quite rightly so, but it did not need so many of them because the presence of the disease in Greece and Germany had already been notified and a general ban had been imposed on meat from all of the regions from the very outset” (European Parliament 1997d: Lambraki, PSE, Greece).

In this light, the suspension of BSE-related veterinary inspections is interpreted as a determination to treat BSE differently from other diseases and the UK differently from other member states. “Could it be that instead of distributing or allocating your resources, you systematically chose not to send anyone to the United Kingdom? Could you give an example of a comparable disease on this scale in a third country where you have claimed that your hands were tied” (European Parliament 1997c: Graefe zu Baringdorf, Verts/ALE, Germany)? The Commission, the Committee of Inquiry’s rapporteur implies, deliberately chose not to investigate BSE. Although “Commission officials carried out 37 veterinary inspections in the UK between 1990 and 1994, none of those checks was on BSE. This leads us to believe that the UK Government actively wished to prevent such checks being carried out and that the Commission was not firm enough to impose them (European Parliament 1997d: Medina Ortega, PSE, Spain). Thus, one member of the European Parliament sums up, “the 15

Member States are equal under the Treaty, but we noted that some are more equal than others. One such is the United Kingdom: effectively it rejected Community controls, and the Commission acquiesced in that situation” (European Parliament 1997d: Lambraki, PSE, Greece).

Finally, few attempts were made, both on the part of the UK government and the EU institutions, to check compliance with decisions. In the UK, “the absence of adequate control and recall measures (...) led to a failure to ensure the total disappearance of meat-and-bone meal (...) from ruminant feed” (European Parliament 1997a). What is more, the UK government failed to take action to control the export of such meal from the UK. In fact, the Committee of Inquiry points out, in 1989, just after the UK ban on feeding meat and bone meal to ruminants, exports from the UK rose to 25 005 tonnes as opposed to 12553 tonnes in 1988. The attitude of the Commission, it is maintained, was equally lax. In particular, it introduced no controls over the conditions of manufacture and export of meat and bone products (European Parliament 1997a). Is it, one member of the parliamentary inquiry asks, “usual to issue an instruction to Member States and then not check that it has been followed up” (European Parliament 1997c: Gillis, PSE, Ireland)? The question is answered by another member: “I do not think I know of any field in which the Commission assumes that the enactment of a piece of legislation will mean that it is implemented straight away” (European Parliament 1997c: Voggenhuber, Verts/ALE, Austria). Yet again, then, the inquiry accuses the Commission of bowing to pressure from the UK government.

All in all, it is concluded, the crisis resulted from a failure of the EU regulatory apparatus. As we have seen, the parliamentary inquiry identifies two problems as particularly pressing: First, the lack of a coordinated approach to consumer health and safety, and, second, the vulnerability of the EU regulatory apparatus to political pressure and manipulation. In addition to “specific responsibilities and acts of negligence”, therefore, “this matter of epizootics has revealed the institutional gaps in the functioning of the European institutions” (European Parliament 1999b: Trakatellis, PPE, Greece). To a large degree, this description of the crisis echoes that of Majone (2000). Given this similarity in problem description, can it be assumed that the European Parliament also favours a strengthening of independent regulatory agencies in Europe?



### 4.3.3 Accepting the diagnosis but not the medicine

The European Parliament welcomes the creation of a European Agency for Veterinary and Phytosanitary Inspections and advocates the setting up of a European equivalent to the US Food and Drug Agency (European Parliament 1997a). For scientific evidence and veterinary inspections to be credible, it is essential that scientists and inspectors operate independently from political pressure. To this effect, it must be ensured that the Commissions has “recourse (...) to scientists whose independence is guaranteed” (European Parliament 1997d: Stenzel, PPE, Austria), and that “the powers of the veterinary inspectorate [are] increased, guaranteeing it what it has certainly lacked previously, which is a stable function and adequate independence” (European Parliament 1997d: Viola, PPE, Italy). Does this imply that the European Parliament endorses Majone’s conclusions?

There are some similarities between the two. The legitimacy of veterinary inspections and scientific committees, the European Parliament accepts, hinges on their ability to adopt a technocratic approach to the problem at hand. Because veterinary controls and the production of scientific evidence are a matter of technical rather than political knowledge, they must be shielded from political input. Information producing activities must be effective, transparent and independent, and this requires that scientists and inspectors be insulated from pressure from political authorities as well as industry. Responsibility for producing scientific evidence and conducting veterinary controls ought, therefore, to be placed in the hands of those who are not themselves too beholden to producer lobbies or other interests, however legitimate they may be in their own right. The legitimacy of inspectors and scientific experts, in short, stems from knowledge.

In contrast to Majone, however, the European Parliament considers that the role of inspectors and scientists in EU regulation should be limited. According to Majone, the activities of regulatory agencies should include both risk assessment and risk management, and this implies the delegation of important implementing powers from political authorities to independent agencies. Thus, the setting up of independent agencies also involves a conferral of decision-making authority over secondary legislation. The European Parliament limits the role of independent agencies to risk assessment. The agencies, according to the European Parliament, ought to inform decision-making but not participate in it. Their activities, in other words, should be restricted to that of producing information. Unlike Majone, then, the European Parliament distinguishes between the legislative aspects of regulation, on the one

hand, and the information and monitoring aspects, on the other. The role of independent agencies, it insists, should be limited to the latter, and policy choices should be left to actors with some form of democratic legitimacy, such as the Council, the Commission and the European Parliament itself.

The differences in the approaches result from different views on the nature of regulation. More specifically, the European Parliament contests the regulation/redistribution dichotomy. Whereas Majone insists on the possibility of separating efficiency and redistributive concerns, the European Parliament maintains that regulation comprises both administrative and political choices. As one of its members put it: “apart from questions of administration and technical competence, there is a problem of political deontology, political ethics” (European Parliament 1997c: Martin, UPE, France). One lesson from the BSE crisis is that politics permeates all forms of regulative decisions. Even seemingly neutral issues, such as food policy and consumer protection, may have important redistributive and value-allocative effects. In addition to its impact on public health, the parliamentary inquiry demonstrates that BSE affected important economic interests, such as the beef and rendering industry, and it also affected the livelihood of farmers. Basically, the inquiry finds, the crisis resulted from the inclination of political actors to give the economic interests of industry and farmers priority over the non-economic interests of citizens and consumers. Thus, it concludes, the “BSE tragedy is a sad and dramatic example of what can happen when the health of the public and the safety of consumers is sacrificed on the altar of business expediency and profit enhancement” (European Parliament 1997d: Green, PSE, UK).

Given the political nature of regulation, the decisions of experts will also be political. Therefore, it cannot be assumed that experts always have the public interest in mind. Like everyone else, experts are susceptible to political pressure or influence. “Official veterinary committees are composed of bureaucrats like any others and they sometimes cut their science to the cloth of the orders they receive from their heads of department. Anyone who does not think that this is the case knows nothing about bureaucracy. However, I think that it is an amazing example of collective innocence to expect veterinary experts to be fonder of the truth than Plato was! Because they are not” (European Parliament 1997c: Rosado Fernandes, UPE, Portugal). Moreover, experts, like all other actors, might have a political agenda of their own. As Dehousse (2003:145) reminds us, “all sorts of considerations, ranging from their vision of their country’s interests to possible links with the industry they are supposed to regulate, may influence the positions they take within committees”.

If the efficiency/redistribution dichotomy does not hold, the regulatory state has no legitimacy. Majone is very clear on this point (see for example Majone 1996c). A rejection of the efficiency/redistribution, therefore, underlies most criticisms of the regulatory state (cf. Dehousse 2003; Føllesdal and Hix 2006). The position of the European Parliament could be seen as a continuation of this critique. To some extent, its position is consistent with that of Føllesdal and Hix, to whom the distinction between regulation and redistribution is a matter of degree rather than principle. The “empirical reality of decisions”, they argue (2006:542), “is a continuum between policies that are predominantly efficient and policies that are predominantly redistributive, with many mixes”. However, whereas they see consumer policy and food regulation as examples of policies that are predominantly efficient, the discussions of the European Parliament reveal that under certain circumstances political considerations will prevail even for policies located at the efficiency-end of the continuum. Consequently, one challenge is to identify the factors which lead to politicisation; the other is to define appropriate decision-making structures.

According to Dehousse (2003:145), two options are available: First, the supranational avenue, whereby “the European Parliament (...) being the institution most representative of the European people at large, should play a greater role in overseeing comitology”. Second, the *procedural* model, which rests “on a radically different vision of legitimacy, one which would require the opening of comitology to representatives of all interests affected by its decisions”. The first corresponds to the standard version of the democratic deficit, the latter to the notion of multi-level governance. The rest of this chapter examines how these models informed the debate on the BSE crisis, starting with the governance approach.

#### ***4.4 The problem of capture***

The notion of “political administration” (cf. Neyer 2000) is central to the governance approach. Implementation, the argument goes, is an intrinsically political business, the aim of which is to reconcile divergent interests, perceptions of problems and problem-solving philosophies (Héritier, Knill and Mingers 1996). The approach takes issue with the parliamentary chain of government and its understanding of the relationship between politics and administration. Implicit in the parliamentary model, it is argued, is a “transmission-belt

model of administration” (Smismans 2004b),<sup>64</sup> a hierarchically structured and politically neutral administration (Neyer 2000). However, proponents of governance maintain, EU administration deviates significantly from this model. Rather than a neutral and hierarchical bureaucracy, its administration is characterised by non-hierarchical structures and policy-networks (Smismans 2004b). Comitology, in particular, is indicative of a reorientation of European regulation away from hierarchical policy formulation (Joerges and Neyer 1997).<sup>65</sup> EU administration, therefore, “has to be understood as a mixture of majoritarian and deliberative elements which together form a peculiar European combination that can be conceived of as “horizontal enforcement”” (Neyer 2000:3).

Horizontal enforcement goes hand-in-hand with horizontal accountability. Emphasis is on “the development of co-ordination capacities between the Commission and member state administrations with the aim of establishing a culture of inter-administrative partnership which relies on persuasion, argument and discursive processes rather than on command, control and strategic interaction” (Joerges and Neyer 1997:620). Horizontal accountability thus implies both that the actors are able and willing to account satisfactorily for their opinions and preferences, and that they enforce the standards of accountability on themselves. The system, proponents of governance maintain, provides “an enormous potential for control and a chance to hold actors accountable for individual policy moves which need to be defended in substantive terms” (Héritier 1999:271).

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<sup>64</sup> “This ‘transmission-belt model of administration’ and the parliamentary model are two sides of the same coin. The transmission-belt administration assumes the existence of a general will that finds its sole expression in the parliament. The parliamentary model assumes the neutrality of the administration, which acts as its delegatee and in which the respect for the parliamentary mandate can be ensured by parliament’s control of the executive” (Smismans 2004b:7).

<sup>65</sup> The system of comitology is an institutional form of regulatory policy within the internal market (Joerges and Everson 2000:165). The system, which dates back to the early 1960, represents a compromise between the need for efficient decision-making procedures and the member states’ desire to retain some degree of control over implementation (Vos 1999:21). The Council found itself unable to tackle the demands for technical information and expertise in the legislative process, yet unwilling to delegate full responsibility to the Commission for secondary legislation. The way around this was to delegate important powers to the Commission, while subjecting it to review and oversight by committees consisting of experts, national representatives and, to some extent, socio-economic partners. Over the years, co-operative links have been established between member state administrations, formally independent scientists and Commission officials (Joerges and Neyer 1997:610).

Comitology, then, denotes the variety of committees and procedures which assist the Commission in its decision-making (Chambers 1999:99). The committees can be classified according to three criteria: function, legal basis and the binding nature of consultation (Vos 1999:21). Consultative committees are formed at the initiative of the Commission; they are usually composed of business or professional interests, and, in some cases organisations of civil society. Consultation is not compulsory. Consultation of expert committees, however, is compulsory. Expert committees, which are composed of national civil servants and technical experts, advise the Commission in the formulation and initiation of legislation. Management and regulatory committees assist the Commission in the implementation of legislation. The committees are chaired by the Commission, and comprise one representative from each member state. These committees are set up by the Council, and consultation is compulsory (Vos 1999; Lord 2004).

The BSE crisis demonstrated the vulnerability of this system. It “highlighted the fact that even scientific institutions can easily be captured by certain interest groups and instrumentalized for political purposes by the Commission” (Joerges and Neyer 1997:619). There was, in other words, breakdown of horizontal accountability. Thus, the crisis illustrated that the risk of collusion in governance networks is quite real (Dehousse 1999). Where there is a convergence of interests, concerns and language among participants in governance networks, there are good grounds for assuming that the participants will neither be able nor willing to hold one another to account. Lack of transparency, moreover, means that actors outside the network have little or no opportunity to detect what is going on. As a result, participants in governance networks are allowed to pursue particular interests with impunity.

Above all, proponents of governance insist, the crisis demonstrated the need for more transparency in comitology (cf. Joerges and Neyer 1997; Dehousse 1999). Transparency, the argument goes, serves several purposes: It enhances the responsiveness of governance by compelling participants to argue in terms of the public interest, it is a means of ensuring a greater openness of decision-making procedures, thereby permitting the participation of a broader spectre of actors and interested parties, and, finally, it will help generate public support for EU decisions and decision-making structures (Héritier 1999; Dehousse 2003). Thus, proponents of governance claim, the crisis demonstrated the need to reform EU governance not to dismantle it. Can the European Parliament agree to this framing of the crisis?

#### **4.4.1 A call for more transparency**

According to the parliamentary inquiry, lack of transparency in EU decision-making was a major factor contributing to the crisis. The secrecy and opacity of EU decision-making not only allowed the actors to keep BSE out of the public eye, it also made the system vulnerable to capture. As the Committee of Inquiry put it, “the existing system of comitology seems to be totally exempt from any supervision, thereby enabling national and/or industrial interests to infiltrate the Community decision-making process” (European Parliament 1997a). Two problems are highlighted in the course of the parliamentary inquiry: lack of transparency allowed the Commission to pursue a policy of disinformation, but, more importantly, it

reduced the effectiveness of the response. Consequently, the parliamentary inquiry insists, more transparency in EU decision-making is called for.

The parliamentary inquiry accuses the Commission of actively pursuing a policy of disinformation (European Parliament 1997a).<sup>66</sup> In response to British pressure, and out of fear for the functioning of the internal market, the Commission “on a number of occasions actually covered up the suspicions which had arisen” (European Parliament 1997d: Myller, PSE, Finland).<sup>67</sup> In addition, due to its suspension of BSE-related inspections to the UK and its failure to initiate research into BSE, the European Parliament also holds the Commission responsible for impeding the production of information about BSE (European Parliament 1997a). First and foremost, the inquiry suspects, the policy of disinformation was directed at the public and the member states. The Commission, it suggests, pursued a non-transparent policy for fear of consumers overreacting and member states taking unilateral action to prevent the import of British meat (European Parliament 1997a).<sup>68</sup>

However, the disinformation policy also affected the response of the EU. More specifically, it prevented other EU actors from responding to the emerging crisis. Although “the Commission denies the existence of the policy of disinformation (...), the facts show that (...) the most important sources of information were not available; and (...) the Council and the Commission began to neglect their duties. These two facts are connected, since if the flow of information is cut off and the Commission fails to fulfil its role in initiating legislation, the Council is sidelined. It is clear that the policy of disinformation was not confined to misleading public opinion, but played a full part in relations between the Community institutions” (European Parliament 1997a).

The effects of the disinformation policy were exacerbated by the workings of comitology. In the management of BSE, the Committee of Inquiry points out, “there were

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<sup>66</sup> It should be noted, however, that not all of its members agree with this conclusion: “we found no evidence whatsoever of a sinister conspiracy between British officials and their compatriots in the Commission. What we did find in the Commission was a dreadful inertia” (European Parliament 1997d: Whitehead, PSE, UK).

<sup>67</sup> To a large degree, the parliamentary inquiry bases its accusation on an internal Commission note of 12 October 1990, in which it is suggested that the BSE issue ought to be played down and a policy of disinformation pursued.

<sup>68</sup> The Euro-sceptical phalanx within the European Parliament takes the criticisms one step further. The disinformation policy, they argue, was pursued in order to protect the integration project and, in particular, to ensure the ratification of the Maastricht Treaty. “You tell us: ‘We have no motive. Why would we have done that?’ However, Mr Santer, if the public had known the truth in 1990, if, in 1992, it had known that free trade, the unrestrained pursuit of productivity, was resulting in contamination, it would not have accepted the GATT agreements and the Maastricht Treaty. That is your motive. You concealed the contamination by meat-based meal in order to conceal the contamination by your ideas. Above and beyond the infection by meat-based meal, the public was being poisoned by your ideas, Mr Santer! And, in terms of the Vienna Treaty, you violated the people’s right of consent. You secured the ratification of the Maastricht Treaty by invalidating that right of consent” (European Parliament 1996a: Martinez, NI, France).

chronic shortcomings at this time in the flows of information between the Community institutions and in the information provided to the Member States' veterinary authorities. These two factors helped reduce the efficiency of the comitology (sic!). In this way, the disinformation policy not only affected public opinion but also restricted the Community's capacity to legislate" (European Parliament 1997a). The system of comitology in veterinary matters includes the Council, the Commission, the Scientific Veterinary Committee and the Standing Veterinary Committee. The Scientific Veterinary Committee acts as a consultative organ for the Commission. Based on the recommendations of this committee, the Commission presents a proposal to the Standing Veterinary Committee for adoption. The Standing Veterinary Committee may adopt the proposal by qualified majority or refer it to the Council. The Council can then either reject the measure by simple majority or unanimously agree to change it. The Commission may implement the measure if a) it has been adopted by the Council, or b) if the Council fails to act within a given time limit (Vos 1999:25). Two features of this system, the parliamentary inquiry finds, contributed to the crisis: the lack of clear channels of information and the organisation of scientific advice.

First, there are no clear channels of information between the Scientific Veterinary Committee and the Standing Veterinary Committee. "This means that there are no guarantees that a scientific position of the Scientific Veterinary Committee will necessarily be adequately represented on the Standing Veterinary Committee" (European Parliament 1997a). In the management of BSE, this resulted in the latter being "only partially aware of the information coming out of the Scientific Veterinary Committee" (European Parliament 1997a). As a result, the Committee of Inquiry concludes, the Standing Veterinary Committee could adopt measures while not in full knowledge of the facts. This problem, moreover, was exacerbated by the Commission's inability to monitor the work of the Standing Veterinary Committee. In this connection, the Committee of Inquiry notes, "it is surprising that the Commission does not possess detailed minutes of the meetings of the Standing Veterinary Committee; if there are no minutes of the meetings and debates, it is scarcely possible to carry out effective monitoring of the policy lines expressed by the delegations on the Standing Veterinary Committee" (European Parliament 1997a).

Second, the organisation of scientific advice means that it is particularly susceptible to capture. The Scientific Veterinary Committee consists of experts appointed by the Commission from a list of names put forward by the member states. Because "the criteria for appointment have to be based on professional qualifications", the Committee of Inquiry points out, "there is (...) no criterion of nationality in its membership" (European Parliament 1997a).

In the case of BSE, the result was a majority of British experts on the BSE subgroup of the Scientific Veterinary Committee. “The influence of British thinking on the Commission was obviously increased by the preponderance of British experts and Ministry of Agriculture officials on the BSE Subgroup of the Scientific Veterinary Committee. This initially derived from the fact that the UK had far more experience of BSE than any other Member State. With other diseases the experts came predominantly from the Member State concerned (for example with swine fever). Nonetheless, the BSE Subgroup of the Scientific Veterinary Committee has almost invariably been chaired by a UK national, which made considerations of objectivity and impartiality particularly important” (European Parliament 1997a).

The parliamentary inquiry expresses doubts concerning the objectivity and impartiality of these experts. Two incidents are cited in favour of this conclusion: First, the BSE subgroup “has, almost throughout, been chaired by a UK national (first Mr Plowright and then Mr Bradley), and has included a substantial number of British scientists. Mr Bradley, who from 1969 to 1991 was head of the UK’s Central Veterinary Laboratory and was subsequently an adviser to the British Ministry of Agriculture, has acted as rapporteur on BSE at the full meetings of the Scientific Veterinary Committee; it emerges, furthermore, from some of the minutes of the committee meetings that a number of members have suggested that Mr Bradley may have withheld information” (European Parliament 1997a). Second, the responsible Commission official also had strong ties with the British Ministry of Agriculture. “Mr Marchant, a temporary Commission official entrusted by DG VI with the day-to-day management of the BSE affair, who was formerly an official of the British Ministry of Agriculture, has been responsible for drawing up the minutes and providing Commission administrative support for the BSE Subgroup, in close cooperation with Mr Bradley. The letter of 31 January 1992 in which Mr Bradley provides Mr Marchant with instructions, which is in the possession of the present committee (...), clearly reveals the nature of the professional relationship between the two. It is a typical example of correspondence between two officials (one from the Commission, one from a national government), rather than an instance of cooperation between an independent scientist and a Community institution” (European Parliament 1997a). In this light, the Committee of Inquiry concludes, “there has been, at least, a lack of transparency” in the Scientific Veterinary Committee’s management of the BSE affair (European Parliament 1997a).

The obvious answer, the parliamentary inquiry concludes, is more transparency in EU decision-making. More transparency will make it possible for EU institutions to react more efficiently, ensuring more timely and effective action. Furthermore, it will help restore



citizens' confidence in EU decision-making (European Parliament 1997g; European Parliament 1997h: Graenitz, PSE, Austria). Most importantly, however, transparency is a condition for democratic control (European Parliament 1997a). "The total and deliberate lack of transparency in the conduct of European affairs", one member of the European Parliament explains, "prevents the instruments of democratic control – Parliament and the press – from performing their functions on a day-to-day basis" (European Parliament 1997c: Pasty, UPE, France). Transparency cannot be but a good thing for EU legitimacy. "After all, a Commission and a Council that are more transparent, more attentive to the needs and protection of the public, and freer of the pressures exerted by lobbyists and national governments, together with a European Parliament exercising democratic vigilance over the actions of the other institutions, cannot fail to provide the sound basis that we want Europe to have" (European Parliament 1997d: Viola, PPE, Italy).

#### **4.4.2 Responsibility dissolved**

According to the European Parliament, however, there are more deep-seated problems with comitology. The complexity of the system, it argues, has the effect of dissolving responsibility. In the management of BSE, the Committee of Inquiry finds, the Council has tried to leave the responsibility in the hands of the Commission, the Commission has variably blamed the European Parliament for not allocating sufficient resources and the UK government for neglecting its responsibilities under the treaties, the UK government has claimed that it must be exempted from blame because the Commission has no proof of non-compliance (European Parliament 1997a). As one member of the European Parliament puts it: "the Committee of Inquiry's report reveals a *de facto* abdication of responsibilities by the Commission and, to a lesser extent, the Council" (European Parliament 1997d: Pasty, UPE, France). The workings of comitology, the European Parliament explains, allows responsibility to be shifted from one actor to another, thereby preventing any of them from taking effective action.

At the outset, it is observed, it would appear that the responsibility for failed implementation lies with the Commission. As the guardian of the treaties, it is the responsibility of the Commission to supervise and enforce the application of EU legislation (Cini 2002). This, the Committee of Inquiry's rapporteur notes, is also the position of the

Council. “The President-in-Office has told us that the Council’s powers in some areas are purely legislative, with implementation being the responsibility of the Commission and the Member States” (European Parliament 1997c: Medina Ortega, PSE, Spain). However, he continues, comitology interferes with this seemingly simple division of responsibilities. “This is where we start to run into difficulties, since we all know that in fact the Council has some important implementing powers and that – through the comitology procedure, to be precise – the powers of committees are only exercised by delegation from the Council and with the involvement of Council representatives. So it would seem that there does indeed exist an area of responsibility of the Council and the governments of which it is composed” (European Parliament 1997c: Medina Ortega, PSE, Spain).

One problem with comitology, then, is that it does not abide by the principle of the separation of powers between the legislative and executive branch of government. “And this raises a serious problem: the Council, which is the legislative body, delegates some executive responsibilities to the Commission, but it retains the fundamental power. It is as if it had given the Commission a bullet, but that bullet is on a cord, so that after each shot, the Commission has to return it to the Council” (European Parliament 1997d: Medina Ortega, PSE, Spain). Thus, the rapporteur finds, comitology is in breach of fundamental democratic principles. “One of the principles of our constitution is the separation of powers. In order to be a Member of the European Community, a state must abide by the principles of the EC. However, the European Community itself does not abide by the principle of the separation of powers – and it has even been said that if the European Community asked to join the European Community, it could not be accepted because it does not abide by that principle” (European Parliament 1997d: Medina Ortega, PSE, Spain).

Establishing where responsibility lies is further complicated by the role of the Standing Veterinary Committee. On the one hand, this committee “enjoys by delegation powers which are the preserve of the Council” (European Parliament 1997a), indicating that ultimately the Council is responsible for its decisions. However, the Commission “convenes the committee and draws up its agendas”, hence “it is the Commission that exerts control over it” (European Parliament 1997a). Then again, when it comes to voting in the committee “the votes are weighted, with the effect that the influence exerted by the different governments is not a function of scientific reason, but of those governments’ political will or weight”, and, as “a result decisions of an executive nature which are adopted in the Council are then counteracted by the way in which committees made up of representatives of the Member States’ governments operate” (European Parliament 1997d: Medina Ortega, PSE, Spain).

In this light, the Committee of Inquiry asserts, comitology contributes to dissolving responsibility for poor or contentious decisions. “The complexity of the comitology system and the lack of transparency of the procedures inherent therein make it even more difficult to apportion responsibilities, be it with respect to the institutions or to the committees, and enables one institution to shift political and administrative responsibilities on to another” (European Parliament 1997a). Not only does comitology make it very difficult for the European Parliament to carry out its monitoring tasks, for the EU citizens it is all but impossible to determine where responsibility lies. “For the Community’s citizens, it is rather like playing the game – which is a popular one in many countries – of guessing which of the three cups the little ball is under. You think you have kept close track of the ball, but in the end it turns out to be under a different cup. Our main concern, therefore, is the distribution of responsibilities” (European Parliament 1997c: Medina Ortega, PSE, Spain). As summed up by another member of the European Parliament: Responsibility “dissolves into a labyrinth, so that ultimately no one is responsible” (European Parliament 1997d: Raschofer, NI, Austria).

#### **4.4.3 Accepting the medicine but not the diagnosis**

Comitology, according to the European Parliament, is an impediment to democratic control. The result is delegitimation. “The Community’s citizens are currently alarmed at the development of mysterious institutions which meet in Brussels, and in which there are possibly lobbies at work, and they have no assurance that the food they eat, the products they consume, are provided with adequate health safety guarantees” (European Parliament 1997d: Medina Ortega, PSE, Spain). Simple reform of comitology, it argues, is not enough. Thus, in contrast to proponents of governance, who see increased transparency as a means of improving governance, the European Parliament wants more transparency because it is a condition for democratic control.

The European Parliament has little faith in horizontal mechanisms of accountability. Where proponents of government see a system in which mutually suspicious actors scrupulously monitor one another, the European Parliament sees collusion. Comitology, the argument goes, gives national and sectoral interests a back-door influence over secondary legislation. The complexity and lack of transparency of the procedures allow “national and private lobbies to prevail over the Community or general interest. These lobbies have virtually

taken over some Commission departments, as well as the extraordinary advisory committees, whose variable geometry is determined by the particular interests that are being pursued in them” (European Parliament 1997c: Pasty, UPE, France). What is more, in its management of BSE, the Council “generally used the elite club of the Council to look after national interests rather than those of the people of the Union. It reinforces the view of my group that the Council, when acting as a corporate body, hides behind the members’ individual democratic legitimacy and acts together in a secretive and unacceptable way” (European Parliament 1997d: Green, PSE, UK).

In calling for more transparency in EU decision-making, the European Parliament accepts the medicine but not the diagnosis of the governance approach. Whereas proponents of governance embrace transparency on the grounds that it will bolster horizontal accountability, the European Parliament is in favour of more transparency because it is a requirement for vertical accountability, i.e. the ability of citizens and their representatives to hold EU decision-makers to account. In contrast to proponents of governance, in other words, it maintains that transparency is a necessary but not sufficient condition for democratic control. In addition, it insists, the powers of the European Parliament must be expanded, allowing it to influence the shaping of EU policies in the area of food and agriculture (European Parliament 1997a; 1997g; 1999a).

Introducing co-decision, it argues, will enhance the transparency of EU decision-making. The “non-public decision-making procedures in the Commission, on the Commission Council circuit, in the management committees and so on were not enough to prevent the most major crisis imaginable in the beef sector in Europe from occurring. The only solution is to have more openness, which means greater codecision powers for the European Parliament” (European Parliament 1997d: Mulder, ELDR, the Netherlands). The argument, it must be assumed, is that co-decision moves the legislative process from closed fora into the public domain. Rather than being adopted behind closed doors, legislation will be debated and scrutinised in the plenary of the European Parliament. Thus, the legislative process will not only be accessible to the representatives of EU citizens, but also to the citizens themselves. Consequently, the Committee of Inquiry “urges the Commission together with Parliament to call at the Intergovernmental Conference (IGC) for the codecision procedure to be used for agricultural matters. Until the Treaty is amended by the IGC, the Commission should use Article 100a on the internal market as the legal basis for its proposals in all agricultural-related matters which affect or could affect the protection of health or the quality of foodstuffs” (European Parliament 1997a, emphasis removed).

The European Parliament thus ignores the fact that the effect of co-decision on transparency is contested. As pointed out by Warleigh (2003), the powers of the European Parliament have increased over the years, yet its public impact remains low. In fact, the expansion of its powers have had the opposite effect; rather than increasing its visibility in EU decision-making, empowering the European Parliament has had the effect of removing it from the public view. The co-decision procedure, Warleigh argues, can serve as an example. Firstly, negotiations between the Council and the European Parliament, i.e. the conciliation-stage, take place behind closed doors, making it difficult for the public to assess the contributions of the European Parliament. Secondly, in order to have an impact at the conciliation-stage, the European Parliament must adopt an agreed institutional perspective, thus limiting the scope of partisan politics and its ability to conduct a meaningful plenary debate. In other words, even if it is an increasingly important actor in various policy networks, its influence largely goes unseen by the public.

The experience of comitology suggests that increased transparency is not the main motive behind the call for more co-decision. Rather, representation appears to be the main concern. In order for EU decision-making to be legitimate, the European Parliament insists, citizens must be represented. The BSE crisis, moreover, demonstrated that the need for representation extends even to seemingly technical areas, such as food safety and regulation. In the last section of this chapter, I will expand on the European Parliament's arguments.

#### ***4.5 Responding to changing problem structures***

The BSE crisis not only produced change, it was also the product of change. From the time when BSE was first identified in the UK to the European Parliament's inquiry important changes had taken place in Europe. The most important of all was the fall of the Berlin wall. The 1989 revolutions in Eastern and Central Europe paved the way for democratisation of former Communist countries, and held the promise of a united Europe.<sup>69</sup> Less dramatic, but nevertheless important, was the breakdown of the "permissive consensus" in the EU. Subsequent to the turbulence surrounding the ratification of the Maastricht Treaty,<sup>70</sup> the

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<sup>69</sup> An idea expressed, among others, by the late François Mitterand in his speech to the French people on New Year's eve 1990 (cf. Eriksen and Fossum 2000b).

<sup>70</sup> In Denmark it took two referendums and several exceptions to the Treaty before it could finally be ratified. In France, the Treaty was ratified by the people in a referendum, but only just.

European political elite came to realise that it could no longer rely on the automatic support of its citizenry. Democracy had become priority number one. “After the fall of the Berlin wall”, Linz explains (1997:404), “no anti-democratic ideology appeals to politicians, intellectuals, religious leaders (...) as an alternative to political democracy”. And the breakdown of the permissive consensus had demonstrated that the democratic imperative applied beyond the state.

Thus, the BSE issue emerged in a political climate which was favourably inclined to arguments for democratisation. In BSE, the European Parliament saw an opportunity to advance its vision of democratic reform. As a result, it declared the BSE crisis to be a crisis of European integration. The BSE crisis, it stated, was not limited to EU food policy and regulation; it demonstrated the degree to which the European project was out of touch with popular opinion. Whereas European integration is geared towards the protection and promotion of economic interests, it argued, European citizens request that integration be extended to non-economic interests and values. The crisis, according to this view, was brought about by this conflict over the ends and means of European integration. In their reactions to BSE, the main actors had been motivated by the desire to avoid disruptions in the flow of goods on the internal market. The concern of EU citizens, however, was not the market as such, but their health and safety, as well as the need for a sustainable and ethically sound agricultural policy.

More than anything, the parliamentary inquiry suggests, the BSE crisis illustrated that the problem-structure of European integration was out of touch with the interests and values of EU citizens. The conclusion is premised on a three-step argument. First, EU decision-making structures are systematically biased towards the market, thus compelling decision-makers to give priority to economic interests over those of the public at large. Second, the relationship between technical support and political structures is poorly defined. One lesson from the BSE crisis, the European Parliament insists, is that expertise cannot solve political problems. Third, too many political decisions are taken by actors who are not electorally accountable. The bias in decision-making is brought about by a deficit in political representation. Whereas national governments and stakeholders are represented in EU decision-making, EU citizens are not. However, because questions of how to regulate the market are political, they cannot be legitimately resolved without popular input.

### 4.5.1 Biased policy making

The BSE crisis was, one representative explains, “a disaster waiting to happen” (European Parliament 1997d: Green, PSE, UK). Although the main actors – the UK government, the Council and the Commission – cannot be exempted from blame, “[r]esponsibility for the BSE scandal (...) also lies in the structures of the EU” (European Parliament 1997e: Kreissl-Dörfler, Verts/ALE, Germany). The crisis did not develop by pure chance, but reflects a deep-seated and structural problem of European integration. More specifically, the crisis is seen as the product of a systematic bias, a bias which compels decision-makers to give priority to the market and to ignore other legitimate interests. “The BSE tragedy”, in short, “is a sad and dramatic example of what can happen when the health of the public and the safety of consumers is sacrificed on the altar of business expediency and profit-enhancement” (European Parliament 1997d: Green, PSE, UK).

The parliamentary inquiry identifies two sources of this bias: the organisation of the internal market and the Common Agricultural Policy. The internal market, it finds, is structured in such a manner that it favours economic interests to the detriment of public health and consumer protection. It is obvious, the rapporteur for the Committee of Inquiry explains, that the opening of borders, although desirable, leads “to new problems in terms of animal epidemics, new diseases and new forms dissemination of diseases which were previously non-existent and that, therefore, requirements should be strengthened in terms of veterinary administration and diagnosis and research centres” (European Parliament 1997c: Medina Ortega, PSE, Spain). Nevertheless, the internal market has no provisions for a common European health and consumer policy. “At present, the very structure of the Commission, the structure of the system of scientific and other committees, is not designed to guarantee health protection. As the Community has developed, with the emphasis being placed on its essentially economic aspects, it has been forgotten that the fundamental purpose of economic activity is to protect people and enable them to develop their potential” (European Parliament 1997d: Medina Ortega, PSE, Spain). The BSE crisis “is obviously the result of the fact that Europe does not really exist in this field” (European Parliament 1997e: Pimenta, PPE, Portugal). The BSE crisis served to illustrate that food safety and control is not merely an essential task for any state (cf. Elvbakken 1997), but also a prerequisite for the functioning of the internal market.

“One of the lessons to be drawn from the ‘mad cow’ affair concerns the state of chaos of health controls in Europe” (European Parliament 1997e: Berthu, EDN, France). Because “[e]ffective control mechanisms for consumer protections have never been established” (European Parliament 1997e: Kreissl-Dörfler, Verts/ALE, Germany), strategic actors are allowed to pursue their interests in disregard for food safety. “It seems that even today, Community citizens like us are exposed to the arbitrariness of one Member State, which can relax veterinary measures without any higher level of controls” (European Parliament 1997c: Medina Ortega, PSE, Spain). “For the future of European integration”, therefore, “it is important to draw the institutional consequences” (European Parliament 1997e: Valverde López, PPE, Spain). Above all, this means that “we need to establish a new policy of controls right down the line, from company to table, and to apply the principle of precaution adequately” (European Parliament 1997h: Tamino, Verts/ALE, Italy).

The Common Agricultural Policy is also criticised for giving priority to economic interests. Originally developed in response to concerns for inadequate food supplies in post-war Europe, the Common Agricultural Policy is described as “an industrial agricultural policy” (European Parliament 1997d: Frischenschlager, ELDR, Austria) with little regard for animal welfare or sustainable agriculture (European Parliament 1997d: Jensen, PSE, Denmark; European Parliament 1997e: Kreissl-Dörfler, Verts/ALE, Germany). As summed up by one representative: The “responsibility for the BSE crisis is shared by many, but the real responsibility lies with the Common Agricultural Policy and all EU institutions are responsible for that, including Parliament. It has created production conditions of an extreme, stressful and artificial nature. It has crossed national boundaries and facilitated the spread of the disease via animals and foodstuffs. It has encouraged an imbalance in the location of slaughter houses leading, as a result, to animals being transported over unreasonably long distances. It has, to put it bluntly, been developed on the belief that plants, animals and the soil can be treated as dead material” (European Parliament 1997d: Svensson, GUE/NGL, Sweden).

Two specific criticisms are made in the debates. First, that the markets in agricultural produce are guided exclusively by economic considerations. That the “Commission, the responsible authorities of the Member States, producer organizations and farmers in general should be urged to give priority to the interests of market management of the COMs is nothing more than a shortsighted policy option for the CAP. Consumer confidence through appropriate guarantees for public health protection is the only way to ensure a viable agricultural policy which satisfies both consumers and producers. To this end, all of the above



should be urged to ensure that these considerations are a fundamental element in future changes to the rules of the CAP” (European Parliament 1997a). Rather than economic considerations, the chairman of the Committee of Inquiry urges, “agriculture, rural economy on the principle of sustainability and thinking over generations must be our motto, the need for an agriculture adapted to its location, observing the precautionary principle in improving efficiency and using hormones, and the development of a code of good agricultural practice” (European Parliament 1997h: Böge, PPE, Germany).

Second, the emphasis on quantity rather than quality is seen as problematic. The members of the European Parliament take issue with the agricultural production methods encouraged by the Common Agricultural Policy, in particular methods of meat production. “We first have to change what is no longer acceptable in our European Union, for example the way in which we produce meat” (European Parliament 1997d: Görlach, PSE, Germany). The problem, more specifically, is the practice of feeding meat and bone meal to ruminants, a practice which turns “herbivores into carnivores” (European Parliament 1997d: Jensen, PSE, Denmark).<sup>71</sup> “Ladies and gentlemen”, one representative rhetorically asks, “would even Dr Faustus ever have thought of breaking an age-old tradition and feeding meat-and-bone meal to ruminants” (European Parliament 1997d: Martens, PPE, Belgium)? The result of this practice, which violates “nature in the name of economic growth”, are “new problems and new, unknown, diseases” (European Parliament 1997d: Lambraki, PSE, Greece). It is imperative, therefore, that “our efforts (...) be centred on bringing about an agricultural sector based on sustainability and on production methods best suited to each type of animal” (European Parliament 1997d: Böge, PPE, Germany).

The main lesson from the BSE crisis, then, seems to be that health and consumer protection must not be allowed to be sacrificed for the sake of profits. “We have learned, and the learning was bitter, that he who puts the market before health precaution loses” (European Parliament 1997h: Graenitz, PSE, Austria). With few exceptions, the members of the European Parliament seem to agree on this point. Does this shared commitment to health and consumer protection imply that EU food policy is regarded as efficiency-oriented rather than redistributive, a policy area where Pareto-efficient solutions can be identified? Not quite. Although they are as good as united in their demand for improved health and consumer protection within the internal market, the members of the European Parliament are well aware that there is a political dimension to this issue. And, indeed, ideological cleavages are

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<sup>71</sup> And carnivores into cannibals, one could add.

apparent in the debate. To the extent that they can be said to agree on a set of reforms, therefore, this is a result of an overlapping rather than a genuine consensus.

#### 4.5.2 A political issue

It is obvious, from the deliberations of the European Parliament, that EU food regulation is political. The patterns of conflict are well-known, and can be summed up under two headlines: more versus less integration, and economic liberalism versus regulated capitalism. The first concerns the primary locus of authority. Should the EU function as an intergovernmental organisation whose legitimacy is premised on and derived from the democratic legitimacy of its component states, or should it be some form of supranational organisation whose legitimacy is direct? The second concerns the scope of authoritative regulation. Should the EU favour the Anglo-American model of market liberal capitalism or the form of regulated capitalism associated with the continental Europe Rhine model (cf. Hooghe 2001)? The response of the members of the European Parliament to the BSE crisis suggests that, far from being apolitical or efficiency-oriented, the issue of EU food policy activates both of these conflict dimensions.

The members of the European Parliament frame the BSE crisis in terms of more or less Europe. To the proponents of intergovernmental cooperation, the BSE crisis clearly demonstrates that European integration has gone too far. The “European Union is now in a state of health disarmament, not by accident, but because of a policy which I do not hesitate to qualify as conscious disorganization destined, in the minds of the apprentice sorcerers who conceived it, to cause chaos in the European state. (...) we believe that the single market has been vitiated by the dogma of the Commission, according to which it was absolutely necessary to abolish all frontier controls and all goods accompanying documents. Free circulation has thus become free contamination. To emerge from this, we must question this policy” (European Parliament 1997e: Berthu, EDN, France).<sup>72</sup> From this observation, two

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<sup>72</sup> The argument is based on the following observation: “From the point of view of the single market, which was to eliminate all import controls on internal frontiers – a directive 89/662/CEE reorganized the system: the principal health supervision was no longer incumbent on the importing country, at its frontiers, but on the country of origin – in this case the United Kingdom for its meat exports. However, this formula has cumulative inconveniences: it lays the burden of control on the partner who has the least interest in exercising it vigilantly. To correct this bias, ‘federal’ controls would have to be established for the supervision of exporting countries; but this complicated structure would prove oppressive for national sovereignties, and also costly, as an army of

inferences are made: First, competences in the area of food safety and control ought to be restored to the member states.<sup>73</sup> Second, responsibility for the BSE crisis rests not only with the Commission, the Council and the UK government, but also with the European Parliament and the major European media. “They kept quiet while one of the most terrifying epizootics or perhaps even zoonoses was being incubated in order to allow the incubation of another ‘prion’, an ideological one – the federal European Union of the single market and the Maastricht Treaty” (European Parliament 1997a, minority opinion: Martinez, NI, France).

The proponents of deeper integration, on the other hand, maintain that the crisis is a sign that European integration does not go far enough. The BSE crisis, they insist, demonstrates that EU competences in the area of health and consumer protection must be significantly strengthened. “The European Union needs real executive powers of direct inspection as well as higher inspection and the capacity to withdraw products from the market automatically and ban their sale, both inside and outside the European Union. Similarly, it must be given powers to require strict fulfilment of Community legislation by the Member States” (European Parliament 1997e: Valverde López, PPE, Spain). Most importantly, in addition to improved capacity for damage control, the Commission must be equipped with the instruments necessary to prevent damage from occurring in the first place. It “is essential that the Commission should actively monitor the transfer and implementation of Community law within the Member States and submit proposals for improving the system of control and export of meat and other foodstuffs, since the effective protection of consumers can only be safeguarded when measures are taken beforehand, rather than (sic!) afterwards, when the damage has been done, as in the case of BSE” (European Parliament 1997h: Trakatellis, PPE, Greece).

Thus, the call for a re-nationalisation of competences is pitched against a supranational vision for the EU. According to proponents of the first, the proposals of the latter are nonsensical. From the perspective of a nationalist, the report of the Committee of Inquiry gives rise to the following observation: “from the crushing verification it ascertains, it draws

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officials would have to be recruited in Brussels. That summarizes in a few sentences if not the causes of mad cow disease (which originates from an agricultural policy contrary to nature), but at least the causes of its spreading; the European Union has abolished its national controls, without introducing, or even first devising, other properly operational systems to take the relay. What is the current situation? With fixed customs on internal frontiers having been abolished and documents which accompany goods having been eliminated too, controls are becoming very difficult. They are exercised here or there, on the post, with no serious documentary base and when goods are already circulating on the internal market of each country. Under these conditions, fraud of every kind multiplies. The chaos is complete” (European Parliament 1997e: Berthu, EDN, France).

<sup>73</sup> “It is true (...) that the only effective measure would have been the banning of free movement, but to tell you that is the only effective measure would be to strike at the heart of the European construction” (European Parliament 1997h: Martinez, NI, France).

paradoxical proposals. Has the Commission failed? Its duties should be extended and reinforced. Has it shown itself indifferent to public health? It should take full responsibility for it. Has the European Parliament not exercised particular vigilance? Its powers should therefore be extended particular as far as joint decisions in the agricultural field, which risks ruining the very architecture of the common agricultural policy” (European Parliament 1997e: Souchet, EDN, France). From the vantage point of supranationalism, the intergovernmental stance is equally perplexing. “It is unimaginable that the European Union should continue to function on the basis of the sovereignty of the Members States, with a totally free interaction of market forces, and a lack of effective Commission powers in health and other areas which are important for the welfare of its citizens” (European Parliament 1997h: Medina Ortega, PSE, Spain).

The main focus of the debates, however, is EU economic policy. To a greater or lesser extent, the members of the European Parliament take issue with processes of market deregulation. The BSE crisis, it is argued, “strikingly illustrates the fact that the single market – whose praise we sing – can produce the worst excesses if the market is allowed to regulate itself” (European Parliament 1997d: Fayot, PSE, Luxembourg). Thus far, it seems, the members of the European Parliament are in agreement. However, when it comes to how, more precisely, the market is to be regulated, this agreement dissolves into a left and a centre-right camp. The call for more and better market regulation comes in three versions: First, the position of the centre-right camp insisting on the need for more effective health and consumer protection. There was, one representative observes, “an inability to make preventive consumer protection a central issue within the internal market, and a lack of interest in doing so” (European Parliament 1997d: Böge, PPE, Germany). Citizens’ confidence in EU institutions and regulatory apparatus, the argument goes, will depend on the extent to which the EU regulatory apparatus is capable of correcting negative externalities and preventing fraud.

Second, according to the socialists, responsibility for the BSE crisis lies in the structures of the internal market, structures which have been shaped by an aggressive neo-liberal ideology. “We are living in a time – it seems to be part of the current climate – in which we are obliged to make savings. We are obliged to make things pay, to be competitive – but for the sake of whom, for the sake of what? For the sake, of course, of the unbridled pursuit of profit of monetarism and high finance” (European Parliament 1997d: Happart, PSE, Belgium). The call is for a shift in regulatory ideology. A “simple commitment to regulation”, the argument goes, “is as outmoded and dangerous a concept as a simple commitment to deregulation. What is needed is appropriate regulation: regulation to protect the health of the

public and regulation to secure the safety of consumers is, in our view, necessary in a single market” (European Parliament 1997d: Green, PSE, UK). Overcoming the neo-liberal philosophy is difficult, but not impossible. “You will need a great deal of energy and willpower to do this, Mr Santer. Above all, you will need the support of those European political forces which do not talk solely in terms of profit, deregulation and liberalization, but which wish to see a prosperous Europe in which human and natural values are respected” (European Parliament 1997d: Fayot, PSE, Luxembourg).

Some representatives, however, take the criticisms one step further. If the BSE crisis has taught us anything, they argue, it is that there is a need to move from economic to political integration. “In the last analysis, I think this has just been the first example of what can happen in an internal market which is dominated exclusively by economic considerations. It makes me think that there are limits to economic activity and to the extent to which market forces can be allowed to regulate every situation within the internal market. If the European Union is nothing more than a mechanism for economic harmonization, then we will encounter this type of difficulty from time to time. In other words, the European Union has to be more than just a sort of referee of market forces” (European Parliament 1997h: Medina Ortega, PSE, Spain). It should not be forgotten that “the fundamental purpose of economic activity is to protect people and enable them to develop their potential. If we continue to subordinate everything to the economic interests of particular business sectors, we shall ultimately condemn the common market and cause harm to the Community’s citizens as a whole” (European Parliament 1997d: Medina Ortega, PSE, Spain). What is needed, in other words, are “proper ecological and social safeguards” (European Parliament 1997e: Kreissl-Dörfler, Verts/ALE, Germany).

To sum up the debate: In various ways and to various degrees, the members of the European Parliament find fault with the existing problem structure. As one representative argues, the parliamentary inquiry “shows above all the great shortcomings in the present concept of Europe”, shortcomings which “are symptoms of a sickness that is inherent in the system. The report of the Committee of Inquiry shows that the institutional structure cannot function as it exists at present” (European Parliament 1997d: Raschofer, NI, Austria). Amending the existing problem structure is more than a mere technicality. As the above discussion illustrates, the issue is itself subject to partisan politics. It involves important political choices, and cannot therefore be delegated to experts. Only through proper democratic procedures can the system be reformed, and only through constant democratic control can the legitimacy of its policies be ensured.

### 4.5.3 The people must be given a voice

EU institutions, actors and policies cannot be legitimate unless they are democratic. This, in short, is one of the main conclusions of the parliamentary inquiry. The EU, it is suggested, is experiencing a process of delegitimation.<sup>74</sup> Due to undemocratic decision-making procedures, citizens feel that their interests are not being represented, and rightly so. The BSE crisis is a case in point. The crisis, it is argued, was brought about because “the concerns of lobbies and governments (...) took precedence over the general interest” (European Parliament 1997c: Mamère, ARE, France). In the course of the parliamentary inquiry, therefore, the members of the European Parliament seek to explain why democracy is necessary and how it can come about. Three questions structure the debate: Why is democracy justified? Who can and ought to represent the people? What instruments does the European Parliament have at its disposal, and what instruments ought it to have at its disposal?

Two justifications for democracy can be discerned in the debates. The first is of a pragmatic nature. Democracy is necessary for citizens’ interests to be represented. As it is, the lack of citizen representation in EU decision-making allows specific interests to prevail over the more diffuse interests of European citizens. “Do you not realize that you are building Europe without the involvement of its citizens, that you are building Europe in the interest of business and against those of its citizens” (European Parliament 1997d: Happart, PSE, Belgium)? This, the argument goes, is precisely what undermines the legitimacy of EU institutions, actors and policies. As one member of the European Parliament puts it: “Mr President, the development of the European Union will depend on whether its citizens espouse the idea of European integration because they feel that their interests are being represented. A policy which gives priority to business over people and which puts the functioning of the market above public health is letting down the citizens of Europe and thereby ultimately calling into question what it professed to support” (European Parliament 1997d: Graenitz, PSE, Austria).

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<sup>74</sup> “We have now reached a stage where many of our fellow citizens no longer believe in what we are doing at European level. Social problems, the despair that people feel when they are faced with unemployment and see no future for their children, the despair they feel in the face of international organized crime, the mafia, the drugs problems, and the despair they feel when their very health was put at risk, must make all those in positions of responsibility in the European Union who are currently preparing the new Treaty realize that not only must our decision-making procedures be changed – though this too is important – but we must also try to get to the very heart of the social problems that millions of people face and the fear they feel, and we must let them know what we are doing about it. I hope that the BSE tragedy has brought this home to all those responsible for giving the European Union a more hopeful and human face once again” (European Parliament 1997d: Martens, PPE, Belgium).

However, there is also a moral justification for democracy. In the absence of a democratic mandate, EU institutions cannot command obedience from its citizenry. More specifically, the principle of “no taxation without representation” is invoked. “Without mad cow disease not so much attention would have been focused on the fact that the EU decides on agricultural policy in a more restrictive manner than for other areas of policy, even though the agricultural policy is one of the longest-standing areas of cooperation and this remains the area which accounts for half of the EU budget” (European Parliament 1997d: Jensen, PSE, Denmark). It is highly problematic, therefore, “that the Commission has assumed *de facto* responsibility for legislation, without ever securing democratic legitimacy from the citizens of Europe” (European Parliament 1997d: Raschofer, NI, Austria). Thus, the argument of the European Parliament echoes that of Beetham and Lord (1998:13), who insist that the EU is “the source of authoritative rules and allocations which impinge directly on citizens, and which require their acknowledgement of them as authoritative and binding.”

The next question is who should represent the people? With the exception of the intergovernmentalists, according to whom only institutions at the national level can claim to be representative of the citizens, the members of the European Parliament agree that they are in fact the representatives of the EU citizenry. “The members of the European Parliament, elected by universal suffrage, must defend European citizens” (European Parliament 1997e: Pery, PSE, France). In the capacity of a representative assembly, the “European Parliament has an obligation to our citizens and to our citizens alone” (European Parliament 1997d: Böge, PPE, Germany). In fact, the debate on the BSE crisis is considered to be “an acid test of our willingness to voice the concern of the European public” (European Parliament 1997d: Fantuzzi, PSE, Italy). In this light, one representative concludes, let “us not disappoint the European citizens in our countries, regions and constituencies, whom we represent. They are expecting us to defend them with courage and determination. Let us not give them further cause to doubt the political establishment. They must be able to believe in us, so that they continue to believe in Europe” (European Parliament 1997d: Barthet-Mayer, ARE, France).

What instruments does the European Parliament have at its disposal, and what instruments ought it to have at its disposal? Three instruments are considered particularly important to the European Parliament. Above all, the European Parliament must be allowed to represent the citizens in capacity of a legislative assembly. To this effect, the European Parliament demands that all areas relating to public health, animal health and agriculture must be covered by the co-decision procedure. Two arguments are invoked in favour of more co-decision: Through co-decision citizens will gain more insight into the legislative process, and,

most importantly, through co-decision they will be allowed to exercise democratic control over EU legislation. The European Parliament, therefore, “[w]elcomes the Commission’s commitment to apply Article 100a of the EC Treaty in the area of animal health and food safety” (European Parliament 1997g), and insists that all “necessary agricultural legislation for which a qualified majority is required in the Council must in principle be covered by the codecision procedure” (European Parliament 1997a).

The second instrument is the right of censure. In the debates on BSE, considerable attention is devoted to the use of this instrument. The European Parliament has, since the Treaty of Rome, had the right to censure the Commission by a double majority: an absolute majority of members and two thirds of the votes cast. Even if a motion of censure has yet to be carried, the right of censure is an important instrument of control. But how does it work? Should it be likened to the vote of no confidence in parliamentary systems, or is it more like the right of impeachment of the US Senate, only to “be exercised in extreme circumstances” (Hix 2005:60)? On this point, the members of the European Parliament are divided. The question, more precisely, is whether the Commission, given its omissions and maladministration, should be forced to resign or whether a conditional censure would serve the purposes of the European Parliament better.

A minority of its members opt for immediate censure. Censuring the Commission is, they claim, a duty. The “conclusions and findings of the final report of the BSE Committee of Enquiry (sic!) clearly and unequivocally place all political and administrative responsibilities with the Commission” (European Parliament 1997d: Novo, GUE/NGL, Spain). Given the gravity of the established facts, “public opinion will not understand if the Commission is not censured” (European Parliament 1997e: Dury, PSE, Belgium). In other words, the censure is essential if the public is to regain confidence in EU decision-making. “The moment you and your Commissioners leave, the Union’s citizens will begin to have faith in a Europe that is courageous and transparent enough to dismiss you. And by going, you will enable the Europe in which you believe to move forward” (European Parliament 1997d: Bébéar, PPE, France).

Moreover, a motion of no confidence is seen as the normal democratic procedure. Accountability must be *ex post*. “A motion of censure can be tabled to call for responsibilities to be assumed that were incurred in the past” (European Parliament 1997d: Jové Peres, GUE/NGL, Spain). Furthermore, democracy requires of elected representatives that they hold the unelected bureaucracy to account. In “any normal democracy, those responsible for blunders like this would be dismissed” (European Parliament 1997d: Vandemeulebroucke, ARE, Belgium). “Ultimately, Mr President of the Commission, it is because we wish to have



strong European institutions that we also wish those institutions to be politically responsible. The two things are connected. Mr President, your admissions, your promises of reforms, your commitments are not enough. There is a need for a more powerful political gesture to exorcise past misdeeds” (European Parliament 1997d: Lalumière, ARE, France).

The ideal, then, is the parliamentary chain of government. The Commission bureaucracy must be accountable to the college of Commissioners. “It must be made clear to every Commission official that he cannot hide behind management errors and organizational shortcomings, of which there were plenty in this case, and that, in the case of individual misconduct, he will be personally called to account” (European Parliament 1997a). The college of Commissioners must be accountable to the European Parliament. “The European Commission must answer to this Parliament” (European Parliament 1997d: Puerta, GUE/NGL, Spain). Finally, the European Parliament must be accountable to the citizens. “It is now the duty of the European Parliament, elected by universal suffrage and responsible towards citizens, to sanction the Commission” (European Parliament 1997d: Poisson, UPE, France).

The majority of members, however, believe that an immediate censure would be detrimental not only to citizens’ representation, but to the legitimacy of EU decision-making. A censure will “divert attention from the necessary reform of the EU in favour of a superficial debate on scapegoats” (European Parliament 1997d: Jensen, PSE, Denmark). Instead, the Commission should be held to a programme of reform. “The Commission’s responsibility now lies in carrying out these fundamental reforms, because, as the Medina report says, this will serve the Committee of Inquiry’s purposes better than simply dismissing the Commission outright. Our group therefore confirms that it has confidence in the Commission to implement these reforms. It needs to take urgent action to restore the credibility of the European Union by giving public health and consumer protection precedence over economic interests” (European Parliament 1997d: Martens, PPE, Belgium).

The dismissal of the Commission would strengthen, rather than lessen, the crisis. A “successful motion of censure at this stage would simply lead to an institutional crisis which would last for months and not do one single thing to strengthen public health or consumer protection at European level” (European Parliament 1997d: Green, PSE, UK). Contrary to the proponents of immediate censure, the majority does not believe that a censure will cleanse the system. Rather, they see it as an attempt to reverse the process of integration. A “number of Members are seizing on the BSE crisis in an attempt to discredit the Europe of the Maastricht Treaty. From the far left to the far right, there are many people who wish to take advantage of

this affair to push Europe into a crisis that will permanently weaken it and give rise to the widespread re-emergence of nationalism, the ending of the process of economic and political integration and, ultimately, new confrontations between the countries of Europe, weakening it for good” (European Parliament 1997d: Fayot, PSE, Luxembourg).

In other words, the motion of censure is not an instrument that should be used lightly. It is not, as Hix (2005:60) points out, comparable to the right of elected representatives in parliamentary systems to withdraw majority support for the executive. The point is not to throw the Commission out of office, but “to give people constructive reasons to have confidence in us” (European Parliament 1997d: Thyssen, PPE, Belgium). “Parliament has been given significant powers, and these are being used, but they must be used sensibly. One must never misuse the significant powers one has been given” (European Parliament 1997d: Kofoed, ELDR, Denmark). “What we must do, ladies and gentlemen, is not to provide bread and circuses for the public, but prove that we are capable of using the instruments of power available to us as they were intended, so as to ensure that we have a policy which guarantees the highest possible food quality” (European Parliament 1997d: Thyssen, PPE, Belgium). The solution, therefore, is not immediate censure. Rather, it is to use the threat of censure in combination with the right to set up committees of inquiry.

Finally, the European Parliament discovers, by adopting a conditional censure it can hold the Commission to a programme of reform. The Commission is presented with a list of reforms, and asked to present a progress report within 6 months. In addition, a temporary committee instructed to follow up the work of the temporary committee is set up. The motion of censure is deferred awaiting the reports of the Commission and the committee of inquiry. The aim of the conditional censure is, on the one hand, to push for a number of specific legislative and administrative reforms, and, on the other, to ensure continuous oversight and monitoring of the activities of the Commission in a particular field or area. In other words, the right of censure and the right to set up committees of inquiry are used as means of exercising control *ex ante* as well as *ex post*. In this light, it is interpreted as proof that the European Parliament “is equal to the task of controlling the Commission [and that it] also has the power to assume the Commission’s role if it feels that the latter is not fulfilling it correctly” (European Parliament 1997d: Kofoed, ELDR, Denmark).

The conditional censure resulted from a creative interpretation of the powers of the European Parliament. It allowed the European Parliament to exercise considerable influence over a policy area where its formal powers are very limited. More importantly, the conditional censure contributed, according to its members and according to some observers (Chambers

1999), to a strengthening of the position of the European Parliament within EU decision-making. “It should be made very clear to the general public that the European Parliament’s right of inquiry, and the way in which it has exercised that right, represent a step forward for democracy in Europe. It demonstrates that impenetrable European and national bureaucracies can be forced to become more transparent. It demonstrates that the elected representatives of the European people can make the truth prevail in the face of compartmentalized and arrogant administrations” (European Parliament 1997d: Fayot, PSE, Luxembourg).

The result of the parliamentary inquiry, according to this view, is a changed political landscape. “Through this committee of inquiry, Parliament has gained a new degree of self-confidence. After BSE, nothing in Europe is the same. We shall have our say on issues of health, nutrition and agriculture. We shall no longer allow an arrogant administration – which is still in place and of which you are now the political leader, namely this Commission – to think that it does not need to take any account of the proposals and initiatives of the European Parliament. If Parliament’s proposals had been implemented, if we had had a right of codecision when the mad cow problem was at its peak, then this BSE crisis would not have assumed such proportions. We should very probably not have had to deal in this way with the consequences which may lie ahead of us. So I would say that the point is definitely to move forward, to give the European Parliament the rights it needs in order to exercise legislative control over the administration and to ensure that the Commission moves in the right direction” (European Parliament 1997d: Graefe zu Baringdorf, Verts/ALE, Germany). The parliamentary inquiry, in short, has contributed to democratisation.

#### ***4.6 Legitimacy of decisions or legitimacy of procedures?***

In integration theory, the BSE crisis is sometimes invoked to back up theoretical claims. In particular, proponents of the regulatory model and multi-level governance hold that the crisis illustrates or points to general weaknesses in the EU institutional apparatus. The European Parliament, or at least a majority of its members, agrees. In contrast to the regulatory and governance model, however, it frames the crisis in terms of a deficit of democratic representation in EU decision-making. The EU, it insists, must be democratised and the opinions, values and interests of its citizens must play a more prominent role in decision-

making. In the last instance, the argument goes, the crisis highlights the need for a model of European integration which is more democratic, more social and more ecological.

Thus, the European Parliament sees the crisis as resulting from an unfortunate interplay of a number of factors. The regulatory model and the governance model, in contrast, insist that the crisis can be explained by a limited set of factors. According to the regulatory model, the explanation for the crisis can be found in an inadequate administrative infrastructure and increased parliamentarisation of the Commission. The governance model, in contrast, emphasises the lack of transparency in EU governance structures and the consequent capture of these structures by particular interests. A more complex picture emerges in the debates of the European Parliament. In addition to inadequacies in the administrative apparatus, undue political pressure and lack of transparency, its members suggest that the division of competences between the national and the supranational level, an aggressive neo-liberal ideology, a failed agricultural policy, and the absence of citizen representation were major factors contributing to the crisis.

Implicit in the crisis definitions are different understandings of the relationship between administration and political structure. The regulatory model claims that, in the field of regulation, this relationship ought to take the form of a principal-agent relationship where the agent enjoys a maximum of independence from its principals. Regulation, it insists, is apolitical and must therefore be shielded from excessive political pressure. The governance model maintains that administration is political. Given the political nature of administration, moreover, the model of vertical responsibility as expressed in the parliamentary chain of government cannot and ought not to apply. Rather, responsibility must be horizontal, in the sense that the actors give accounts to and are responsible towards one another. Both are rejected in the debates of the European Parliament. EU regulation, it is understood, is political, and it is precisely because of its political nature that the regulatory apparatus must be answerable to citizens and their elected representatives.

The argument can be reconstructed as follows: First, in its insistence on the efficiency/redistribution dichotomy, the regulatory model misrepresents the relationship between politics and administration. Regulation is not apolitical. Rather different regulatory policies can be located at different positions on an efficiency/redistribution continuum (cf. Føllesdal and Hix 2006). What is more, the position of any given policy on this continuum is not fixed, but depends on the wider context in which the policy is located and interpreted. Any change in understanding of the problem at hand – the problem definition – may therefore result in a change of its position on the continuum. The BSE crisis illustrates how an issue can

be depoliticised or politicised, how a seemingly apolitical issue such as food policy may potentially have considerable political implications. Less effort, therefore, should be devoted to fixing the position of a particular policy on the efficiency/redistribution continuum, and more to the questions of what motivations the political level have for conferring discretion on an agent, as well as when and why it ought to and chooses to delegate power and when and why it ought to and chooses to retain power. Because it ignores the extent to which administration might be political, however, the regulatory model is unable to answer these questions.

The governance model, on the other hand, goes too far in its endorsement of political administration. In order for the political decisions of administrations to be legitimate, there must be mechanisms linking expert deliberation with the concerns of the citizenry at large (cf. de la Porte and Nanz 2003). In the absence of such mechanisms, it can be assumed neither that experts will act in the interests of citizens nor that they will have knowledge of what these interests consist in. Being an expert is not equal to having privileged access to the interests, opinions and values of citizens. As long as a uniquely determined common good or public interest cannot be identified, the only legitimate means of formulating a common position is through fair and democratic procedures. In consequence, even if it could be established that experts do in fact act in a disinterested manner, this would not be sufficient to ensure the legitimacy of their decisions. As Dehousse (2003:145) explains, “granting experts ‘carte blanche’ is likely to be unpopular in a period of widespread mistrust of technocrats of all kinds. Rightly or wrongly, lay people may also have views on the decisions to be taken, and insist that they too should be considered”.

Ultimately, then, the deliberations of the European Parliament touch upon the distinction between the legitimacy of decisions and the legitimacy of decision-making procedures. Whereas the concern of the regulatory and governance models is the legitimacy of collective decisions considered in isolation, the position of the European Parliament is that the willingness of citizens to obey collective decisions hinges on and ought to hinge on their acceptance of the procedures of law-making in general. In order for EU institutions, actors and policies to be legitimate, the argument goes, the procedures of EU decision-making must be fair. Accordingly, the main lesson from the BSE crisis is not that wrong decisions were made, but that EU decision-making is unrepresentative of EU citizens and biased towards major economic interests. In this light, the European Parliament concludes, EU decision-making must be made more representative and responsive to the interests, values and opinions of citizens.

Does this entail support for the democratisation of EU politics along the lines of parliamentary democracy? The rhetoric of the European Parliament and its members certainly suggests so. It seems reasonable to interpret the position of the European Parliament as a call for more popular input in EU decision-making. At the same time, however, there is a constant emphasis on, and attention to, output. The understanding, it seems, is that more democracy is necessary not primarily because it is a fair system of government but because it will produce better results. As one member of the European Parliament puts it: “You have asked here today, Mr Santer, where we would be if common sense had prevailed in the past. Certainly, we would be living in a more democratic, more social and more ecological Europe, instead of a in an uncontrolled market and under the rule of technocrats” (European Parliament 1997d: Voggenhuber, Verts/ALE, Austria). This leaves us with the question of why, more precisely, more representation is justified. What modes of representation do the members of the European Parliament have in mind, and from where do these modes of representation draw their legitimacy?

## 5. THE CONSTITUTIONAL DEBATES

In a much quoted and much discussed speech, Joschka Fischer put the European constitution on the political agenda. Europe, he stated, ought to be “established anew with a constitution.”<sup>75</sup> The speech, which elicited much debate both in academic and political circles,<sup>76</sup> is oft cited as the starting point of the constitutional debates which culminated in the Constitutional Treaty. In light of the “double no” to the Constitutional Treaty in the French and Dutch referendums, the enthusiasm surrounding the constitutional debates and the Constitutional Treaty has been somewhat tempered. At the time, however, the Constitutional Treaty was hailed as the means through which the EU would become more democratic, more efficient and more transparent (European Council 2005). And the method by which it was drafted was described as a turning point in the history of European integration (Shaw 2003), a radical departure from the intergovernmental model of piecemeal and self-interested bargains.

The popularity of the constitutional idea and the convention method was, of course, rooted in many factors (Weiler and Wind 2003), of which two have proven particularly salient: First, the reform of EU institutions. The call was for more efficient, more legitimate and more transparent institutions. The constitutional process, it was argued, would allow the EU to overcome the impasse of Nice, and to adapt its constituent treaties to the reality of enlargement. In this view, the constitutional process needed be no more than a tidying up exercise (Bellamy 2006a). The second was the more ambitious task of defining the EU’s identity. The challenge was two-fold: to define the end state of European integration, Europe’s political form, and to permit the peoples of Europe to constitute themselves as a political community. The constitution, in this view, was both a process of self-definition and self-identification (Habermas 2004 [2001]). The question, more specifically, was how the EU ought to be constituted in order for its citizens to recognise it as legitimate.

The convention method, it was suggested, would change both the scope and form of EU constitutional debates. First, it would allow for a comprehensive debate. In contrast to the piecemeal and instrumental approach of the past, the Convention was given the task of

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<sup>75</sup> “From Confederacy to Federation: thoughts on the finality of European integration”. Humboldt University, 12 May 2000.

<sup>76</sup> See for example: Jacques Chirac’s speech to the German Bundestag on 27 June 2000; Tony Blair’s speech to the Polish Stock Exchange on 6 October 2000; Jean Monnet Working Paper 7/00: Symposium: Responses to Joschka Fischer, with contributions by, among others, Christian Joerges, Yves Mény, J.H.H. Weiler, Johan P. Olsen, Helen Wallace and Giuliano Amato.

rethinking the “constitutional” setting of the EU in its entirety (Magnette 2004). Second, it would provide for a more deliberative approach to constitution-making, a departure from the intergovernmental bargaining of the past. Not only was the method hailed for introducing a more open and more representative approach to treaty change, it was also thought to enhance the search for common ground and shared understanding (Closa 2004). Finally, as the President of the Convention himself suggested, it was hoped that an open and consensual debate on the ends and means of European integration would enhance the popular legitimacy not only of the constitutional process but also of European integration more generally (cf. Eriksen and Fossum 2002).

In one reading, then, constitution-making post-Nice is an, admittedly imperfect, experiment with deliberative democracy. For one thing, the stated aim of the constitutional process was to produce a common understanding on the ends and means of European integration. Second, such an understanding was to be reached by means of discourse, the aim of which was to achieve “broad consensus on a single proposal” (Giscard in Magnette 2004:213). Finally, the setting itself was conducive to deliberation. The mandate of the Convention was broad, its members represented a broad spectre of actors, who, in addition, was asked to consult with representatives of civil society, the conventionnels met in public, and its conclusions were to be reached by consensus. Thus, even though its mandate resulted from classic intergovernmental negotiations, its deliberations took place in the shadow of the intergovernmental conference and, moreover, were not open to all, and its rapport with the EU citizenry was weak, the Convention was nevertheless seen as “testimony to the high credibility people attach to deliberative bodies, when it comes to forging proposals and decisions of a constitutional nature” (Eriksen and Fossum 2002:419).

This chapter examines the constitutional debates of the European Parliament against the backdrop of the deliberative model. According to proponents of integration through deliberation, the European Parliament provides an ideal setting for assessing the deliberative approach to constitution-making. For one thing, deliberation is held to be “intrinsic to the mode of representation on which Parliaments are based” (Eriksen and Fossum 2002:411). Moreover, because deliberation “presupposes the ability to conduct an open and free debate without serious ties or aspects of ‘bootstrapping’ of representatives”, the weakness of the European party system means that there is “more scope for open deliberation (...) than in a fully fledged party-based system” (Eriksen and Fossum 2002:413). Finally, the European Parliament has itself stressed that political decisions ought to be underpinned by a “fundamental consensus” (European Parliament 2001j), thus indicating that the legitimacy of



normal politics emanates from the constitutional settlement. The question, then, is whether the deliberative setting provides for a deliberative approach to constitution-making.

The debates of the European Parliament do not point in the direction of a deliberative consensus. Rather, three distinct and conflicting visions of European integration can be discerned, visions which more or less correspond to the propositions of the *no demos thesis*, *constitutional tolerance* and *constitutional patriotism*. Proponents of the no demos thesis argue that, in the absence of a European demos, integration should not move beyond intergovernmental cooperation, and that citizens therefore should be represented by their national governments or parliaments. Constitutional tolerance, in contrast, point out that there are more peoples than member states in the EU, and that European institutions therefore should give voice to non-state identities. Finally, advocates of constitutional patriotism believe that the peoples of Europe are able and willing to unite into a single demos represented by the European Parliament.

The manner in which these visions are debated, moreover, suggests that the members of the European Parliament are more concerned with explaining, defending and gain a hearing for their understanding of European integration and legitimacy than they are with discovering or establishing a common ground. The reason, I argue, is that the debate on representation touches on one of the most politically controversial questions in the EU, namely the question of more or less integration. Whereas proponents of the no demos thesis see European integration as a threat to national sovereignty, and therefore demand the return of competences to the member states, proponents of constitutional patriotism propose that the EU become some kind of federation. Finally, proponents of constitutional tolerance advocate neither the model of intergovernmental cooperation nor the federal state, instead asking that the EU be a structured arena providing access to actors of different types (cf. Keating 2001a).

In this setting, I argue, the deliberative model's insistence on consensus on constitutional arrangements is bound to be counterproductive. For one thing, it draws attention to the question of Europe's end state, and thereby to the question of more or less integration, a question which is highly politicised and on which there is profound disagreement within the European Parliament. Second, it raises the stakes, making it less likely that the participants in the constitutional debates will reach a constitutional settlement. Finally, rather than directing attention to the procedures of collective decision-making, it points to the objectives and ideals that decision-makers should strive for. The focus on the ends of the integration process reduces the citizen to a fictitious actor, whose role is not

specified and whose options are foreclosed. The impression, then, is that of democracy without a demos and without politics.

The chapter proceeds in four steps. The first section discusses the no demos thesis, and asks how proponents of the thesis approach issues of citizen representation in EU policy-making: Who should be represented, how and by whom? Moreover, it will focus on the implications of the no demos thesis for the EU, and explain why the thesis no longer is a satisfying approach to the challenges of European integration. The next section introduces the notion of a union of multiple demoi. Here, the question is whether EU democracy is framed according to the principle of constitutional tolerance, and, if so, what the implications of this framing are for EU democracy and the integration process more generally. Who are the peoples of Europe, and how should they be represented in EU decision-making? The third section discusses the idea of a union of citizens, and asks whether this approach manages to distance itself from the perception of the EU as a problem-solving entity. According to this vision of the EU, it is the interests and preferences of citizens that should be represented. Proponents of a union of citizens promote the federalisation and parliamentarisation of the EU, as well as the construction of a European demos. At the outset, therefore, this approach appears to imply a break with the apolitical understanding of integration. Yet, the understanding of the EU as a problem-solver dies hard, and this, I argue, is a major obstacle to the establishment of parliamentary democracy in a federal EU. Finally, I conclude with a discussion of the debates in light of the deliberative model.

## ***5.1 The no demos thesis***

According to a minority within the European Parliament, EU democracy is a contradiction in terms. The EU cannot be democratised because there is no European people - no demos – on which to build democratic institutions. There is, in the words of one member of the European Parliament, “no such thing as a European people – only the peoples of the individual Member States” (European Parliament 2001a, minority opinion: Ribeiro e Castro, UEN, Portugal). In line with J. S. Mill (1972 [1861]), they maintain that democracy is next to impossible in a political association made up of different people. In the absence of a European people, the feeling of belonging to a community will be too weak to guarantee support for EU

institutions, actors and policies.<sup>77</sup> “There is no single European people, but a great many. There is no single European mother tongue, but a great many. There is no single European nation, but a great many. There is no single European culture, but a great many” (European Parliament 2001c: Sacrédeus, PPE, Sweden). Under these conditions, EU democracy can be nothing “other than a kind of technocratic smokescreen” (European Parliament 2002c: Berthu, NI, France).

In consequence, democracy is “best expressed at Member State level” (European Parliament 2001a, minority opinion: Ribeiro e Castro, UEN, Portugal). Because democracy cannot be realised at the European level, the only remaining option is to legitimise the EU with reference to the democratic character of its member states. It is, therefore, essential that the process of European integration does not undermine national democracy. The gradual transfer of powers from the national to the European level causes, it is argued, “increased public alienation”. “Only by reversing the trend to return powers to national institutions with which the peoples of Europe identify, is a re-emergence of healthy public interest in the political process possible” (European Parliament 2002i, minority opinion: Bonde, EDD, Denmark; Hannan, PPE, UK; Berthu, NI, France; Ribeiro e Castro, UEN, Portugal). Competences vital to the national interest should remain national, and the EU should not acquire competences and capabilities beyond that of an “association of states” (European Parliament 2001k: Väyrynen, ELDR, Finland).

Integration, in other words, is couched as pragmatic cooperation between sovereign states, and the EU is, or should be, and international organisation rather than a polity in its own right. With this in mind, proponents of the no demos thesis advocate the slimming down of the Community acquis. In order not to infringe on the competences and prerogatives of its member states, the EU should only cover issues of cross-border concern, with all other competences being returned to the member states (European Parliament 2002i, minority opinion: Bonde, EDD, Denmark; Hannan, PPE, UK; Berthu, NI, France; Ribeiro e Castro, UEN, Portugal). It should, in other words, only carry out the tasks that its members are unable to deal with individually. The EU is depicted as a problem solver, whose functions supplement rather than replace those of its component states. As such, its legitimacy is

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<sup>77</sup> It should be noted, however, that proponents of the no demos thesis within the European Parliament are a mixed lot. Whereas some clearly subscribe to its ethno-cultural version, others seem more inclined towards the civic identity version claiming that it is the lack of a linguistically integrated, rather than a culturally integrated, public that impedes democratisation. Notwithstanding, they reach a similar conclusion, namely that democracy is and must be confined to the member states.

premised not only on the democratic character of its member states, but also its ability to serve their interests.

This combination of indirect legitimacy and legitimacy through performance has marked the EU since its inception (Fossum 2000). The indirect mode of legitimacy is typically associated with international organisations, whose legitimacy depends on three factors: the legitimacy of its member states, the ability of the organisation to serve the purpose of its component states and respect for national sovereignty (Lord and Magnette 2004). The EU is, in short, “a successful intergovernmental regime designed to manage economic interdependence through negotiated policy coordination” (Moravcsik 1993:474). European integration is seen as occurring through a series of intergovernmental bargains. Interests are formulated, negotiated and aggregated at the national level, and representatives of the member states’ governments then bargain among themselves in order to realise those interests. Moreover, as long as the process of European integration does not impinge on national sovereignty, national democracy is not undermined. At the European level, the interests of citizens are protected and promoted by their national governments in the Council. Consequently, citizens exercise their democratic rights by holding their governments to account in national elections.

A major objection to the intergovernmentalist reading is that the deepening of European integration means that it can no longer be legitimised indirectly. The limits of the intergovernmental approach have been thoroughly dealt with elsewhere (see for example Weiler 1995; Beetham and Lord 1998; Nugent 1999). Here, I will merely summarise the main points of the critique: First, the claim that Member States retain full sovereignty is controversial. On the contrary, observers have noticed that the principles of sovereignty and direct effect significantly challenge the notion of state sovereignty (Beetham and Lord 1998; Fossum 2000). Furthermore, the introduction of qualified-majority voting in the Council means that national governments risk being outvoted in the Council, and, consequently, their ability to pursue nationally defined interests is hampered. This, in turn, reduces citizens’ capacity for exercising democratic control over EU policy-making through national elections. The crucial question, therefore, is not whether national governments are able to control EU institutions, but whether citizens can hold their representatives to account.

Proponents of the no demos thesis within the European Parliament largely agree with these objections to intergovernmental cooperation. The Council, they maintain, “has long lost its *raison d’être* as the guardian of national interest” (European Parliament 2001c: Meijer,

GUE/NGL, the Netherlands). Decision-making in the Council is outside the public domain. It legislates behind closed doors, and, combined with the complexity of its procedures, this lack of openness makes it possible for decision-makers to evade responsibility for poor and contentious decisions. As a result, European integration has led to an unprecedented rise in executive power, whereby national governments are allowed to pursue their goals isolated from the interests and demands of citizens and stakeholders. Therefore, it is pointed out, the “intergovernmental method of decision-making is no longer a guarantee that the diverse wishes that prevail in the Member States are taken into account” (European Parliament 2002c: Meijer, GUE/NGL, the Netherlands).

Rather than intergovernmental cooperation, these members of the European Parliament advocate a strengthening of the role of national parliaments in EU decision-making. “In order to revitalise democracy in Europe, it is essential to give each people the visible power of decision at European level. Consequently, in future we must see national parliaments as standing at the centre of the decision-making process rather than on the periphery. (...) The legitimacy of democracy today is based on the elections to the national parliaments and, as a consequence, the institutions of the European Union must be adjusted to this fact” (European Parliament 2002c: Blak, Denmark; Figueiredo, Portugal; Frahm, Denmark; Miranda, Portugal; Schmid, Sweden; Seppänen, Finland; Sjöstedt, Sweden; GUE/NGL). The will of the peoples of Europe is expressed by their respective national parliaments. Here, the principles of popular and national sovereignty come together. National parliaments “alone have full sovereignty” (European Parliament 2002a, minority opinion: Berthu, NI, France). Hence, respecting the “sovereignty of Member States” (European Parliament 2001i, minority opinion: Bonde, EDD, Denmark) means respecting the sovereignty of their parliaments. Accordingly, “there will not be any true democratisation of the Union unless we reassess the value of the national parliaments, and unless they acquire direct power in the European decision-making process” (European Parliament 2002a, minority opinion: Berthu, NI, France).

However, there are good grounds for questioning whether national parliaments are suitable arenas for deliberation on EU politics and policies. Given that European issues are only exceptionally on the agenda in national elections, it is not obvious that national parliaments are representative of public opinion on these issues. What is more, national parliaments are far-removed from the European policy process. Information may be scarce, and even when it is not, national parliaments may lack the capacity to process this

information. Above all, national parliaments differ in their powers to act on their scrutiny of EU decisions (Lord 2004). Few parliaments can issue legally or politically binding instructions to their governments on European issues.<sup>78</sup> The different powers and capabilities of the national parliaments mean that the quality of citizen representation will depend on where they live. In other words, “reliance on them to the exclusion of the EP in key policies risks political equality” (Lord 2004:181). As Weiler (1995:238) convincingly argues, “[y]ou simply cannot be serious about democracy in Europe and believe that given the present array of powers and competences already transferred to the Union, democratisation can take place exclusively at the national level.”

The normative assumptions of the no demos thesis are equally, if not more problematic, and the conflation of *ethnos* with *demos* particularly so. Democracy, according to the no demos thesis, is only possible within a polity constituted by the nation and its members, the people. Membership in the polity is conditioned upon membership in the nation. The nation, in turn, is defined in ethnic-cultural terms, and citizenship is therefore “ultimately parasitic upon nationhood as a social concept” (Beiner 1996). Hence, in order to become members of the polity, citizens must assimilate to the “national ideal” (Scruton 1990). The question is whether it is reasonable, given the heterogeneity of European societies, to ask citizens to give up their ethnic and cultural attachments in order to assimilate to the ethnic-cultural identity of the majority.

The notion that democracy is conditioned upon the existence of an ethnically defined *demos* is controversial. European states are not, and have never been, ethnically homogeneous. For one thing, there are more nations than there are states in Europe. The European nation state, therefore, is a nation state in name only. Moreover, increased social and economic mobility means that traditional hierarchies of authority have been challenged, making European societies more differentiated and complex, and increased geographical mobility and processes of migration have led to more ethnically diverse societies. Modern societies are, in other words, characterised by deep diversity and cultural pluralism, and, whereas in the past this diversity could be stifled or ignored by models of the “normal” citizen, the decline of traditional hierarchies has led to demands for more inclusive conceptions of citizenship (Kymlicka 2002). It can, in other words, no longer be assumed that citizens are willing to assimilate to the national ideal if this ideal is formulated in ethnic-cultural terms. The no demos thesis does not only lead to the conclusion that EU democracy is

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<sup>78</sup> And even those who do have no guarantee that their governments will not be outvoted in the Council.

unfeasible, it also questions whether, given the increased social and culturally heterogeneity of European states, democracy is at all possible.

Of course, not all of its sponsors within the European Parliament subscribe to the ethno-cultural variant of the no demos thesis. Some defend a version of the thesis more reminiscent of Mill's discussion of the absence of a linguistically integrated public. There are, however, grounds for questioning even this version of the thesis. The process of European integration challenges the relationship between nation and state, and compels us to query our received understandings of nation, state and citizenship. At the empirical level, it has been observed that the process of European integration gradually has relieved the state of some of its functions, undermined traditional sovereignty, and, thereby weakened the need for statehood (Keating 2004). At the theoretical level, observers are increasingly challenging the notion that the demos can only be contained within an ethnically, culturally or linguistically homogeneous nation state. In fact, the no demos thesis stands accused of giving an empirically open question the status of a normative maxim (cf. Kraus 2004). The assertion that a high degree of homogeneity is necessary in a democracy should not be automatically accepted. Instead, these assumptions should be studied empirically. Such empirical investigation might uncover that state-building is but one path to demos-building. Indeed, the nation state itself emerged as a contingent and convenient response to the challenge of membership.

Therefore, rather than automatically rejecting the possibility of democracy beyond the nation state, one should examine the possibilities and conditions for post-national democracy. Can democratic principles and processes be transferred from state level to the European level? If so, how can these principles and processes be translated and implemented at the European level? In the literature one can identify at least two alternative theories on demos formation: the construction of a common identity based on the principle of *constitutional patriotism*, or the management of multiple demoi through the principle of *constitutional tolerance*. The crucial question is whether citizens should be represented as individuals or as collectives, i.e. as peoples. According to the principle of constitutional patriotism, it is the opinions, values and interests of individual citizens that should be represented. Constitutional tolerance, in contrast, maintains that it is the cultural and social characteristics of groups that should be represented. The next section focuses on the principle of constitutional tolerance and the notion of deep diversity. Is the EU framed as a union of peoples, and, if so, what are the implications for EU democracy and the integration process more generally?

## *5.2 A union of peoples*

In its reports and resolutions, the European Parliament repeatedly refers to the EU as a “Union of States and peoples” (European Parliament 2001h; 2001i; 2001m; 2002a; 2002d; 2003a). The question, then, is what it means to be a union of peoples and states, as opposed to being a union of states and citizens, on the one hand, or only states, on the other. In contrast to conceptualisations of the EU as a union of states and citizens (as will be discussed in the next section), proponents of a union of peoples maintain that the peoples of Europe, defined in ethnic-cultural terms, must be recognised “as holders of some of the Union’s legitimacy” (European Parliament 2003c: Ferrer, PPE, Spain). However, counter to the no demos thesis, they also hold that the peoples of the EU should be represented in a European institution. “As a union of nations, [the EU] expresses itself through the European Parliament and, as a union of states, it expresses itself through the national executives, which in turn rely on the trust placed on them by their national parliaments” (European Parliament 2002b: Tsatsos, PSE, Greece). At the European level the peoples are, and should be, represented by the European Parliament (European Parliament 2001e; 2001h).

EU democracy, in short, must take place at both the national and the European level. Democratisation therefore entails a simultaneous strengthening of the powers and prerogatives of parliaments at both levels. It “must take an original path, resting on two pillars, the European Parliament and the national parliaments” (European Parliament 2002a; 2002d). Whereas only the European Parliament, by virtue of being a European institution, can interact effectively with other European institutions, the “solidity of national democratic frameworks and their closeness to the citizens are an essential asset which can in no way be ignored in pursuing the ‘parliamentarisation’ of the Union” (European Parliament 2002a; 2002d).<sup>79</sup> In sum, “the involvement of both the European and national parliaments constitutes the basis for a European system with democratic legitimacy” (European Parliament 2001j; 2001n). It is important to notice, though, that the national parliaments and the European Parliament are assigned different functions in this system.

The role of the European Parliament is to act as the representative of the peoples in EU decision-making. First and foremost, this means that the European Parliament should act as co-legislator alongside the Council. Co-decision should be applied “in all areas, where

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<sup>79</sup> Or, as one member of the European Parliament puts it, it “is the national parliaments which will keep their citizens in touch with developments in the European Union and make them feel that they are European citizens” (European Parliament 2002b: Tsatsos, PSE, Greece).



decisions in the Council are taken by qualified majority” (European Parliament 2002i). Strengthening and extending co-decision is depicted as a means of improving dialogue with the Council, and thereby of giving the European Parliament a say in law-making. On the one hand, co-decision ensures that EU laws are “approved by the representatives of the people” (European Parliament 2003f: Paciotti, PSE, Italy). On the other, it has allowed the European Parliament “to develop a shared culture in which the Council, for the first time, has been opening up to Parliament” (European Parliament 2001f: Barón Crespo, PSE, Spain). Co-decision, in this reading, is a non-hierarchical mechanism of accountability.<sup>80</sup> Whereas the function of co-decision in the first sense is to give the representatives of the peoples a say in law-making, in the latter sense its function is to allow the European Parliament to check and balance the Council in the everyday operation of the EU’s policy process. In consequence, the extension of co-decision envisaged in the draft Constitutional Treaty is considered to be “an essential step towards increasing the democratic legitimacy of the Union’s activities” (European Parliament 2003e; 2003g).

National parliaments, in contrast, should not be involved in decision-making at the European level. Such participation “would entail the risk (...) that the different roles of the national governments and the national parliaments would become confused, leading to serious distortions in relations between governments and parliaments in the countries of the Union” (European Parliament 2002a).<sup>81</sup> European policy should, however, “be constantly baptised in

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<sup>80</sup> Co-decision is the most important instrument available to the European Parliament. However, it is not the only one. The need to improve its dialogue with the Council outside the context of co-decision is also emphasised in the debates. For one thing, it is suggested that the Council should be present at the plenary sittings of the European Parliament “during an additional half-day, in order to be present, in particular, during debates and critical votes on legislation, legislative initiatives by the Member States and the Commission’s annual legislative programme” (European Parliament 2001e). Moreover, the President-in-Office of the Council should “report to Parliament three times during the Council presidency: at the beginning of the presidency, to present his programme, once during the presidency to report on progress achieved, and at the end of the presidency to give a concluding assessment” (European Parliament 2001e). Finally, relations between the two institutions should, to a greater extent, be organised and co-ordinated through interinstitutional agreements (European Parliament 2002m).

<sup>81</sup> The European Parliament also rejects proposals to set up a second legislative chamber composed of members of the national parliaments. “The possibility of a second chamber consisting of national parliaments is still being proposed by a number of national parliaments, but without the consensus of many others. The proposal is based on the conviction that this could strengthen the democratic legitimacy of the Union and respond to the concern among national parliaments that their influence over the decision-making process at European level and developments in European integration is being further reduced. As this document shows, we believe that these concerns can be resolved without the creation of a second chamber. A second chamber would be a new institution not directly elected by citizens and its effect would be further to weigh down the already complex institutional structure of the Union. The organisational problems of a chamber the members of which are also members of the national parliaments have already been experienced and appear to be such as to lead some of the advocates of a second chamber to provide for the number of part-session days during the year and, in short, its tasks, to be reduced to a minimum. But even on the basis of apparently moderate proposals for the tasks and powers of a second chamber – preliminary scrutiny of every text from the point of view of the application of the principle of subsidiarity, supervisory or consultative powers with regard to matters coming within the current

the waters of the national parliaments” (European Parliament 2002b: Tsatsos, PSE, Greece). To that effect, national parliaments should guide and monitor the work of their governmental representatives in the Council. Control should be both *ex ante* and *ex post*. On the one hand, “national parliaments must be able to intervene when European legislative texts are being drawn up by expressing opinions and making contributions which the respective governments undertake to take account, even though they cannot serve as binding negotiating briefs”(European Parliament 2002a). On the other hand, national parliaments should monitor the transposition and implementation of EU directives and regulations. Such a supervision of the national executives is “the fundamental way of ensuring the participation of national parliaments in the legislative work of the Union, as well as in the development of common policies” (European Parliament 2002a).

Most members agree that national parliaments should play the role of stock-takers, rather than that of agenda-setters. Yet, as we have seen, national parliaments have limited competences when it comes to monitoring the Council’s exercise of legislative authority. Above all, they do not have access to the decision-making process. Therefore, openness in the Council is fundamental. “It is entirely unacceptable in a democracy for laws to be made behind closed and bolted doors on behalf of 380 million people and without there being any public scrutiny” (European Parliament 2001f: Sacrédeus, PPE, Sweden). “If parliamentarians at all levels in Europe are to be engaged effectively, there must be open and public legislative debate in the Council” (European Parliament 2001g: MacCormick, Verts/ALE, UK). Put succinctly, openness is a condition for democratisation. “Through this future openness, the European Union will be democratised. It will lead to greater pressure being exercised by electorates and to greater supervision of the Council by national parliaments” (European Parliament 2001f: Sacrédeus, PPE, Sweden).

Even if the Council is to legislate in public, however, the capacity and competences of national parliaments vis-à-vis the Council are limited. Members of the European Parliament recognise that the European institutional structure limits the ability of both the European Parliament and the national parliaments to participate in decision-making. Whereas national parliaments suffer from “[d]eficient monitoring facilities and the governments’ failure to supply appropriate briefings” (European Parliament 2002b: Kaufmann, GUE/NGL, Germany), the pillar structure places strict limits on European Parliament participation. The

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second and third pillars – there would be a confused overlapping of the role of the hypothetical second chamber and the roles of other institutions, such as the European Parliament and the national parliaments themselves” (European Parliament 2002a).

answer, however, lies neither in strengthening the prerogatives of the national parliaments vis-à-vis their governments, nor in abolishing the pillar structure. Rather, the curtailment of parliamentary control should be overcome by improving cooperation between the European Parliament and the national parliaments.

Cooperation between the European and the national level will, it is suggested, lead to greater political cohesion in Europe. Parliaments at both levels will profit from cooperation. For instance, improving communication between European and national party groups “may be a way of achieving what has hitherto largely been lacking: efforts towards reciprocal information and understanding between the representatives of similar political forces in the European Parliament and the national parliaments, in order to bring their perceptions and points of view closer together” (European Parliament 2002a). Moreover, “[c]oncern about (...) a deficit in democratic controls is one driving force behind calls for improved interparliamentary relations within the European Union” (European Parliament 2002a). National parliaments could, and should, benefit from the European Parliament’s permanent focus on the European arena and its intimate knowledge of European institutions and policies. The European Parliament, on the other hand, can gain access to public opinion in the member states. For the European Parliament, then, cooperation could be a means of connecting with national political life, and through that with European citizens (European Parliament 2002b: Inglewood, PPE, UK). In sum, cooperation will improve parliamentary representation in, and control of, EU policy-making, and, consequently it will enhance its democratic credentials.

Increased cooperation is, in fact, essential for democratic legitimacy. In its report on the role of national parliaments, the European Parliament acknowledges that it has profound difficulties meeting the input conditions of democracy. Then again, national parliaments struggle to satisfy the output conditions of democracy. “On the one hand, electoral turn-out for European parliamentary elections tends to be low in all member states relatively to national and regional parliamentary elections, and turn-out has been declining election-by-election since the introduction of direct elections to the Parliament. On the other hand, the increasing volume of law and regulation that has its origin at Union level has reduced the real scope for law making in what remain at least in theory sovereign legislative bodies of the member states” (European Parliament 2002a). In line with Scharpf’s (1996) view that the democratic deficit can only be managed and not resolved, this argument for increased interparliamentary cooperation seems to suggest that the input conditions of democracy are best met at the national level and the output conditions are best met at the European level.

What understanding of democracy, its institutions and values, is implicit in this account? I argue that this take on EU democracy is consistent with the principle of *constitutional tolerance*. Like the no demos thesis, this position is based on the insight that there is no European identity. Contrary to the no demos thesis, however, it argues that such an identity, at least if defined in ethnic-cultural terms, is neither desirable nor necessary. Rather, it lauds the fact that the EU is composed of citizens who, by definition, do not share the same nationality (Weiler 1995). It represents, in other words, an attempt to decouple nation from demos and demos from state, in ways that “does not require a denigration of the virtues of nationality – the belongingness, the social cohesion, the cultural and human richness which may be found in exploring and developing the national ethos” (Weiler 1995:251). The question, then, is what democratic and constitutional arrangements are available in a union of peoples.

### 5.2.1 Audit democracy and constitutional tolerance

In a union of peoples there is no constitutional *demos*, no single *pouvoir constituant*, “by whose supreme authority the specific constitutional arrangement is rooted”(Weiler 2003:8). The national communities, not the union, are the loci of primary and deeper attachments (Fossum 2004). Rather than *the* demos, in other words, the basis of allegiance is multiple *demoi*. Citizens are invited to comply, not in the name of a European demos, but in the name of the peoples of Europe. As a consequence, acceptance of authority is, at least in principle, “an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities” (Weiler 2001:53). This is Europe’s *Sonderweg* (Weiler 2003), the notion that one are bound by “precepts articulated, not by ‘my people’, but by a community composed of distinct political communities: a people, if you wish, of ‘others’” (Weiler 2003:20).

Shared nationality, then, can no longer serve as the criterion for membership. Instead, there must be “a willingness to accept a binding discipline which is rooted in and derives from a community of others” (Weiler 1995:568). Hence, the constitutional structure of the EU has to recognise political and national diversity. It must acknowledge and accept the plurality of

ways of belonging in Europe. European integration, in other words, is about community rather than unity. It is a supranationalism that “seeks to redefine the very notion of boundaries of the State, between the Nation and State, and within the Nation itself” (Weiler 1995:249). Such a community would be more than an international organisation, but less than a state. It is a legitimising principle that permeates and is embedded within an institutional structure displaying both supranational and intergovernmental traits (Fossum 2004).

In the European institutional architecture, the distinction between supranationalism and intergovernmentalism is reflected in the pillar structure. The pillar structure, as established by the Maastricht Treaty, means that the EU is based on three pillars: the European Communities; a Common Foreign and Security Policy; and Cooperation in the Fields of Justice and Home Affairs. Whereas decision-making within the first pillar is supranational, cooperation within pillars two and three is conducted according to an intergovernmental logic. Even if a majority within the European Parliament wishes to do away with the pillar structure, there are members who defend it. “Decisions concerning key national entries”, they argue, should “remain the exclusive domain of individual Member State governments” (European Parliament 2001b: Collins, UEN, Ireland). The very fact of there being an international dimension to some policy areas does not, in itself, justify a common European approach. “The nation states must be allowed to define certain areas as being essentially domestic” (European Parliament 2002j: Hannan, PPE, UK). At the same time, supranational action is needed, because “citizens demand more Europe” (European Parliament 2002j: Carnero González, PSE, Spain). There is, it is observed, a “gulf between the citizens’ expectations of Europe and the issues actually dealt with by the latter” (European Parliament 2002e).

The challenge, then, is to institutionalise EU democracy in such a way that it is responsive to the expectations and interests of its citizens while, at the same time, respectful of their national identities. It has been proposed that the principles of *audit democracy* fulfil the requirements of a union of peoples (Eriksen and Fossum 2002; Fossum 2004). The main characteristics of audit democracy can be summarised as follows: First, there is a bottom-to-top hierarchy of authority, in the sense that the supranational level is “intended to fulfil a specified set of tasks that the lower level entities confer on it” (Fossum 2004:230). Second, accountability is emphasised over representation, meaning that parliaments promote democracy through their monitoring and stock-taking role more than through their decision-making role (Eriksen and Fossum 2002). Finally, output legitimacy takes precedence over

input legitimacy. The onus is on parliaments to ensure that policies and institutional arrangements resonate with popular needs (Eriksen and Fossum 2002; Fossum 2004). To what extent is this vision of democracy promoted within the European Parliament?

As we have seen, the prime function of parliaments in EU decision-making is to check and balance the exercise of power of the other actors, and, in particular, that of the Council. Whereas the monitoring role of the national parliaments is confined to checking the performance of their respective governments, the European Parliament should guide and monitor the Council in the exercise of its legislative competences. The European Parliament exercises its stock-taking and monitoring function by participating in EU law-making. As suggested by Lord (2004:183), “[g]iven that the Commission frequently exercises its legislative initiative in response to what member governments perceive to be a need for Union-level law-making, it is by no means far-fetched to interpret Co-decision as conferring a power on the EP to deny the Council its legislation in a polity whose main business is law-making”. Co-decision becomes the instrument by which the European Parliament can hold the Council to account. Parliamentarisation, then, means enabling elected assemblies, whether national or European, to act as democratic auditors. In this light, it can be argued that accountability is emphasised over representation.

At the same time, this approach emphasises output. The purpose of accountability mechanisms is to ensure that the output of EU decision-making reflects the needs of EU citizens. Democratic policy-making, in this view, is ultimately about responsiveness, and the aim of the constitutional process should be to enter “a new phase in European integration, whose objectives are to respond to the demands of the citizens” (European Parliament 2001b: Carnero González, PSE, Spain). The focus changes from input, the democratic legitimacy of its actors and institutions, to output. Or, put alternatively, the concern is with ends rather than means. “We must not make the institutional debate the main issue; we must start from the objective questions: What do we actually want to do with the EU? How is this to be done? What tools shall we use? We must start with the objective debate” (European Parliament 2001b: Anderson, PSE, Sweden). Priority should be given “to the content of the European Union and primarily to the needs and the rights of all citizens” (European Parliament 2001c: Krivine, GUE/NGL).

The strategy of legitimation through output imparts an understanding of the EU as a problem-solving entity. It echoes the Laeken Declaration’s call for “more results”, “better responses to practical issues”, and a “common approach on (...) all transnational issues which

they instinctively sense can only be tackled by working together” (European Council 2001). The legitimacy of the EU, then, is ultimately derived from its ability to provide results. This is output democracy. The idea being that, even if the decision-making process does not fulfil the input conditions of democracy, the policies emanating from this process are considered to enjoy democratic legitimacy to the extent that they respond to the wishes of the electorate in aggregate (Crombez 2003). Accordingly, rather than improving the input side, democratic reforms should be undertaken with the aim of enhancing the performance of EU institutions.

The role of parliaments in this process is to ensure that EU policies resonate with popular need. Parliaments, it is suggested, have access to the will of the peoples of Europe *qua* representatives. This is descriptive representation, in the sense that representatives *stand for* rather than *act for* the represented. The emphasis is not on what representatives do, but who they are. Descriptive representation is premised on the assumption that representatives whose social characteristics match those of the represented have a better grasp of their constituents’ values, interests and opinions (Pitkin 1967; Phillips 1995). Rather than something that is carried out by individuals, representation is seen as a feature of a certain sort of institutions (Pitkin 1967; Weale 1999). According to this view, parliaments, as institutions of democratic representation, should mirror the characteristics of society as a whole. In the context of European integration, this means that whereas the national parliaments are representative of their respective nations, their people, the European Parliament represents the community of these distinct political identities, the peoples of Europe.

This approach to representation raises three questions: First, how should the peoples of Europe be represented in the European Parliament? Second, who are the peoples of Europe? Whereas the answer to the first question is relatively straightforward, the second question is more problematic. There is, as we will see, a tendency among the members of the European Parliament to conflate the nation with the state. This conflation is problematic in that it can no longer be assumed that the European Parliament accurately reflects the ethnic and cultural characteristics of EU citizens. Moreover, if the European Parliament no longer mirrors its constituents, the question is whether it can be assumed that it has some form of privileged access to their interests, opinions and wishes. The question, then, is whether representation does not require some form of feed-back, or accountability, mechanisms.

## 5.2.2 Representation of the peoples

Descriptive representation is commonly associated with proportional representation (Pitkin 1967). The rationale of proportional representation is to secure that the socio-cultural segments of society are reflected more or less accurately in the representative assembly. Fair representation, in other words, implies proportionate representation according to social characteristics such as ethnicity, social class and gender (Phillips 1995). In the context of European integration, where it is the national segments that should be represented, this means that the peoples of Europe should have proportional representation in the European Parliament.

In its constitutional debates, the European Parliament is concerned with proportional representation. Seats, it is argued, should be distributed “in accordance with the demographic weight of the States” (European Parliament 2001a). The number of seats allocated to a member state should, in other words, correspond to the number of seats allocated to other member states of a similar size. Moreover, the more populated member states should have proportionally more seats than lesser-populated member states. On these grounds, the European Parliament “[d]eploras the fact that the proposed make-up of the European Parliament does not follow any clear logic”, and “[c]alls, when the respective accession treaties are negotiated, for the number of representatives in the European Parliament specified for Hungary and the Czech Republic to be corrected to match the 22 seats allocated to Belgium and Portugal (countries with a similar population) and for this already to be taken as an opportunity to make the decision-making procedures (...) more democratic”(European Parliament 2001a).

Notwithstanding its commitment to proportional representation, the European Parliament seems to prefer effective representation to descriptive representation. The concern of the European Parliament is to ensure that the system of representation follows a clear and predictable logic. More importantly, in order not to dilute its decision-making competences, the European Parliament is concerned that the number of members should not rise above the ceiling of 700. Hence, “its surprise at the decision to exceed the limit of 700 Members laid down at Amsterdam; warns of the risks that might ensue if its membership were to rise too high during the transitional period, and calls on the Council to pay careful heed to those risks when it lays down the accession timetable” (European Parliament 2001a). Thus, as pointed out by one of its members, the European Parliament is not concerned with the need to “ensure



a more pluralist composition following enlargement” (European Parliament 2001b: Figueiredo, GUE/NGL, Portugal).

However, that the European Parliament does not mirror the social, ethnic and cultural diversity of the EU need not be problematic. If one assumes, in line with the communitarian approach, that the national, or collective identity, is the starting point for, and affects the development of, individual identities, “the good of individuals – indeed their very identity and capacity for moral agency – [will be] bound up with the communities they belong to” (Kymlicka 2002:209). If it is the national identities of EU citizens that should be represented, the composition of the European Parliament need not reflect the various political communities in their entirety. Instead, it is the nations that should be represented, and pluralism should, therefore, be understood in terms of national identity, rather than other characteristics or affinities, such as gender and social class. In other words, what is important in a union of peoples is that the peoples of the union are represented.

The question is who the peoples of the EU are. As already mentioned, there is a tendency among scholars and politicians alike to use the terms nation and state as though they are co-extensive. Yet, as pointed out in the debates of the European Parliament, there are more nations than there are states in Europe.<sup>82</sup> Indeed, to some members of the European Parliament, the process of European integration represents a new and original means of remedying this lack of fit between national groups and state borders. They claim “the right [of stateless nations] to exist in a political link to Europe where all peoples will be present as such” (European Parliament 2002j: Gorostiaga Atxanlandabaso, NI, Spain). The constitutional structure of the EU should, the argument goes, acknowledge “that the EU does not only comprise states but has a more complex composition” (European Parliament 2003b: Maes, Verts/ALE, Belgium). In other words, stateless nations demand to be recognised by the European constitutional framework.

This implies, on the one hand, cultural recognition. In line with the principle of deep diversity, which stipulates that a “plurality of ways of belonging (...) [should be] (...) acknowledged and accepted” within the same polity (Taylor 1993:183), these members of the European Parliament ask that the cultural and linguistic diversity of Europe be recognised by the European constitution. The constitution should, accordingly, be evaluated partially – but not exclusively – on the basis of its “respect for the European Union as an entity united in

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<sup>82</sup> (European Parliament 2001b: MacCormick, Verts/ALE, UK; 2002j: Gorostiaga Atxanlandabaso, NI, Spain; 2003f: Borghezio, NI, Italy; Maes, Verts/ALE, Belgium; Gasòliba i Böhm, ELDR, Spain; 2003g: Vallvé, ELDR, Spain).

diversity” (European Parliament 2003e). Hence, the Charter of Fundamental Rights, and its commitment to “the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe”, is welcomed. Insofar as the Charter respects and promotes diversity, it “could make a substantial contribution to the comparison of the various cultures and peoples involved in the process of European integration” (European Parliament 2002q: opinion of the Committee on Legal Affairs and the Internal Market). Contrary to the majority view, however, the representatives of stateless nations hold that as a “union united in diversity”, the EU must recognise and promote national diversity beyond the nation state.<sup>83</sup>

Recognition, however, goes beyond mere cultural recognition. It also involves claims to territory. In this context, two proposals advanced in the debates of the European Parliament merit particular attention: the incorporation of the European Charter of Local Self-Government into the *acquis communautaire* (European Parliament 2003a), and the notion of internal enlargement. Including the Charter of Local Self-Government in the *acquis* entails a commitment on the part of the EU to guarantee the political, administrative and financial independence of local authorities. It will “institutionalise the presence in the European Union’s institutions of territorial units with legislative competence, that is constitutional nationalities and regions, Länder, federal states that have a constitutional and, in certain cases an historical and political identity as nations, which cannot be ignored or denied in this Europe of unity in diversity” (European Parliament 2002k: Nogueira Román, Verts/ALE, Spain). The demand is that constitutional regions, as distinguished from regional and local authorities which lack legislative competences, should be recognised by the European constitution, and that decision-making powers and prerogatives be allocated to them.<sup>84</sup>

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<sup>83</sup> “I would also urge you to continue to guarantee the same respect for all languages and their users. I would therefore urge you to discontinue your planned intentions concerning the use of language in the bureaus for the protection of industrial right of ownership. People do not understand this, neither do they want or accept this. They do not want a second-rate language, and neither do they want to be treated like second-class citizens” (European Parliament 2001k: Thyssen, PPE, Belgium). “Mr President, I am speaking here on behalf of those who dream of a truly united Europe of regions and peoples, a Europe that the proposed constitution will not bring about. As is stated in the Tsatsos report, it is a major step in the Union’s democratisation process, but we are still not developing into the decisive and transparent Europe that can play a role on the world stage and inspire confidence in its own citizens. Sovereignty only rests with a few Member States that boast their own constitutional structure. The diversity of languages and cultures is only recognised within the Member States that grant this recognition. The regions that have constitutional authority are witnessing the accession to the EU of some ten new Member States, some of which are smaller than those of their own regions that possess constitutional powers, such as Flanders, Scotland, Catalonia, Wales, and so on. These sovereign states may even be less willing to work towards the establishment of a real Union. (...) There is a certain unity in diversity, but we should, above all, continue to uphold these latter aspects together” (European Parliament 2003f: Maes, Verts/ALE, Belgium).

<sup>84</sup> The decision-making competences of constitutional regions should include the right to bring cases before the European Court of Justice (European Parliament 2003b: Vallvé, ELDR, Spain; Ortuondo Larrea, Verts/ALE,

Internal enlargement, on the other hand, denotes a process whereby stateless nations can become full members of the EU. The members of the European Free Alliance (ALE), in particular, “believe that the European Union is at present a historically unprecedented union of shared sovereignty, and the stateless nations, such as Galicia, want to make progress through their participation in these institutions, and are even working towards a kind of internal enlargement. (...) Stateless nations very often have a history, a political will and a demography that justify this participation” (European Parliament 2003c: Nogueira Román, Verts/ALE, Spain).<sup>85</sup> This is a stronger claim than the above-mentioned claim to local self-government. It is a post-sovereign claim in that it “promises a territorial basis for self-rule but without the exclusive connotations of territorial control implied in classical nationalist doctrine” (Keating 2004:374). In its post-sovereign trappings, sovereignty no longer denotes the capacity of a polity to retain full internal control and external independence; rather it is a claim to original authority. As such, “it can be advanced by various actors and institutions and is intrinsically divisible” (Keating 2004:369).

The majority within the European Parliament expresses sympathy with the idea that regions deserve a greater say in European decision-making. Regions, it is acknowledged, “contribute to the success of European integration in many and various ways”, and they can potentially “play an important role in bringing the EU closer to its citizens”. The “protection and strengthening of regional and local autonomy in the various European countries represents an important contribution to the process of European integration based on the principles of democracy, proximity and decentralisation of power” (European Parliament 2003d). In its resolution on the division of competences, the European Parliament also recognises that “the forthcoming enlargement of the Union to include many small countries may raise political difficulties for large regions in the existing Member States” (European Parliament 2002i). This is because the new Member States, some of which have only a few thousand inhabitants, will have full membership rights, “whereas historic regions with several million inhabitants, which make a major contribution to the economic dynamism of the Union

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Spain; Ferrer, PPE, Spain; MacCormick, Verts/ALE, UK; Bodrato, PPE, Italy; Staes, Verts/ALE, Belgium; Sánchez García, ELDR, Spain; Leinen, PSE, Germany; Martin, PSE, Germany; Schleicher, PPE, Germany); the right to become an electoral constituency for the European Parliament (European Parliament 2003b: Ortuondo Larrea, Verts/ALE, Spain). Finally, the right of regions to participate in the meetings of the Council should be strengthened (European Parliament 2003b: Ortuondo Larrea, Verts/ALE, Spain; Sánchez García, ELDR, Spain; Carnero González, PSE, Spain; 2003c: Speroni, NI, Italy; Ferrer, PPE, Spain).

<sup>85</sup> To this end, the members of the European Free Alliance propose that the principle of subsidiarity be interpreted “in a generous and extensive sense”. “Surely indeed, this Union must recognise subsidiarity in a generous and broad sense, it must acknowledge the political and national diversity of the European Union and the debate on the future must take full account of the powers of the internal political units of the Member States, not only of the Member States themselves” (European Parliament 2001b: MacCormick, Verts/ALE, UK).

and to the funding of its budget would still be unrecognised by the European treaties” (European Parliament 2002i).

Nonetheless, the *Europe of the regions* is rejected “as it is now accepted that the European Union is and will remain constituted by States” (European Parliament 2002i). The degree and character of regional involvement is not a matter that should be settled by the European constitution. Rather, “it is for the Member States to promote, within the framework of their constitutional systems, suitable participation for the regions in decision-making” (European Parliament 2002i; 2002l). The “internal organisation and the division of competences within each Member State [are] matters to be decided upon by the Member States alone” (European Parliament 2002l). On these grounds, the European Parliament also refuses to distinguish regions with legislative competences from regions without such competences (European Parliament 2003a). “The nations, and above all their governments and parliaments, must be the link between the local, regional and European levels” (European Parliament 2003b: Schmid, GUE/NGL, Sweden). As a general rule, therefore, “the better regional interests are represented in national decision-making process, the better they will be represented in Brussels” (European Parliament 2003a).

Consequently, the “peoples of Europe” has come to be defined in terms of the state. The member states are portrayed as “the legal and cultural expression of their people” (European Parliament 2002b: Tsatsos, PSE, Greece), thus conveying the impression that the peoples of Europe are the peoples of the member states, e.g. the French people, the German people, the Danish people and so on. This rejection of a Europe of the regions raises the issue of whether and to what extent the peoples of Europe are represented in EU decision-making. If representation means proportional representation according to ethnic-cultural criteria, then it is problematic to include state-based nations to the exclusion of stateless nations. The question is “why Malta and not Galicia? Why Cyprus and not Scotland?” (European Parliament 2003c: Nogueira Román, Verts/ALE, Spain). Even if the European Parliament is open to the proposal that regions could become constituencies for the European Parliament (European Parliament 2003a), it insists that any such proposal must be mediated and implemented through the member states.

For the stateless nations of Europe this means that the European arena will not provide a discursive space within which they can present their post-sovereign claims. The risk is that this will place a premium on becoming a state even if this should be the second choice of the nations themselves (Keating 2004). The importance of keeping the debate on the regions open was emphasised by some of the participants in the debates. As long as the EU is willing to,

and capable of, accommodating new authority claims, claims for succession may be tempered, but succession nevertheless remains an option for stateless nations. Therefore, as pointed out by Neil MacCormick (European Parliament 2003c: Verts/ALE, UK), the onus is on the EU to convince these national groups that being a constitutional region is a satisfactory alternative to being an independent member state.<sup>86</sup> Given that the notion of a Europe of the regions has been dismissed, the question is whether there are alternative forms of attachments available to the regions. More specifically, can governance networks function as a substitute for more traditional forms of representation?

### 5.2.3 Regional representation through multi-level governance

One purpose of *multi-level governance* is to establish more direct contacts between the European and the sub-national levels of government (Wallace 2000). The stated intention of the Commission's White Paper on Governance is to open up "the policy-making process to get more people and organisations involved in shaping and delivering EU policy" (European Commission 2001), and a more open policy process should also lead to greater regional involvement.<sup>87</sup> According to the Commission, "the way in which the Union currently works does not allow for adequate interaction in a multi-level partnership; a partnership in which national governments involve their regions and cities fully in European decision-making" (European Commission 2001). Thus, multi-level governance has two implications for regional representation: First, that processes of regionalisation in Europe should influence the mode of EU decision-making, and, second, that contacts with the EU level cannot and should not be monopolised by the national central governments of the Member States.

In its report on the Commission's White Paper, the European Parliament repudiates the claim that regions are inadequately represented in EU decision-making. Member states, it is maintained, "are well able under the Treaties to provide appropriately for the involvement of their regions and local authorities in the shaping and implementation of EU policy, in

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<sup>86</sup> "This report will not convince those in my party at home who think that being an independent Member State would be better than being a constitutional region, as things stand" (European Parliament 2003c: MacCormick, Verts/ALE, UK).

<sup>87</sup> The "expansion of the Union's activities over the last fifteen years has brought it closer to regions, cities and localities, which are now responsible for implementing EU policies from agriculture and structural funding to environmental standards. The stronger involvement of regional and local authorities in the Union's policies also reflects both their growing responsibilities in some Member States and a stronger engagement of people and grass roots organisations in local democracy" (European Commission 2001).

keeping with their respective constitutional systems” (European Parliament 2001j). At the same time, however, it is acknowledged that regional and local authorities could be more closely involved in the preparatory stage. The Commission could, for example, enlist expertise at regional and local level at the early stage of the preparation of legislation. Moreover, in its report on the role of regional and local authorities, the European Parliament recognises not only the contribution of regional and local authorities to the process of European integration,<sup>88</sup> but also that “the Union must devise new methods of participation that acknowledge the key role to be played by regional and local bodies, in particular in the process for the drawing up of Community decisions and in the implementation of Community policies, since that will increase the support of the Union’s citizens for further progress in European integration” (European Parliament 2003a).

Does this mean that the European Parliament has adopted a more favourable position towards governance? In its resolution on the role of regional and local authorities, the European Parliament notes “that every democratic legitimacy conferred upon institutions at all levels of government possesses its own value and merit and that any view of the Union’s institutional system as being necessarily hierarchical and pyramid-shaped must be abandoned” (European Parliament 2003d). This emphasis on non-hierarchical decision-making certainly is reminiscent of the governance perspective, and it appears, then, that the European Parliament has, in the course of the constitutional debates, reconsidered its stance on governance.

Such a conclusion would, however, be faulty. The Commission’s commitment to non-hierarchical policy-making does not stand unchallenged. Contrary to the Commission’s understanding of governance as interest group representation and mediation, the European Parliament insists that parliamentary democracy must be the overriding institutional framework. When the Commission argues that policy-making through independent networks will include non-political actors in the decision-making process, the European Parliament responds that democratic legitimacy “presupposes that the political will underpinning decisions is arrived at through parliamentary deliberation” (European Parliament 2001j), and that, accordingly, “only regional, national and European institutions which possess democratic legitimacy can take accountable legislative decisions” (European Parliament 2001j; 2001n).

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<sup>88</sup> The European Parliament is aware that “the protection and strengthening of regional and local autonomy in the various European countries represents an important contribution to the process of European integration based on the principles of democracy, proximity and decentralisation of power” (European Parliament 2003a).

Proponents of internal enlargement reject governance on the grounds that it ignores the differences between interest groups, civil society and regions. Their demand is that constitutional regions and their regional parliaments are recognised as having a distinct status as democratic bodies. Rather than reducing the role of constitutional regions to the role of interested parties, the aim of the constitutional debates should be to find “a valid architecture so that all the institutional elements, all the existing democratic public powers, can find their places in the common Europe” (European Parliament 2003b: Ortundo Larrea, Verts/ALE, Spain). Putting the constitutional regions on a par with regions and municipalities without legislative powers, let alone putting interest groups and civil society organisations on an equal footing with the constitutional regions, is to “introduce and preserve the idea of a false neutrality” (European Parliament 2003b: Frassoni, Verts/ALE, Italy). There must be, one representative warns, something “for a region between being a Member State and being nothing” (European Parliament 2003b: MacCormick, Verts/ALE, UK). Reducing the regions to interested parties is not taking the ancient nations of Europe seriously.

The concern of the majority, in contrast, is the power and prerogatives of the European Parliament. The Community method, it maintains, must prevail (European Parliament 2003a). The European Parliament interprets the Community method as “institutional balance”, stressing co-decision as a means of establishing a genuine system of “checks and balances between the Council, the Commission and the European Parliament. Whereas it can be argued that the Commission’s approach to governance is a continuation of the consultative practices inherent in the Community method,<sup>89</sup> the European Parliament insists that the method must be parliamentarised (European Parliament 2001j; 2001n; 2002a; 2002d). This reading of the Community method, however, is not conducive to non-hierarchical decision-making. Rather it is based on the principle of the separation of powers (institutional balance) and a hierarchy of norms.<sup>90</sup>

In this system regions play a limited role. The European Parliament coins the phrase “participatory representation” to illustrate how greater involvement of regions can help bring

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<sup>89</sup> Originally, the Community method, also known as the “Monnet method”, rested on an elitist and technocratic approach, the aim of which was to engage economic elites in building transnational coalitions in support of European policies (Smismans 2004b). Two concerns were particularly salient: on the one hand, to improve the quality of decisions, and, on the other, to render decisions acceptable to those bound by them (Magnette 2003). Involving “concerned interests” in policy formulation was considered an appropriate answer to both concerns, and the Commission, designed as an apolitical and technocratic administration, was considered to be a suitable mediator between these particularistic interests and the general European interest.

<sup>90</sup> Where legislative and budgetary acts are adopted by the Council, representing the member states and the European Parliament, representing the peoples, and where secondary legislation falls within the competence of the Commission.

the EU closer to its citizens (European Parliament 2003a). Yet, it does not significantly extend the scope for sub-state representation. For one thing, not only is there no distinction between regions with and without legislative competences, regions are not distinguished from other local authorities or municipalities (European Parliament 2003a; 2003d).<sup>91</sup> In this light, it can hardly be argued that concern for the post-sovereign claims of sub-state or non-state national groups are salient to the majority within the European Parliament. Moreover, “participatory representation” does not entail actual participation in decision-making. Rather, it is based on “consultation and partnership requirements”, the aim of which is to “ensure that regional and local authorities and/or the Committee of the Regions were involved in elaborating policies and legislative proposals which might have practical implications for these authorities and their powers” (European Parliament 2003a). In practice, then, the “new modes of participation” envisaged for the regions does not go beyond consultation.

The concern is efficiency, not the accommodation of regional and local identities. The European Parliament may be critical of the Commission’s efficiency-driven approach,<sup>92</sup> and insist that “the concept of efficiency in the sense of administrative efficiency must not jeopardise democratic legitimisation” (European Parliament 2001j). Nevertheless, when arguing for extended consultation of sub-state actors it relies on arguments of efficiency. Consultation, it is suggested, is important for performance and compliance. “Early participation on a consultative basis, upstream of the preparation of the decision-making process, could increase the likelihood of correct and dynamic implementation of Community

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<sup>91</sup> “Firstly, we need to consider all the autonomous territorial entities which operate within the Member States as a single unit. As we are all aware, they vary greatly in size and nature but they all, from the largest to the smallest, whatever their role or powers, represent certain shared values – the value of proximity, of the closest possible adherence to the views, opinions and needs of the citizens, the value of the most immediate and widespread democratic participation possible – and the European Constitution must recognise that they all have a key role to play in the achievement of the goal set for the Convention on the Future of Europe: the goal of bringing Europe considerably closer to the citizens, of making the Union more democratic as well as more effective. I have therefore not proposed in my draft report to subdivide regions or local authorities into different categories. Giving a specific category of autonomous territorial entity special status or exclusive rights within the Union would lead to difficult, counterproductive disputes, even as regards defining and establishing the boundaries of a particular category – the category of regions with legislative powers, for instance – and would conceal the value of recognising all the regional and local authorities together as one whole, as one overall entity” (European Parliament 2003b: Napolitano, PSE, Italy).

<sup>92</sup> Rather than constituting an alternative to present practices, European governance, as outlined in the White Paper, appears to be a continuation of these practices (Eriksen 2001; Magnette 2003; Smismans 2004a). First of all, the Commission’s governance approach has a clear efficiency-driven bias. Rather than developing the concept of “participatory democracy”, the concern of the Commission is the efficiency of the decision-making process (Eriksen 2001). In keeping with a technocratic approach, participation is “not about institutionalising protest”, but about “more efficient policy shaping” (European Commission 2001). Finally, as concerns European citizens in general, the Commission largely see their participation as a matter of communication and information with the aim of helping “people to see how Member States, by acting together within the Union, are able to tackle their concerns more effectively” (European Commission 2001). In sum, rather than ensuring popular input to EU decision-making, good governance appears to be about “delivering the goods”(Eriksen 2001), that is, the output of decision-making.



legislation. Cooperation in the early stages would ensure better implementation further down the line” (European Parliament 2003a).

In conclusion, neither the traditional nor the new modes of participation accommodate the claims and demands of non-state national groups. This begs the question of whether the peoples of Europe are represented at the European level. Yet, the legitimacy of a system of descriptive representation hinges on its ability to represent the various cultural segments. Descriptive representation does not rely on accountability mechanisms to ensure high quality representation. Instead, representatives are seen as standing in for the populace in a statistical sense, and, in “being a substitute for the community, the sample would not have to be accountable to the community” (Weale 1999:111). As we have seen, however, the European Parliament cannot function, and is not designed to function, as a substitute for the political communities of the EU. Consequently, issues of accountability come into prominence.

#### **5.2.4 The challenge of accountability**

The issue is whether this model is capable of reconciling representation with the aim of effective problem-solving. As we have seen, the concern of audit democracy is to satisfy the demands of citizens for problem-solving beyond the state. The EU should, in this view, attend to those areas where solutions can be found only at the level above the state. At the same time, however, the competences of the EU should not come into conflict with the national identities of its member states. This is the principle of subsidiarity, which, according to the Maastricht Treaty, stipulates that the EU should take action “only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”.

Subsidiarity, then, is the mechanism by which EU institutions can be held to account. The draft Constitutional Treaty enforces this mechanism. The Protocol on the Application of the Principles of Subsidiarity and Proportionality obliges the Commission to account for its application of the subsidiarity principle, by means of a *subsidiarity sheet*, when it proposes legislation. More significantly, however, it sets up an early-warning system, thereby allowing national parliaments to join in the monitoring of compliance with subsidiarity. Finally, national parliaments are granted the right of appeal to the European Court of Justice on

grounds of infringement of the subsidiarity principle. This right is also granted to the Committee of the Regions in cases where the Treaty provides that the Committee be consulted. The draft Constitutional Treaty thus strengthens the capacity of national parliaments, and to some extent the regions, to protect areas of particular national interest. Moreover, even though they were initially criticised by some members of the European Parliament on the grounds that they were too generous to national parliaments (cf. Norman 2003), the European Parliament endorses these mechanisms to monitor subsidiarity.

Those members of the European Parliament who see themselves as representatives of national or non-national regions, however, feel that this is not enough, and that the regions should also have access to the Court of Justice. Denying the regions the right of referral simply is not fair. “[I]f I am from little Luxembourg, I can of course oppose the right of appeal – and quake in my boots when I do so – but I am in a quite different position if I am from the Basque country or from some other region. Here we are, trying to move this great European project forwards, not by shoring up privileges that have come about by accidents of history, but by opening the door to the new” (European Parliament 2003b: Martin, PSE, Germany). Therefore, the “Union must recognise subsidiarity in a generous and broad sense, it must acknowledge the political and national diversity of the European Union and the debate on the future must take full account of the powers of the internal political units of the Member States, not only of the Member States themselves” (European Parliament 2001b: MacCormick, Verts/ALE, UK).

In line with the draft Constitutional Treaty, however, the majority within the European Parliament draws the line at giving regions with legislative capacities the right to refer matters of subsidiarity to the European Court of Justice. “The principle of subsidiarity does not stop with national governments, but nonetheless, by virtue of that principle of subsidiarity, it is not up to the Union itself to tell the Member States how to organise themselves internally”. Regions “should be able to bring a case either via their national governments or via the Committee of the Regions. The committee would therefore be a sort of filter. It would check what level of support there would be for a court case. A case would not necessarily be brought if only one region were interested, but if several regions felt there was a real violation of their rights, then the Committee of the Regions would proceed and bring a case. That is a reasonable compromise: to allow regions the right to go to court, not individually, but to raise the matter and check, either via their national government or via the Committee of the Regions, whether there is a wider feeling that subsidiarity has been violated; if so, then a court case could be brought” (European Parliament 2003b: Corbett, PSE, UK).

Yet again, we see that the regions are excluded in practice, if not in theory. Granted, the regions are given the opportunity to act via the Committee of the Regions. For the national and non-national regions, however, this is an unsatisfactory response. For one thing, the representatives of these regions question whether the Committee of the Region can really function as an instrument for representation.<sup>93</sup> As argued by one member of the European Parliament, “I feel that the compromise put forward has two major shortcomings, for it proposes two filters, two filters which are themselves inadequate. The state cannot act as a filter for the regions because, in many cases, it is in a position of opposition to a region and its powers, and the Committee of the Regions, which was created to be weak on purpose, cannot be another filter for the powers of the regions because, not least, that would introduce and preserve the idea of a false neutrality, as Commissioner Barnier said, and a false equality between the regions. This equality cannot exist because the regions have different powers, and that is just as it should be” (European Parliament 2003b: Frassoni, Verts/ALE, Italy).

From the vantage point of a union of peoples, representation, and its corollary accountability, is not attended to satisfactorily. If one accepts that citizenship can be decoupled from the state, and the state from the nation, and, at the same time, maintains that the nation is the locus of primary attachments, the question is how one can afford to disregard the claims of non-state national groups. If the community, defined in ethnic-cultural terms, is the source of the common good, it should not be excluded from the process of realising this good. If the political communities are depicted as the source of EU legitimacy, it is not easy to find a justification for the decision to effectively recognise only those communities that are state-based. Descriptive representation is imperfect if not all identities are included in the system. This suggests either that the role of the regions have not been thought through thoroughly, or that the motive for restricting the role of national and non-national regions can be found in an alternative vision of Europe, namely that of a Europe of citizens.

If not all peoples are represented, would it be better to represent citizens individually? In a representative system where the representatives *act for* the represented, rather than *stand*

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<sup>93</sup> “It is recognised that, in appropriate constitutional circumstances, regions will have access to the Court of Justice. It is recognised rather clearly and in good terms that the principle of subsidiarity is iterative and applies down the line, not just between the Union of the Member States, but to the regions and local authorities as well. There are some points I regret. I particularly regret that the opportunity was not taken to comment about the odd composition of the Committee of the Regions. In future, for example, it seems probable that there will be five Members from Malta in the Committee of the Regions, as against 21 from Spain and 24 from the United Kingdom. That means that there will likely be five times as many Maltese as Galicians in the Committee of the Regions, if any Galicians get there at all – or Catalans or Scots. This is not a satisfactory situation. The Committee of the Regions is supposed to counterbalance the Parliament. The balance of populations and regions on the Committee of the Regions is not at all a reasonable one” (European Parliament 2003c: MacCormick, Verts/ALE, UK).

for them, the failure of the system to represent its various cultural segments need not be problematic. Here representatives do not stand in for the representatives; rather representation entails “acting in the interest of the represented, in a manner responsive to them” (Pitkin 1967:209). Thus, the emphasis is not on who the representatives are, but what they do. A significant part of the European Parliament certainly thinks that representation as acting for is preferable to representation as standing for. In the final section, therefore, I will discuss their vision of the EU as a union of citizens.

### ***5.3 A union of citizens***

Towards the end of the constitutional debates, the reports and resolutions of the European Parliament stop referring to the EU as a union of peoples, and, instead refer to it as a union of citizens (cf. European Parliament 2003d; 2003e; 2003g). The difference in naming is, as the members of the European Parliament are acutely aware, not inconsequential. As noted by one representative: “I do not consider this to be a purely linguistic or philosophical issue. It is an issue of crucial importance. It forms the basis of the legitimacy of the European Union. Does Parliament want to discard the traditional definition of a Union of States and peoples and adopt the concept of a Union of States and citizens” (European Parliament 2003c: Berès, PSE, France)? It is “important in terms of the Convention, on something which is of great importance to this Parliament, which is the legitimacy, the double legitimacy, of the Union” (European Parliament 2003c: Méndez de Vigo, PPE, Spain). This shift, which is endorsed by a majority within the European Parliament,<sup>94</sup> entails that citizens should be represented individually rather than collectively, thus changing the emphasis from their ethnic-cultural identities to their interests and preferences. The motivation is as follows: “The concept of the people seems (...) to be an archaic one. We want to talk of citizens, because we want to bring Europe closer to the citizens. (...) I would also ask the Socialist Group to take on board that this is truly the modern way to act and not the old-fashioned one” (European Parliament 2003c: Méndez de Vigo, PPE, Spain).<sup>95</sup>

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<sup>94</sup> It should be noted, however, that several members of the European Parliament were opposed to the shift from peoples to citizens (European Parliament 2003c: Berès, PSE, France; Dehousse, PSE, Belgium; Ferrer, PPE, Spain; Berthu, NI, France; Pasqua, UEN, France; Nogueira Román, Verts/ALE, Spain).

<sup>95</sup> This assertion does not stand unchallenged: “Mr President, I knew that Mr Méndez de Vigo was reactionary on issues of European diversity, but I did not know that he was so ignorant. To call the concept of a people

How does this vision of a union of citizens and states differ from that of a union of peoples and states? Establishing a union of states and citizens “means tackling the fundamental issues not only of the Union’s role but also of its very nature – and of its relation with its Member States. Are we ready to move from the detailed, subtle, esoteric code of conduct drawn up by diplomats for their own use to a real constitutional-style sharing of roles, which is understandable and acceptable to citizens and their representatives? If this is not the case, we should spare ourselves the trouble of drafting a sub-Treaty of Nice. But if the answer is yes, it will open up a very new chapter in the history of the Community. It will require a noticeably different legal and political architecture. This is the price to be paid for achieving the political union of an enlarged Europe” (European Parliament 2002i). Put alternatively, if the aim of the constitutional process is to establish a union of citizens and states, then the constitution, as the end product of this process, should aspire to reduce the *federal deficit* of the EU (cf. Trechsel 2005).<sup>96</sup> The aspiration is to move from an understanding of the EU as a problem-solver to the establishing of a genuine political union at the European level.

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archaic not only runs counter to the fundamental principles of our civilisation, it is also contrary to many constitutions, such as that of the United States of America, which starts with the precise phrase ‘We the people’. Mr Méndez de Vigo's statement conflicts with the constitution of the United States, and also with the views of his boss, José Maria Aznar. (...) Nevertheless, the Napolitano report was a step in the right direction, but it has to some extent been frustrated by the reactionary Jacobinism of people like Mr Aznar and Mr Méndez de Vigo, a Jacobinism that is now negated by the reality of the European Union itself” (European Parliament 2003c: Nogueira Román, Verts/ALE, Spain).

<sup>96</sup> The federal structures of the EU have been the subject of debate at repeated occasions. Federalism, both as an idea and a variable combination of institutions, has constituted “a yardstick to measure past achievements and to prospect future developments” (Fabbrini 2001:55). Asserting that the EU is, or at least about to develop into, a federation implies that the EU is not seen as a unique polity, but rather an unusual version of a well-known model. Drawing on Riker’s definition (1964), federalists argue that, similar to traditional federations, the EU allocates power between at least two territorial levels of government in such a way that each level of government is autonomous in at least one area of action. Moreover, this autonomy is constitutionally guaranteed in the Treaties. Finally, both the European and national levels of government provide for direct representation of its own citizen base (Nugent 1999; Abromeit 2002). Hence, even if the EU lacks some of the defining features of a federal state, the similarities are considered sufficient for a comparison to apply. Unsurprisingly, the federal deficit of the EU is the primary concern of federalists (Abromeit 2002; Trechsel 2005). The uneven process of federalisation, it is argued, seriously hampers representation and accountability at the national as well as the European level. For one thing, member states have, in spite of the considerable widening and deepening of integration over the years, largely retained unanimity in decision-making. Granted, the scope of qualified majority has been extended, but informal norms of consensus still remain the primary mode of decision-making (Heisenberg 2005) More importantly, perhaps, there is a mismatch between decision-making structures and citizens’ participation rights. As argued above, European decision-making procedures have undermined the role of national parliaments, and have contributed to a shift in power from the parliaments to the executive. As a consequence, national parliaments are increasingly unable to hold their governments to account. Moreover, this loss of parliamentary power has not been adequately compensated for at the European level. Even if the European Parliament has been gradually empowered, this has not been translated into an increase in perceived power. As a consequence, the European Parliament is not considered the primary channel for influencing European politics and policies, and the result has been increasing voter apathy rather than voter mobilization (Thorlakson 2005).

### 5.3.1 Addressing the federal deficit

The desired move from economic to political union is envisaged according to a well-known pattern. Proponents of a union of states and citizens in the European Parliament propose that the federal deficit be reduced by giving the EU legal personality, thus abolishing the pillar structure, by democratising the Community method and strengthening its federal elements, and, finally, by strengthening EU citizenship. Of these, the notion of a genuine European citizenship is the most problematic. In fact, the legitimacy of the other proposals hinges on the existence of a common identity, or, if you like, a sense of shared destiny, among EU citizens. Therefore, I will devote particular attention to how issues of citizenship are dealt with in the debates. First, however, I will discuss how proponents of a union of states and citizens propose to federalise the EU.

In order to establish itself as a full-fledged federation, the EU should be given legal personality, and the existing treaties should be merged or combined into a single constitutional text. Legal personality, the argument goes, will boost effectiveness, create legal certainty and transparency, and give the EU a higher profile vis-à-vis its own citizens. To begin with, a single legal personality would mean the end of the pillar structure, and, thereby, a move from a mixed system of intergovernmentalism and supranationalism to supranational decision-making. This, it is maintained, will strengthen the EU's capacity to act. "The European Union is strong wherever the Monnet method is used. The European Union is weak wherever the intergovernmental method is used" (European Parliament 2001b: Brok, PPE, Germany).<sup>97</sup> Moreover, democracy will be strengthened. Bringing the second and third pillar within the Community sphere will "consolidate democratic legitimacy and ensure parliamentary and judicial scrutiny" (European Parliament 2002i; 2002j). Finally, legal personality will "give Union policy a higher profile and make it easier for citizens to identify with the Union" (European Parliament 2002f: Carnero González, PSE, Spain). In sum, giving the EU legal personality "constitutes the prerequisite for legal clarity of the status of the political Union and the European Constitution" (European Parliament 2002i). Therefore, the European Parliament "[r]eiterates its call for a constitution for the Union addressed to all its citizens, which recasts the various treaties and merges them into a single text concerning a

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<sup>97</sup> "We see it in the area of foreign and security policy with the twin structures that hamper our freedom of action. We also see it, for example, in the fact that closer cooperation is used everywhere where it is not necessarily needed; but where it is needed most urgently – in defence – it is not used" (European Parliament 2001b: Brok, PPE, Germany).

single entity, the Union, endowed with single, full legal personality” (European Parliament 2002i).

The merging of the pillars raises the issue of how competences should be divided between the national and the European level. For the European Parliament, flexibility is a major concern. It therefore rejects the idea of a *catalogue of competences*,<sup>98</sup> that is, the drawing up of an inventory of powers in line with the German federal system. Such a catalogue, it is pointed out, would “involve drawing up an exclusive list of powers to be conferred on the European Union, a second list relating to the Member States and a third list of shared powers (...). If this were to come about it would constitute a radical break with some of the basic features of the Community method since the gradual transfer of powers to the Union would be replaced by the establishment once and for all (in the manner of a frozen image) of the various spheres of competence. This is totally at odds with what has been done in the past and largely impracticable because it would in effect create a tricameral system” (European Parliament 2001a). Instead, the system of competences “must be capable of evolving and adapting to social, economic and political changes that might take place in the future” (European Parliament 2002i).

At the same time, it is recognised that the “constitutional approach must be accompanied by a new presentation of the competences of the Union”, a presentation that is “sufficiently clear to be understandable to all citizens” (European Parliament 2002i). A distinction should therefore be made between competences exercised by the state; competences exercised by the EU, and shared competences. Instead of drawing up a list of competences, the European Parliament proposes that competences should be allocated according to the following principles: The Member States have jurisdiction where the constitutional text does not stipulate otherwise. The EU’s own competences must be few in number.<sup>99</sup> Finally, shared competences should be exercised according to the criteria of relevant scope,<sup>100</sup> synergy,<sup>101</sup> and solidarity<sup>102</sup> (European Parliament 2002i). This, in sum, is

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<sup>98</sup> The German Länder, anxious to protect their constitutionally guaranteed powers, have put paid to a catalogue of competences since the Nice negotiations, and it was also they who introduced the debate on the competence catalogue in the Convention (Norman 2003).

<sup>99</sup> EU competences should relate, as is the case today, to customs policy, external economic relations, the legal basis of the internal market, competition policy or cohesion policies, association treaties, and, where the euro area is concerned, monetary policy. In addition, the European Parliament proposes that the following areas are added to the list: the drawing up and running of the common foreign and defence policy, the legal basis of the common area of freedom and security and the funding of the EU budget (European Parliament 2002i).

<sup>100</sup> The “relevant scope of the proposed measure goes beyond the limits of a Member State and the measure might give rise to perverse effects (distortion or imbalances) for one or more Member State should it not be implemented at Community level” (European Parliament 2002i).

as far as the European Parliament is willing to go as concerns the fixing in advance of the respective competences of the EU and its Member States.

Federalisation, the European Parliament suggests, should not follow the American model of *dual federalism*.<sup>103</sup> Rather, it points out “that the political model of the Union is currently based on two fundamental features: the Union has only small management departments, at least for internal policies, for which it relies on the Member States (subject to the Commission monitoring the obligation of Member States to apply the policies adopted); and the bulk of fiscal and tax power must also remain at national level” (European Parliament 2002i). Hence, a form of *cooperative federalism* is promoted in the debates, whereby the laws are made at the central level and the federated units are responsible for implementing them. In other words, rather than a vertical separation of powers, the European Parliament prefers a functional separation of powers (Börzel and Hösli 2003).

Cooperative federalism requires a strong representation of the federated units at the central level (Börzel and Hösli 2003). As pointed out by one member of the European Parliament, the Council already provides strong representation of the governments of the Member States at the European level (European Parliament 2002j: Corbett, PSE, UK).<sup>104</sup> Still, representation in the Council can be made more effective. On these grounds, it is suggested that the role of the General Affairs Council should be strengthened “in order to ensure the coherence of decisions and the horizontal coordination of policies” (European Parliament 2001e; 2001h).<sup>105</sup> What is more, the “Council must confine itself to its original brief, namely

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<sup>101</sup> The “measure planned at Community level would generate, by comparison with similar measures implemented by individual Member States, substantial synergies in terms of effectiveness and economies of scale” (European Parliament 2002i).

<sup>102</sup> The “proposed measure meets a requirement for solidarity or cohesion which, in the light of disparities in development, cannot be met satisfactorily by the Member States acting alone” (European Parliament 2002i).

<sup>103</sup> Dual federalism, which emphasises the institutional autonomy of different levels of government, rests on a vertical separation of powers where each level of government has an autonomous sphere of responsibilities. Thus, for each sector, one level of government holds both legislative and executive powers, and, because each level manages its own affairs autonomously, there tends to be a duplication of government structures (Börzel and Hösli 2003).

<sup>104</sup> “The true guarantee against over-centralisation is, and should be, a political guarantee as we consider proposals in the normal procedures of the institutions: from the Commission, as Mr Méndez de Vigo has just said, when it makes its proposals to us as a Parliament, and also the Council. Let us remind ourselves who sits on the Council: national ministers, members of national governments, accountable to national parliaments – not people who are predisposed towards centralising everything in the European Union. Not at all. You have to convince a very large majority of them to get a qualified majority. These are the political guarantees, the procedural guarantees against over-centralisation, and the ministers in the Council can, and should, involve their national parliaments as well. The Treaty of Amsterdam gave a protocol giving a six-week period for ministers to discuss with their national parliaments” (European Parliament 2002j: Corbett, PSE, UK).

<sup>105</sup> The General Affairs Council should meet more regularly, and it is also suggested that cabinets of the Member States “should include on the agenda a permanent item “European affairs” to enable the member of the government sitting on the General Affairs Council to absorb the government’s position on the items on the agenda for the subsequent General Affairs Council” (European Parliament 2001h).



to express the view of the Member State governments, under the supervision of the national parliaments and the European Parliament” (European Parliament 2001f: Maij-Weggen, PPE, the Netherlands). Furthermore, the scope of qualified-majority voting in the Council must be extended,<sup>106</sup> because, on the one hand, the exercise of EU competences must “no longer be thwarted by (...) unanimous decision-making” (European Parliament 2002i), and, on the other, decision-making has to be “adjusted in light of the population factor” (European Parliament 2001a). Finally, there must be a distinction between the executive and the legislative Council, and when the Council acts as legislator “both the deliberations and the votes should be in the public domain” (European Parliament 2001e). In conclusion, “the Council should function entirely in line with its actual tasks as a Federal Council, much like its German model” (European Parliament 2001f: Maij-Weggen, PPE, the Netherlands).

The Council, it is noted, is a Community institution and as such it derives its democratic legitimacy not only from the democratic character of its Member States, but also from the democratic character of the EU. The legitimacy of the Council depends, on the one hand, on the effectiveness of its decision-making procedure and, on the other, on the extent to which decision-making occurs according to democratic principles. The exercise of executive power should be checked by national parliaments at the national level and by the European Parliament at the European level. Therefore, “attention must be paid to the points on which national parliaments have lost competences which have not been passed on to the European Parliament. (...) We must check this very carefully, and we must ensure once again that these competences are returned either to national parliaments or to the European Parliament” (European Parliament 2002b: Maij-Weggen, PPE, the Netherlands).<sup>107</sup> In other words, citizens will only be able to exercise democratic control if EU decision-making is subject to democratic procedures. To put it bluntly, the method of supranational decision-making, the Community method, must be democratised.

Democratisation entails, first and foremost, extending the powers and prerogatives of the European Parliament. Above all, extended qualified-majority voting should be combined with co-decision in order to “reconcile efficiency in the decision-making process with the

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<sup>106</sup> However, changing the formal rules is not enough. Even where qualified-majority voting is the rule, informal norms of consensus remain the primary mode of decision-making (Heisenberg 2005) Putting an end to the informal rules of consensus is therefore an additional concern. For that reason, it is emphasised that “[w]hen the Council is called upon to decide by qualified majority it is not essential to seek a consensus at all costs”. Instead, “[t]he presidency should hold the vote once a sufficient majority is reached” (European Parliament 2001e).

<sup>107</sup> “It is an unfortunate fact that the competences ceded by the national parliaments to Europe have not all as yet arrived at the European Parliament, the only European institution to be legitimised by elections. (...) That is the real scandal of the democratic deficit in Europe” (European Parliament 2002b: Schleicher, PPE, Germany).

democratic legitimacy of the procedure” (European Parliament 2001a). As argued in the report on the draft Constitutional Treaty, the European Parliament “as the expression of Europe-wide direct universal suffrage, is the institution specifically designed to representing the Union of the people of Europe” (European Parliament 2003e). Therefore, “we have (...) to establish the legislative competences of the European Institutions, and make it clear that, of all the European Institutions, it is the organ of popular representation, the European Parliament, that holds the mandate for this popular representation” (European Parliament 2001k: Medina Ortega, PSE, Spain). There can be no democratic legitimacy unless the European Parliament is granted full legislative powers. On these grounds, the European Parliament “[w]elcomes the new “legislative procedure”, which will become the general rule, as an essential progress towards an increased democratic legitimacy of the Union’s activities, acknowledges this noticeable extension of codecision and underlines that the latter will have to be pursued further” (European Parliament 2003e; 2003g).

Democratisation and federalisation also means establishing the Commission as the EU executive. Does this mean that the Commission should be equal to a European government? Some members of the European Parliament certainly seem to think so.<sup>108</sup> In any case, it is repeatedly stressed that the Commission rather than the Council should be, and increasingly is, the EU executive.<sup>109</sup> Consequently, the Commission President should have the final word as concerns the internal organisation of the Commission, thus “enhancing the supranational and independent character” of the Commission (European Parliament 2001a). More importantly however, it is maintained that it is from the endorsement of the European Parliament that “the Commission derives its democratic legitimacy” (European Parliament 2003e). The composition of the Commission should be more closely linked with the outcome of elections to the European Parliament. The European Parliament, therefore, regards “as positive the election of the President of the European Commission by the European Parliament and stresses that this is in any case an important step towards an improved system of parliamentary democracy at the European level” (European Parliament 2003e; 2003g).

In sum, federalisation and democratisation should occur along the lines of parliamentary democracy. A parliamentary system has the following characteristics: A constitutional basis, parliament as the political centre of the system, the expression of voter

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<sup>108</sup> See for example European Parliament 2001b: Van den Berg, PSE, the Netherlands

<sup>109</sup> “It is clear that, although it comprises representatives of the national governments, and although it enjoys political prerogatives which are governmental in nature, the Council is not intended to be an executive authority, since executive power must rest with those who can call on administrative support and who implement the budget, i.e., as things stand, the Commission, and within their individual spheres of competence, the Member States” (European Parliament 2002m).

preferences through periodic elections and a party system (Andersen and Eliassen 1996). At the European level, the proponents of a union of citizens argue for the establishment of a two-chamber system, where the European Parliament represents the citizens and the Council represents the member states. Together, the Council and the European Parliament constitute the EU legislature, and the two institutions should therefore, in principle, enjoy the same legislative and budgetary powers. Moreover, the European Parliament designates the Commission, thus giving the EU executive a political dimension. This, in short, is the European Parliament's version of the parliamentary chain of government, where the bureaucracy is accountable to the executive, the executive to parliament, and parliament to citizens.

However, full parliamentarisation, as envisaged here, is problematic. The heterogeneous, multi-dimensional and multi-level character of the EU means that the unitary legitimation of majority decisions is not necessarily an available option (Scharpf 1997; Abromeit 2002).<sup>110</sup> Citizens, critics object, do not identify sufficiently with the EU to accept majority decisions made by EU institutions and actors. "Where people do not feel a part of the unit in question, its acts may be experienced as an outrageous interference, rather than as a pleasing exercise in self-governance by a well-defined community" (Beetham and Lord 1998:33). In the absence of a European demos, decisions may be considered illegitimate even if the decision-making procedure is considered acceptable in principle. Consequently, in order for a federal EU to have democratic legitimacy there must be a sense of community or "we-feeling" among its citizens. Or, put alternatively, establishing the EU as a fully-fledged parliamentary democracy requires a fully-fledged European citizenship.

### 5.3.2 European citizenship

It is generally agreed that democracy presupposes some form of common identity. Two arguments are usually invoked: A shared identity is necessary in order to resolve the tension between individual autonomy and collective responsibility, between the self-interested "bourgeois" and the society-oriented "citizen" (March and Olsen 1995). Collective identities

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<sup>110</sup> "[I]n a highly segmented polity of uncertain dimensions the use of parliamentary institutions is limited: they are the obvious means in all matters of control of the central administration and have their rightful place as the forum of political debate on all questions of overall ('federal') policies; but they are not adequate instruments for the safeguarding of the various peoples' preferences at the peripheries" (Abromeit 2002:18).

are designed to bridge this gap by instilling trust and institutionalising a common frame of reference. In addition, it is often remarked that the principle of popular sovereignty requires a clear definition and delimitation of the demos. In order to promote the “rule of the people” we need to know who “the people” are. Leaving aside the question of the boundaries of the polity, i.e. the delimitation of the demos, the challenge for the EU is to construct a European sense of identity that is strong enough to sustain its authority claims.<sup>111</sup>

The assertion that a European identity can be constructed begs the question “constructed around what?” (Beetham and Lord 1998). As we will see, the members of the European Parliament subscribing to a union of citizens tend to promote something akin to *constitutional patriotism*. According to Habermas, who is perhaps its best known advocate, constitutional patriotism is a contextualisation of the universal that can create bonds between individuals in the absence of a shared history. “Perhaps one would do better to speak of a common horizon of interpretation within which current issues give rise to public debates about the citizens’ political self-understanding. (...) But the debates are always about the best interpretation of the same constitutional rights and principles. These form the fixed point of reference for any constitutional patriotism that situates the system of rights within the historical context of a legal community” (Habermas 1998:225). Thus, citizenship as rights and citizenship as belonging is treated as two sides of the same coin. The question, then, is whether such rights and principles, to the extent that they are perceived to be universal, are sufficient to generate a sense of belonging to a particular polity.

The rights established by the Charter of Fundamental Rights should, according to proponents of constitutional patriotism, form the basic building-blocks of a European identity. The Charter, it is suggested, is the tool that will make “citizenship come alive” (European Parliament 2002r: Berès, PSE, France). It establishes a “more extensive rights-based regime within the European Union” (European Parliament 2002q). As a bill of rights, it protects “the citizen from any abuse by the European Union of its enlarged powers” (European Parliament 2002q). More importantly, however, it “reflects the fact that the Union is founded on common values” (European Parliament 2001a). It is the source of reference for the values that must be present in all EU policies. The Charter has “succeeded in making existing rights more visible. In building a fresh, large consensus around a new formulation of rights, the Charter brings

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<sup>111</sup> According to the 1999 Eurobarometer on European citizenship, 45% of the EU-15 populace feel themselves to be national only, 42% feel themselves to be national first and European second, 6% feel themselves to be European first and national second, and only 4% feel exclusively European. As the survey indicates, even if many of those who live in the EU have a multi-tiered sense of belonging, the European tier remains the weakest. In the event of conflict, therefore, EU citizens it might be expected to trade-off the claims of their respective attachments in favour of the national level rather than the European (Beetham and Lord 1998).

greater clarity and salience to them. It reflects contemporary European norms of good governance with respect to equality and anti-discrimination, social policy, ecology, civic rights, administration and justice. The rights are indivisible: in Europe, liberty, equality and solidarity hang together” (European Parliament 2002t). The Charter is, in other words, perceived as the instrument that will allow the EU to establish itself as a political union (European Parliament 2001a). With this in mind, the European Parliament “[g]reatly welcomes the installation of the Charter of Fundamental Rights as an integral, legally binding part of the Constitution (...) and stresses the importance of the person’s dignity and fundamental rights as crucial elements of a civic, social and democratic Union” (European Parliament 2003e; 2003g).

Legitimacy, in this reading, requires the protection and promotion of a common value system. As suggested in the European Parliament’s report on governance, legitimacy means “that political decisions must be underpinned by a fundamental consensus, such as that expressed in the Charter of Fundamental Rights recognised by the European Union – in the sense of individual rights and an objective value system”(European Parliament 2001j). This *fundamental consensus* is, in other words, an articulation of the identity of the EU. And, the legitimacy of the EU is seen as conditioned upon its ability to protect and promote these European values and rights.<sup>112</sup>

This raises the issue of whether shared civic values, in the sense of democracy and fundamental rights are sufficient to generate a sense of belonging to the EU. As pointed out by Beetham and Lord (1998), this approach may not be able to resolve the EU’s boundary problems. For one thing, attachment to democracy is not unique to EU member states and citizens, nor is it obvious that issues of democracy are best addressed at the European level. As the constitutional debates of the European Parliament demonstrate, there is considerable disagreement as to whether EU democracy is possible or desirable. Moreover, the commitment to rights protection is not necessarily shared by all of its member states and citizens. There may be an agreement that the EU should protect and promote civil and political rights, but disagreement as to how these rights should be interpreted, implemented and enforced (cf. Bellamy and Schönlau 2004b). Moreover, there is considerable disagreement as to the role and status of social rights. Whereas some members of the

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<sup>112</sup> This, of course, raises the issue of what rights should form the basis of EU citizenship. In order not to reopen the debate on the Charter, the majority of members refrain from discussing what kind of rights should be the building-blocks of European citizenship. Rather, they propose to accept the Charter as it stands (European Parliament 2002q).

European Parliament hold that the European constitution must guarantee a “high level of social protection” (European Parliament 2002k: Dehousse, PSE, Belgium), others maintain that the social dimension should be kept at a minimum, that it should not amount to more than residual social membership.

The debates of the European Parliament provide some insight into the contentious debate on social citizenship. One issue is the role of social citizenship in territorial system-building (cf. Ferrera 2005). “In a society that is based on universal equality, as well as the right to individual diversity”, one representative explains, “individual and social constitutional rights that are legally enforceable are indispensable” (European Parliament 2002s: Meijer, GUE/NGL, the Netherlands). Those representatives who do not wish European integration to move beyond the cooperation between autonomous and sovereign states, insist that issues of redistribution must remain the prerogative of the member states. The Treaty of Nice is, accordingly, a good treaty for the member states because “any changes concerning taxation policies and security policies will be left to individual countries to decide on” (European Parliament 2001b: Collins, UEN, Ireland). Proponents of federalisation, in contrast, see the extension of EU citizenship to the social domain as a precondition for ongoing integration. Social citizenship, it is argued, is conducive to the development of social and symbolic ties between EU citizens. The establishment of social citizenship will be “a solid and far-reaching step forwards, in its process of gaining political and social depth” (European Parliament 2001b: Seguro, PSE, Portugal), thus signalling the transition from economic cooperation to political union. In addition to ideological conflicts over the role of the state in the economy, therefore, the question of EU social citizenship pertains to the integration-sovereignty cleavage. Is social citizenship necessary for the formation of a common European identity or does the lack of a common identity mean that there is no basis on which social citizenship can rest (cf. Berg 2007)?

The issue, however, is not merely whether a European social policy is possible but also whether it is desirable. On the one hand, reference is made to the European social model (see for example European Parliament 2001b: Poos, PSE, Luxembourg), and the need for citizens’ rights, including social rights, to be firmly anchored in the Constitutional Treaty so that all EU citizens may enjoy the same level of rights protection (European Parliament 2002r: Maij-Weggen, PPE, the Netherlands). On the other hand, there is concern that a common European social policy means less rather than more social rights. In many cases, it is pointed out, the national constitutions provide better protection for citizens’ social rights than

do the Charter. “A weightier status for the Charter”, one representative warns, “can lead to two quite conflicting results, namely more scope for propaganda on the part of the EU and, at the same time, fewer guarantees for rights of EU citizens” (European Parliament 2002s: Meijer, GUE/NGL, the Netherlands). In other words, the members of the European Parliament disagree as to the level of protection the Charter provides, and ought to provide, in the field of social security, and, by implication, it can be questioned whether the Charter really represents a fundamental consensus on which legitimate political decisions can be built.

Implicitly, the members of the European Parliament seem to agree that a commitment to fundamental rights is a necessary, but not sufficient condition for legitimacy. As recognised by the European Parliament, democracy and performance are equally important. “We are well aware that in order to regain consensus and support in the Member States, it is essential, at this stage, to stress ‘what we want to achieve together’, the issues to be tackled and the solutions to be found at European level, projects to be realised gradually by means of a larger Union and its different possible structures” (European Parliament 2002a). The “debate on ‘content’ is inseparable from that on ‘the shape’ of European integration, on ‘how’ to govern the developments, the institutions and their functioning. The questions regarding what kind of Union we want – in an ultimately unified Europe – are an indivisible whole and require an overall design with which the citizens can feel at home, not least because it guarantees more democracy” (European Parliament 2002a). In the following, therefore, I will examine whether and to what extent this approach invites citizens to participate in defining and shaping European policies.

### **5.3.3 Citizenship as access**

Citizenship should not be considered a mere formal status, but also as a practice. As Wiener (1997) convincingly argues, citizenship, in its broadest sense, can be defined as the institutionalised relations between citizen and polity/community. Citizenship includes not only citizens’ legal relation to the polity, i.e. rights, but also rules of participation and day-to-day practices of participation. Citizenship characterises not only the polity and its members, but also the relationship between the polity and its citizens. Traditional accounts of citizenship, which emphasise rights only, fail to take into account that citizenship is also about access, that is, the conditions for practicing the relationship between citizens and polity

(Wiener 1997). What is more, they do not recognise the extent to which participation might generate a sense of identity and belonging to a political system. In the words of Sharpf (1997:20), “above the level of primary groups, collective identities are socially constructed from often quite heterogeneous constituents (...) just as playing together can create teams, living under a common government, and participating in common political processes, can create political identities”. To what extent is citizens’ access to political participation an issue for the members of the European Parliament, and what kind of participation do they envisage?

Citizens’ access to EU decision-making is a recurrent issue in the debates of the European Parliament. In order for European citizens to recognise EU policy-making as legitimate, they must be more closely involved in decision-making. “European citizens”, it is stressed, “have given up. They are not really turning against Europe, but they no longer feel involved” (European Parliament 2001k: Thyssen, PPE, Belgium). “In fact, the loss of consensus in public opinion and the growing disaffection, disappointment and distrust regarding the development of the Union cannot be explained solely by the shortcomings or unconvincing actions of the Union in its tangible policies and its responses to major demands and the expectations as regards the life and future of citizens, families and the population. The spread of such feelings is also due to a sense of alienation, the serious difficulties encountered in understanding and participating, a fear of helplessness in the face of imposed decisions which cannot be influenced or controlled” (European Parliament 2002a). The access of European citizens must, in other words, be improved.

In order to increase citizens’ access, three remedies are proposed: First, the transparency of the political system must be enhanced. Lack of transparency, which is seen as characteristic of the EU,<sup>113</sup> make it difficult for citizens to determine who decides what, when and why. Therefore, there must be openness in the Council, a hierarchy of acts must be established, and there must be a clearer division of competences between the EU and the national level. In short, the call is for a European constitution “clearly defining the division of competences, clarifying everyone’s role so that citizens finally understand who does what, and so that they can know who is responsible” (European Parliament 2002f: Leinen, PSE, Germany). Second, co-decision must be extended to cover all legislation. Public debate on European issues is seen as conditioned upon the closer involvement of the European Parliament in the legislative process. Co-decision, the argument goes, will lead to “greater

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<sup>113</sup> The EU is characterised as “a complex interweaving (‘Politikverflechtung’) of objectives, substantive competences and functional competences, arising from the existence of four treaties and two different entities, the Union and the Community, from the proliferation of legislative instruments with differing and sometimes questionable legal scope, and from the absence of a real hierarchy of acts” (European Parliament 2002l).



transparency, better control and hence to greater proximity to the public” (European Parliament 2002i; Karas, PPE, Austria). Finally, EU institutions and actors must communicate more with citizens, because maintaining a dialogue with the citizens is, in fact, “the most fundamental of their tasks” (European Parliament 2001j; 2001n).

Will these remedies suffice to stimulate interest on the part of the citizens? This, of course, is an empirical question. Nevertheless, if the aim is to encourage increased citizen participation, there are reasons to doubt whether this approach will do. It presupposes that elections to the European Parliament will constitute the main channel of citizen participation. Elections are depicted as the means through which European citizens hold their decision-makers to account, directly in the case of the European Parliament and indirectly in the case of the other EU institutions. However, the European Parliament’s proposal fails to take into account the consensual character of EU decision-making. In the EU political issues are toned down or translated into technical problems. The experience of consensus democracies suggests that democratic mechanisms, such as elections play a different role than they do in majoritarian systems, and that in consensus democracies the electorate is not to the same extent invited to hold their representatives to account.<sup>114</sup> This framing of the democratic deficit, suggests that its proponents fail to recognise that the effects of majoritarian structures are hard to replicate in a consensus-based system.

The consensual character of EU decision-making hampers citizen participation. Not only is the European decision-making process notoriously complex,<sup>115</sup> it is also characterised by a low degree of politicisation (Eriksen and Fossum 2000b; Magnette 2003; Neyer 2003; Heisenberg 2005). In particular, the Community method, which the European Parliament endorses, provides for consensual decision-making. The legislative proposals of the Commission, which are based on the consultation of a large set of actors, tend to be presented not only as a delicate compromise between different interests, but also as a proposal embodying the common interest of Europe. Moreover, rarely are alternatives to the proposals presented and discussed, leaving the impression that it is the only available alternative (Magnetete 2003). In sum, the Community method, “based on a long process of informal negotiation and the elaboration of a compromise *before* political discussion takes place, is a

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<sup>114</sup> Whereas in majoritarian systems election results have a direct bearing on government formation, the key function of elections in consensus systems is to guarantee that political institutions reflect social plurality. In addition, decision-making in consensus democracies as a rule involves a greater number of actors, and as a consequence it is difficult to identify who is responsible for a political decision.

<sup>115</sup> In the EU, political responsibility is diffused through a complex system of institutional balance between the Commission, the Council and the European Parliament. In addition, there is a broad range of channels through which the various actors can participate (Magnetete 2003).

very powerful disincentive for political deliberation” (Magnette 2000). Will increasing the European Parliament’s participation will, as one of its members suggests, be the means by which the decision-making process is politicised (European Parliament 2001f: Brok, PPE-DE, Germany)?

Experience suggests the opposite. Rather than politicising decision-making, co-decision has had the effect of drawing the European Parliament into the EU’s secretive and consensual decision-making structures (Warleigh 2003). The demand that the Council must meet in public when acting as a legislator is, in this light, a necessary but insufficient condition for stimulating public interest. Admittedly, opening up Council negotiations will entail that negotiations between the Council and its co-legislator, the European Parliament, will also take place in public. Even so, by obliging the European Parliament to agree on an institutional perspective before entering into negotiations with the Council, co-decision nevertheless favours a consensual style politics. As a consequence, the European Parliament is “unable to develop patterns of partisan politics and meaningful plenary debate which might give it greater visibility” (Warleigh 2003:79). This may explain why, the increase of its powers has not led to a corresponding increase in public impact. Instead the European Parliament has been forced to adapt to the consensual style of politics that characterises the EU. There is, in other words, good reason to doubt whether the extension co-decision will have the desired effects.

Perhaps increased transparency is less about citizen participation and more about their acceptance of EU institutions and policies. As argued by the Committee on Petitions, “European citizens will be all the more able to identify and communicate with the Union and its institutions if the latter adopt policies more attuned to international challenges which are clearly explained to the public and meet the expectations of public opinion” (European Parliament 2001j: opinion of the Committee on Petitions). The public will, it is suggested, identify with and embrace the European project if they are presented “with political objectives for which it is useful and necessary to strive” (European Parliament 2001i: Poos, PSE, Luxembourg). Representatives, in other words, should develop policies that correspond to citizens’ needs and interests, and communicate these policies to the citizens. As a result, citizen participation is no longer of primary importance. What is important is that the ends and means of European integration are properly explained to citizens so that they know which policies are pursued and why.

The notion that European integration is about presenting citizens with “objectives for which it is useful and necessary to strive” appears, in fact, to have informed the constitutional

debates. The members of the European Parliament seem to prefer an approach that combines the language of rights protection and democracy with the promise of providing effective solutions to common problems. And the constitutional debates themselves are, to a large extent about defining these common problems. “We need to rewrite the objectives which form the basis for the Constitution of the Union, and that is what will convince our citizens that progress in competences is fully justified. What are those objectives? The market, currency, freedom of movement – these are not enough. We must go further. At the world level Europe is committed to effective multilateralism. It bases its security on dialogue, the abolition of poverty, and development links. It chooses full employment and progress in human capacities. It is against exclusion and bases its cohesion on the sharing of common goods” (European Parliament 2002j: Herzog, GUE/NGL, France). European citizenship, then, is about output as much as input.

However, this is not output as envisaged by the regulatory state. The members of the European Parliament list a number of objectives for which the EU should strive, most of which go beyond what can reasonably be thought of as Pareto-improving policies. Among the objectives of European integration, the members of the European Parliament suggest the need for a genuine common foreign and security policy (European Parliament 2002j: Napolitano, PSE, Italy), economic growth (European Parliament 2001k: Van Lancker, PSE, Belgium), economic, territorial and social cohesion (European Parliament 2003a), social and environmental rights (European Parliament 2002r: Ahern, Verts/ALE, Ireland). Most of these objectives are value-allocative, and thereby political even in Majone’s sense of the word (Majone 1996c). However, rather than defining European citizenship in a manner which ensures citizen input, the European Parliament seems more concerned with writing the objectives of European integration into the constitution, and thus removing them from the political domain.

### **5.3.4 Democracy without politics?**

The proponents of a union of citizens use a vocabulary known from the nation state. They emphasise democratisation through parliamentarisation and federalisation. Moreover, they stress the need to establish a fully-fledged European citizenship. The democratic deficit should be addressed through constitutional reforms establishing the European Parliament and

the Council as co-legislators, with the Commission as an accountable cabinet responsible for the preparation and implementation of laws. This, as observed by Magnette (2003:146), is an orthodox schema whereby “accountability and civic participation simply reproduce the logic of national institutions. And though the word is carefully avoided, the EU is perceived as some sort of a European parliamentary state”.

As we have seen, however, the constitutional debates of the European Parliament were not only about establishing democratic, and federal, institutions, but also about fixing the objectives of integration. Contrary to most national constitutions, which set up institutions within which policies can be elaborated in a democratic process, the European constitutional process is an attempt to define these objectives prior to the democratic process. The actors, in this case the members of the European Parliament, have different visions of what the EU is and should be, which they want the constitution to recognise. Rather than a means for discovering the issues on which there is agreement, the constitutional process becomes the arena within which battles over the ends and means of integration are fought. The problem is that once these objectives have been fixed in a constitution, citizens and their representatives have bound themselves to the mast. They have agreed to remove certain contested issues from policy-making and, hence, from the public debate. In other words, it is the constitutional process, and not day-to-day decision-making that becomes the arena for political conflict.

When the goals are set in advance, day-to-day politics becomes depoliticised. The impression is that the members of the European Parliament, even when they endorse the full parliamentarisation of the EU, promote democratisation without politicisation, or democracy without politics. This is consensus democracy where political debate is not simply channelled into institutions designed to encourage consensual decision-making,<sup>116</sup> but channelled into institutions designed to minimise political debate or to sweep political differences under the carpet. As a consequence, policy-making is no longer presented as an issue of representation and citizen participation, but rather of responsiveness in the absence of popular input. It is about giving citizens what they want, responding to their demands. The European Parliament habitually justifies its actions with reference to the needs and wishes of its constituents, and the constitutional debates are no exception. As it is argued in the report on the division of competences, the expectations of citizens must be a major concern when the divisions of competences between member states and EU institutions are updated (European Parliament 2002e).

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<sup>116</sup> As is the case in traditional consensus democracies, such as the Netherlands and Switzerland.

In such a system, citizens are reduced to fictitious actors, whose interests are continuously referred to, but who are denied a say in developing policies that respond to these needs and interests. They are, in other words, denied their democratic right to exercise popular control. European decision-makers seem content to anchor their decisions in “the will of the people”, yet at the same time they do not pay particular heed to the problem of identifying this will. Citizens are, in short, not given adequate access to decision-making. In the debates insufficient attention is devoted to the problem of representation, and citizens are not provided with effective feedback, or accountability, mechanisms. Instead of politicising decision-making, admitting that citizens have different interests, needs and values that they want the EU to pursue, members of the European Parliament rely on their ability as elected representatives to identify the “common good for Europeans”, or the will of the citizens. In such a system, active citizenship risks becoming a disturbance rather than an asset.

The impression is that the image of the EU as a problem-solving entity is more resilient than the language of parliamentary democracy leads us to believe. Rather than creating an arena for political competition and contestation, where citizens can participate according to the principles of political equality and popular control, European decision-makers seem reluctant to give up the output-oriented approach to European integration. Yet, at the same time, they seek to legitimise the EU with reference to democratic values. Ostensibly, there is a conflation of two separate, but not mutually exclusive, modes of legitimacy: on the one hand, democratic legitimacy, requiring the institutionalisation of the principles of political equality and popular control, and, on the other, output-oriented legitimacy or legitimation through performance. As pointed out by Scharpf (1999), however, output-legitimacy requires both the perception of a range of common interests that are sufficiently broad and stable to justify collective action, and an understanding that certain tasks are more effectively dealt with at the European level. Therefore, even if the output-oriented approach traditionally has been an important European narrative (Beetham and Lord 1998; Weiler 1999a), observers generally agree that the breakdown of the “permissive consensus” in the early 1990s, as well as general developments in the EU,<sup>117</sup> requires some form of democratic legitimacy. Could it be, then, that rather than, or at least in addition to, inadequate concepts of post-national democracy, we are faced with a conflict between what we want the EU to be and how we want it to be legitimised?

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<sup>117</sup> E.g. the supremacy and direct effect of EU law

#### ***5.4 The problem with the deliberative approach to constitution-making***

In the beginning of this chapter, I argued that the constitutional debates of the European Parliament illustrate the problem with the deliberative approach to constitution-making. The quest for a constitutional consensus, I suggested, raises the issue of *finalité politique*, thus drawing attention to the contentious issue of more or less integration. The result, I assumed, would be a debate that was highly politicised, in which gaining accept for one's vision would be more important than agreeing on a constitutional settlement, and, moreover, in which the issue of citizen participation would be neglected in favour of an evaluation of the objectives and ideals of European integration. To what extent do the debates of the European Parliament give grounds for these conclusions?

The debates on representation revolve around issues of social, political and purposive finality (cf. Walker 2002). First, the participants' framing of representation, specifically, and democracy, more generally, is to a considerable degree determined by their position on the social finality of the EU, i.e. the question of whether the peoples of Europe may unite into a European demos. According to proponents of the no demos thesis and constitutional tolerance, the EU is and will continue to be a union of peoples. Proponents of constitutional patriotism, in contrast, believe that a common European identity is emerging. Second, the members of the European Parliament ask what the form of the EU ought to be. Adherents of the no demos thesis suggest a form of inter-parliamentary cooperation, advocates of constitutional tolerance favour some kind of structured arena providing access to actors of different types – stateless nations, regional, national and supranational actors – and proponents of constitutional patriotism envisage a European federation of states and citizens. Finally, the question of purposive finality, i.e. the objectives and ideals for which the EU is to strive, is raised. At issue, in other words, is the question of competences. Implicit in the no demos thesis is the understanding that EU competences should be limited, contingent, calculated and controlled (cf. Lord and Magette 2004). Constitutional tolerance and constitutional patriotism suggest that European integration should reflect the needs and interests of the citizens. What these needs and interests consist in is not clear, but a number of candidates are proposed ranging from a common foreign and security policy, via economic, territorial and social cohesion, to social policies.

Thus, emphasis is on the question of integration first and the procedures for representation second. That is to say that the positions of members of the European

Parliament concerning citizen representation are determined by their position on the issue of more or less Europe. The model of representation which puts national parliaments at the centre of EU decision-making is linked to the no demos thesis; the model of representation including elected assemblies at regional, national and the supranational level is associated with constitutional tolerance; and, finally, representation through the member states' governments and the European Parliament relate to constitutional patriotism.

Whereas there is a high level of agreement within each frame, there is a high level of disagreement across frames. What is more, there are no signs of inter-frame disagreement abating in the course of the debates. If anything, the debates lead to a clearer articulation of the differences between them. Given the ambitious scope of the debates, the participants are invited to elaborate on the implications of their visions in a variety of different settings. This suggests that defending a particular vision is more important than establishing a common ground on which to base the European Parliament's proposals to the Convention. As a result, the reports and resolutions of the European Parliament tend to be expressions of the majority view, i.e. the federal model, rather than some form of negotiated or deliberative consensus.

Notwithstanding disagreement, the frames resemble one another in one respect. Implicitly or explicitly, the EU is understood as a problem-solving entity. In the case of the no demos thesis and constitutional tolerance, the emphasis on EU problem-solving capacity is intentional. According to the no demos thesis, EU legitimacy is derived from the member states, and premised on its ability to serve the interests of these member states. Proponents of constitutional tolerance envisage a two-level approach to legitimacy where the member states are asked to satisfy the requirements of popular input while EU institutions concentrate on providing output legitimacy. Advocates of constitutional patriotism, in contrast, argue that European integration should move beyond mere problem solving. Their continued emphasis on the problem-solving character of the EU is therefore both surprising and problematic in that it points to a discrepancy between the institutionalisation and legitimation of the EU.

By implication, emphasis is on output-oriented legitimacy. In itself, this is not problematic. To some extent, the legitimacy of democratic institutions will always depend on performance, the belief that they can actually deliver and are widely regarded as being entitled to do so (Bellamy 2006b). The problem arises when, as is the case here, problem-solving capacity is linked to constitutionally-defined and, hence, non-negotiable goals. Notions of social, political and purposive finality, Castiglione notes, "proposes a curious view of democratic legitimacy, which forecloses citizens' options by fixing the political agenda in advance of the democratic debate and predetermines their decision by putting in front of them

the stark alternative between integration and decline” (2004:396). Thus, it imposes restrictions on normal politics which would be unheard of at the national level.

Citizens of a nation state are not asked to agree on what the state is, neither in terms of its final point nor in terms of its aims. Rather they are asked to participate in the shaping of its institutions and policies. As a result, political cleavages, such as the centre-periphery and the left-right conflict, have shaped, and are continuing to shape the institutions, policies and identities of European nation states (Tilly 1975). In the constitutional debates, in contrast, the emphasis on output is at the detriment of popular input. Whereas the citizen is repeatedly invoked as the source of EU legitimacy, there are few concrete proposals as to how citizen input is to be enhanced. In the case of constitutional patriotism, it is not even clear in what capacity the citizen is to participate. Is she a holder of rights, a participant, a voter, an interest-group member? In spite of wanting “to talk of citizens” and wanting “to bring Europe closer to the citizens” (European Parliament 2003c: Méndez de Vigo, PPE, Spain), there is virtually no talk of elections, political parties and other mediatory structures within society – such as associations, citizens’ movements and media. As a result, it is not clear how the citizen is to participate or control the EU policy-process.

Thus, the discussion on the EU’s end-state becomes an obstacle to democratic reforms. Rather than limiting the constitution to those issues on which they agree, they see the constitutional process as a means of furthering their visions. Conflicting visions raise the stakes and, consequently, the level of conflict. Obtaining accept for one’s vision becomes all important. In this light, the difficulties of establishing a constitution for Europe should come as no surprise. For one thing, the concern of the actors in the constitutional process is not, first and foremost, to find a common ground on which to build democratic institutions. More importantly, perhaps, citizens might perceive the constitution as their best, if not their only, means of expressing political discontent. The constitution, rather than day-to-day politics, becomes the arena for political contestation. Hence, as we have seen, the authors of the constitution risk finding themselves in a situation where public opinion stands in their way.

Does this imply that constitutional politics collapses into normal politics? Not quite. The distinction has been blurred, but not dissolved. In this chapter, I have argued that the constitutional debates of the European Parliament, to a considerable degree, are informed by the no demos thesis, constitutional tolerance and constitutional patriotism. In different ways and from different vantage points, these approaches address issues of identity and the location of political authority. Thus, the constitutional debates are principled debates in a way that normal political debates are not. However, this is yet another manner in which the actual



constitutional debates deviate from the deliberative ideal. Whereas the deliberative model asks us to appeal to the generalised other, thereby stressing what we have in common as human beings, the constitutional debates are, to some extent, a discussion of what “united in diversity” could mean and what the limits of unity are.



## 6. CAN WE DEFINE OUR WAY OUT OF HERE?

The starting point for this study was that there are certain problems in the major theoretical discourse on EU legitimacy, problems which might be uncovered through an examination of issues of legitimacy at a normative and an empirical level. Four normative approaches to European integration have been identified – the standard version of the democratic deficit, the regulatory state, multi-level governance, and integration through deliberation – and their legitimacy claims analysed. The empirical part examined the uses of these legitimacy claims in two cases: the European Parliament’s inquiry into BSE and its post-Nice constitutional debates. In both cases, its members attempt to formulate a programme for democratic reform. Starting from a representative model of democracy, the representatives defend different ideas of the role of representative institutions in EU decision-making. At first glance, therefore, the debates read as a strong defence of parliamentary democracy. On a closer reading, however, a different picture emerges, that of “democracy without a demos” (cf. Mair 2005a). The question is what the European Parliament’s framing of issues of democracy and legitimacy tell us about normative theoretical discourse.

In order to discuss this question, this chapter examines the findings through the lens of a rhetorical question: Can we define our way out of here? Whereas the theoretical positions advocating non-majoritarian solutions to the legitimacy deficit suggest that we can, the combined normative and empirical analysis suggests that we cannot. Three problems in the attempts at redefining EU democracy have been identified: First, the definitions of democracy, second, the theories’ assumptions about actors, processes and systems, and finally the uses of legitimacy. Given these problems, I conclude, the regulatory state, multi-level governance and integration through deliberation can claim neither to have substantiated democratic nor legitimate alternatives to parliamentary democracy. In spite of the attempts at redefinition, the EU is “still in deficit” (Bellamy 2006b).

The argument is structured as follows: First, the regulatory and governance approaches are discussed. The European Parliament’s inquiry into BSE represents a concise and compelling critique of the two approaches. In uncovering the empirical weaknesses, the members of the European Parliament identify the problems both in their definitions of democracy and their uses of legitimacy. Second, the notion of integration through deliberation is examined. The deliberative model, I argue, corresponds well with the majority’s

understanding of the European Parliament. Like the regulatory and governance approaches, however, the deliberative model is premised on the existence or emergence of a European consensus. When this consensus fails to materialise, the members of the European Parliament have few convincing proposals as to how its deliberations, *qua* strong public, are to be linked with the deliberations of EU citizens. Thus, the European Parliament's debates on representation and accountability highlight another problem of the theoretical discourse: While allowing political actors to use the language of democracy, non-majoritarian approaches do not provide them with concrete proposals as to how the principles of popular control and political equality might be institutionalised in EU decision-making.

### ***6.1 No substitute for electoral accountability ...***

According to the regulatory state, policy implementation ought to be apolitical. According to the governance approach, it is and ought to be political. In spite of their different vantage points, the conclusions of the two are curiously similar. Both argue that legitimate decisions emanate from the deliberations of non-majoritarian institutions, and both claim that the outcomes of such deliberations can claim some form of democratic legitimacy. In its inquiry into BSE, the European Parliament takes issue with the approaches' framing of EU democracy and legitimacy. The approaches, its members conclude, do not establish democratic alternatives to electoral accountability, and the problematic uses – and abuses – of legitimacy mean that they cannot function as a substitute for electoral accountability.

Neither technocracy nor policy networks can reasonably be described as democratic. In the first case, knowledge is the source of authority. In the latter, participation is limited to stakeholders and interested parties. Hence, whereas the first is in breach of the principle of popular control, the latter is in breach of the principle of political equality. Arguably, legitimacy rather than democracy is the issue. Neither, however, need be incompatible with democracy, and, as the experience with regulatory agencies and policy networks at the national level indicates, both may serve important functions within a democracy. The problem, therefore, is not technocracy or interest group pluralism as such. Rather, it is the manner in which these are expected to contribute to EU legitimacy. Whereas in the member states, regulatory agencies and policy networks are embedded within an overall democratic structure – most notably a public sphere – such structures are largely missing at the EU level.

In the EU, the plurality of principals and the absence of a pan-European public sphere capable of exerting diffuse pressure on regulators combine to give regulatory agencies and policy networks an unprecedented degree of independence from popular control.

Given the democratic deficit, the question is what kind of legitimacy regulatory agencies and policy networks can have in EU decision-making. In the absence of mediatory structures – such as European media and a genuinely European party-system – the approaches invoke a putative European consensus to justify the privileged role of experts and interest groups respectively. Explicitly, in the case of the regulatory state, and implicitly, in the case of multi-level governance, references are made to the common interests of all Europeans. To the extent that regulatory agencies or policy networks produce outcomes that are effective and consistent with the European public interest, therefore, non-majoritarian decision-making might be more effective in generating output legitimacy than its majoritarian counterpart.

According to the members of the European Parliament, notions of a European public interest are unconvincing. For one thing, the BSE crisis illustrates there are no European common interests that can be defined outside the political contest. Even seemingly apolitical issues – such as food regulation where “there is a very limited number of correct outcomes, where the distribution of benefits and burden is largely settled in the process of deciding on legal and technical standards” (Føllesdal and Hix 2006:542) – have important political implications. Changes in context – such as the identification of a new disease – may lead to the politicisation of previously uncontroversial policies. Thus, the European Parliament rejects the efficiency/redistribution dichotomy from which the legitimacy claims of the regulatory state derive. Because no policies can be described as exclusively Pareto-improving, the arguments for basing authority on knowledge are rejected. Not only is it unsafe to assume that experts have privileged access to the European public interest. More than this, it cannot be assumed that such an interest exists. As a result, the parliamentary inquiry concludes, independent regulatory agencies cannot be legitimated with reference to some apolitical and pre-political public interest, but must be embedded in a wider context of democratic decision-making.

What is more, given that no European common interest can be defined, it cannot be assumed that the deliberative character of governance allows “generalizable interests” to be defined consensually (cf. Scharpf 1999). Again, the BSE crisis may serve as an illustration. The parliamentary inquiry identifies two interrelated problems of EU governance: capture and collusion. For one thing, the inquiry finds, the crisis demonstrated the extent to which decision-making is vulnerable to capture. The complexity and opacity of comitology allowed

specific interests to capture decision-making, thus ensuring that particular interests were given priority over more general food safety concerns. In contrast to proponents of governance, moreover, the members of the European Parliament maintain that increased transparency can never be but a partial solution. Participants in governance not only represent specific interests, they also represent a limited number of interests. With the convergence of interests, therefore, comes the risk of collusion (Dehousse 2003). Whereas processes of governance facilitate the development of common understandings among its participants, the design of comitology bringing together experts in particular fields and various sectoral interests does not favour a global perspective. Rather, the bringing together of sectoral interests produces sectoral solutions. Not only is the claim that the deliberations of policy networks represent the interest of all citizens dubious, but the practices of governance may also prevent the identification of such interests. It is, in short, highly questionable whether deliberations in governance can be extended to broader publics.

The issue, then, is whether governance networks nevertheless contribute to output legitimacy by granting concerned interests a privileged role in decision-making. The idea is, in other words, that involving affected interests in the formulation of public policies will generate the support of those whose compliance is needed. However, the agreement resulting from the participation of stakeholders and interested parties should not be confused with output legitimacy. If “output legitimacy is meant to generate the support of those affected and concerned interests who directly or indirectly participate or who are consulted by corporatist negotiations, independent bodies and public networks, then we do not need to abuse the concept of legitimacy to understand what is, quite simply, specific consent” (Bartolini 2005:172). Output legitimacy, in other words, requires that decisions can be extended beyond the scope of those participating in them.

In sum, neither the regulatory state nor multi-level governance has formulated alternatives to popular input. The BSE crisis is a reminder that there is no European public interest. Rather, there is a multitude of interests: the interests of farmers, producers, national governments, exporters, EU institutions, consumers, citizens, and so on. In such circumstances, the European Parliament convincingly argues, only elected representatives can claim to speak for citizens. Moreover, to the extent that they ensure that citizens’ interests, values and opinions are represented in decision-making, elected representatives contribute not only to input legitimacy but also to output legitimacy. In contrast to the regulatory and governance approaches, the European Parliament concludes, electoral accountability contributes both to the fairness of collective decision-making and to the acceptability of

results. It is, in short, the only procedure that can claim obedience from those who have not participated in the decision, and from those who, while participating, have not had their preferences satisfied (cf. Bartolini 2005).

## ***6.2 ... other than the strong public***

Whereas the parliamentary inquiry into BSE reads as a strong defence of electoral accountability, a different picture emerges in the constitutional debates. The rhetoric is similar, but the proposed reforms do not put the citizens at the centre of EU democracy. Nowhere is this more evident than in the discourse on representation. Three aspects of the European Parliament's debate suggest that the majority of its members have consciously or unconsciously abandoned the parliamentary model: First, very little attention is devoted to the European Parliament's weak electoral mandate or the European party system. Second, no distinction is made between legitimacy of outcome and legitimacy of procedure. Finally, it is not made clear how and in what capacity citizens are to participate. All in all, I argue, the model of representation defended by the majority is more reminiscent of deliberative democracy than of the mandate or control models of representation.

The European Parliament pays little heed to political parties and elections. Given the majority's stated commitment to electoral accountability, the unconcern towards the second-order character of European elections and the weakly developed European party system is surprising. The federalist phalanx calls for the full parliamentarisation, yet fails to mention the European Parliament's weak electoral mandate or the shortcomings of its split-level party-system. There is little discussion of the role of elections or how to improve turnout, and the mention of political parties is limited to statements recognising their importance. To put it bluntly, the European Parliament ignores the role of elections and parties.

The disregard for the role of elections signals a move away from parliamentary democracy. In parliamentary democracies, elections are the main link between citizens and their representatives. Without elections, no representation.<sup>118</sup> Elections allow citizens to

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<sup>118</sup> There are different views as to what, more precisely, representation implies. Nonetheless, the institutions which initiate, enable and terminate representation have been remarkably stable over the last two centuries, with little variation in their basic structure. The formal arrangements of representative government can be summed up as follows (Manin, Przeworski and Stokes 1999:4): "1. Rulers, those who govern, are selected through elections.

choose between competing political programmes, they are vehicles for fostering political debate, and they allow citizens to reward or sanction after the fact. Elections, in short, are essential not only as a means of producing a government, but also for the “mobilization of bias” (cf. Schattschneider 1960). By implication, not only does the second-order character of European elections make it very difficult for citizens to hold their representatives to account, it also prevents them from giving their representatives a mandate in the first place. Hence, even if the Commission is turned into a genuine EU executive answering to the European Parliament, the state of affairs will be unsatisfactory when measured against either the control or the mandate model of representation.

The absence of political parties also indicates a shift in the European Parliament’s reasoning about democracy. Parties play a central role in parliamentary democracies. “Parties”, Mair (2005a:22) points out, “have always been unique organizations that combined within one agency the crucial functions of representation and government. That is, through party, one and the same institution within mass democracy gave voice to the citizenry and governed on their behalf”. Parties, in other words, facilitate citizen participation *and* responsible government.<sup>119</sup> They are not merely appendages of parliamentary government, “they are in the centre of it and play a determinative and creative role in it” (Schattschneider 1942:1). Without parties, Mair, continues, we are left with a stripped-down version of democracy – democracy without a demos. “These are certainly not unthinkable forms of polity, but they are systems in which conventional popular democracy plays little or no significant role, and in which neither elections nor parties remain privileged. When democracy in Schattschneider’s terms becomes unthinkable, in short, other modes of democracy move to the fore” (Mair 2005a:7).

From the vantage point of deliberative democracy, however, the European Parliament needs not, and perhaps ought not, be based on a party model. Partly due to the weakness of its party system, it is argued, the European Parliament “has been able to develop certain unique deliberative qualities” (Eriksen and Fossum 2002:414). The logic is the following: political parties are based on partisan selection of representatives, impose constraints on their

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2. While citizens are free to discuss, criticize, and demand at all times, they are not able to give legally binding instructions to the government. 3. Rulers are subject to periodic elections.”

<sup>119</sup> In combination with elections, parties provide mechanisms for control. “To the extent that they are coherent, a vote for a party programme is a form of *ex ante* public control that requires those who compete for office to set out a stall for public inspection. Scope to hold a party collectively responsible for its record (...) is, conversely, a powerful instrument of *ex post* accountability” (Lord 2004:115-6). Second, parties function as coordinating devices. They bundle issues into broad programmes, thus facilitating citizen participation. To put it simply, “they are radical simplifiers that allow citizens to participate in complex democratic systems with only minimal information” (Lord 2004:116).



autonomy, structure public opinion around partisan cleavages, and generally reduce the scope for deliberation in parliament (cf. Manin 1997). The absence of political parties, therefore, does not impede, but rather facilitates, the emergence of EU deliberative democracy. Because it is not organised around political parties, the European Parliament functions as a strong public seeking to “foster discussion, ensure rational and transparent decision-making, and promote the development of a more representative EU system” (Eriksen and Fossum 2002:419). In this light, the lack of attention to elections and political parties could be read as tacit support for the deliberative model.

What is more, the European Parliament does not distinguish the practice of democracy from its outcomes. On repeated occasions, democracy is depicted as a method for producing good results. In other words, democracy is to be preferred over other methods of collective decision-making because it is more apt to give citizens what they want, to respond to their needs and interests, than the alternatives. Inherent in this framing is the notion of consensus. Through the democratic process, disagreements will be dissolved, and citizens will discover or become aware of a common will. The role of the European Parliament, accordingly, is not only to promote citizens’ interests in their own deliberations, as well as in its contacts with the Council and the Commission, but also to communicate better with the citizens so that the latter will gain a better understanding of EU institutions and policies and how these correspond to their interests, values and opinions. Hence, emphasis is on the content rather than the practice of collective decision-making.

Once again, the contrast to the parliamentary model is striking. According to the parliamentary model, democracy is a method for managing disagreement rather than producing consensus. Consequently, the acceptance of majority vote is a question of practice rather than outcome. Those on the losing side of a democratic vote, Bellamy (2006b:729) reminds us, “rarely concede that they were wrong – at most they admit to having misjudged the public mood and may even endeavour to win people around the next time.” Legitimacy, in other words, is not a property of isolated decisions. To explain or defend a particular decision, one does not point to some higher ethical principle or any particular understanding of what is good, right or just; rather, one refers to the practice of majority rule and demonstrates that the decision has been reached in accordance with the practice. The European Parliament, in contrast, insists on democracy’s results, thereby deviating from a practice conception of rules.

However, a parallel can be drawn to the deliberative model. As argued in chapter 2, deliberative democracy does not distinguish between the legitimacy of the procedure and the legitimacy of the results. At first glance, the deliberative model seems to adhere to a

procedural model of legitimacy. Outcomes, it specifies, are legitimate to the extent that they result from the free and unconstrained deliberation of all concerned and affected parties. On closer inspection, the deliberative model appears to be more in line with the summary conception of rules (cf. Rawls 1955). The rules of procedure in deliberative democracy are not logically prior to outcomes. On the contrary, they are thought to facilitate the identification of ideally rational decisions on particular cases (cf. Benhabib 1994). Rather than defining the activity of collective decision-making, then, the ideal speech situation serves as a maxim, a guide for identifying outcomes representing the common interest. In this respect also, the European Parliament's framing of democracy resembles the deliberative model.

Finally, in the debates of the European Parliament the concept of citizen participation is obscured. The citizen is repeatedly invoked as the source of EU legitimacy. Yet, not at any stage in the debates is it made clear how and in what capacity he or she is to participate. The citizen is not invited to participate directly in decision-making. EU democracy, the European Parliament insists, is representative. As there is no debate on transnational parties or EU elections, however, it can reasonably be assumed that the EU citizen is not primarily regarded as a voter. Nor is the alternative to electorally-based representation, i.e. functional representation, endorsed by the European Parliament. The citizen is not to be represented via interest groups or associations. Does this imply that the citizen is primarily to be regarded as a rights-holder? Again the answer is no. Even though most of its members agree that fundamental rights ought to constrain the democratic process, the European Parliament is not content with a judicialisation of decision-making. As no other mode of citizen participation is introduced, one can only conclude that the citizen is reduced to a fictitious actor in EU decision-making.

Consequently, a number of approaches to democracy can be discarded as models for the European Parliament: the parliamentary model, in which citizens participate as voters, participatory democracy, in which they participate directly, pluralist democracy, in which citizens are interest-group members, and rights-based democracy, in which citizens are primarily regarded as rights-holders. The deliberative concept of citizen representation, however, is as vague as that of the European Parliament. Deliberative models focus on the communicative and discursive character of decision-making, while neglecting the issue of who is actually supposed to participate (Smismans 2004a). A deliberative assessment of the European Parliament will highlight the consensual style of politics, the conditions for open and free debate, the extent to which preferences may be changed or altered, and the presence or absence of bootstrapping mechanisms (cf. Eriksen and Fossum 2002). What is less clear,

however, is how the concerns and interests of citizens are to be linked to the deliberations and decisions of the European Parliament. The result is a model of representation in which the European Parliament is not mandated or controlled by, but deliberates for, the EU citizenry.

The image conveyed is that of the European Parliament as a strong public, that is, a forum for institutionalised deliberation.<sup>120</sup> Implicit in the debates of the European Parliament, then, is a redefinition of the role of parliaments. The deliberative model spells out the nature and content of this new role. Parliaments, the argument goes, are “quintessential strong publics and essential to democratic legitimacy” (Eriksen and Fossum 2002:411). Accordingly, one issue is how, more precisely, the European Parliament, as a strong public, is to forge stronger links between citizens and EU decision-making. In the constitutional debates, the European Parliament suggests that the answer lies in the constitution-making process itself.

### ***6.3 Legitimacy and the “fundamental consensus”***

The establishment of a broad consensus on the European constitution is necessary for EU decision-making and, hence, the strong public to enjoy public legitimacy. Political decisions, the European Parliament notes, “must be underpinned by a fundamental consensus (...) in the sense of individual rights and an objective value system” (European Parliament 2001j). Judging by its constitutional debates, however, there is little prospect of such a consensus emerging in the near future. To a certain extent, the effect of the debates appears to be the opposite of what the participants had hoped for: Rather than dissolving disagreement, the constitutional process resulted in a clearer articulation of disagreements.<sup>121</sup> From the vantage point of deliberative democracy, the inability of the representatives to reach a consensus on the constitutional architecture of the EU can be attributed to shortcomings in the constitutional process. Here, however, an alternative line of argument is explored: the difficulty of establishing a consensus points to problematic assumptions inherent in the deliberative model.

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<sup>120</sup> Deliberative models sometimes distinguish between strong publics, i.e. publics whose decisions are authoritative, that is publics that govern or make law, and weak publics, i.e. publics that do not govern but whose opinions can shape governing (Fraser 1992; Chambers 2004).

<sup>121</sup> The most obvious example is the decision of the majority of members to discard references to the *peoples* of Europe and instead refer to the *citizens* of Europe. The idea behind this change of nomenclature was to signal support for constitutional patriotism, and had the effect of distancing proponents of constitutional tolerance from the conclusions endorsed by the majority. It would seem, then, that rather than producing a consensus on the ends and means of European integration, the constitutional discourse has the effect of clarifying disagreements and honing the arguments for or against a particular interpretation of the integration process.

The argument is developed in three steps. First, it is impossible to define constitution-making in a manner that excludes politics. Second, it is undesirable to define it in a manner that excludes politics. Finally, the equation of legitimacy with consensus is problematic. I start, however, with a brief discussion of how the actual debates depart from deliberative constitutionalism.

Contrary to the deliberative ideal, the constitutional debates of the European Parliament include a considerable degree of political conflict. Its discussions reflect both integration-sovereignty and left-right cleavages, with the former being a leitmotif in the debates. As a matter of fact, the notions of representation suggested in the debates – the no demos thesis, constitutional tolerance and constitutional patriotism – epitomise the discourse on more or less Europe, and address issues of identity and the location of political authority. Left-right cleavages are less prominent, but nevertheless noticeable, not least in the discourse on social citizenship. Here, conflicts over more or less Europe are combined with conflicts over whether social citizenship ought to extend beyond market-correcting social policies. The issue, in other words, is not merely whether and what kind of social citizenship is necessary for ongoing integration, but also whether the EU can sustain social citizenship. Thus, rather than the absence of politics, the constitutional debates are animated by ideological and symbolic conflicts; and, rather than appealing to the “generalized other” (cf. Benhabib 1987), the participants ask that more or less contested values be recognised in the constitution. In brief, the practice of constitution-making is at odds with the deliberative ideal.

The constitutional experience lays bare certain problems in the deliberative model. First of all, it suggests that constitutional politics does not stand outside and above politics. For one thing, Castiglione (2004:404) explains, it is impossible “to define the province of constitutional politics in a way that excludes ordinary politics”. Constitutional principles are subject to the same reasonable disagreements that animate normal political debate. To a certain degree, therefore, these disagreements are bound to be reflected in the constitutional settlements (Bellamy and Schönlau 2004b). Accordingly, the constitutional consensus is, at best, a post hoc rationalisation.<sup>122</sup> Particularly in multinational polities, moreover,

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<sup>122</sup> Constitutional settlements, Castiglione points out, are reached through a variety of considerations and strategies, which, in addition to principled argument, include processes of bargaining, negotiations, incomplete theorisations and strategic arguments: “What is sometimes considered the binding character of constitutional consensus is at its origins – even when it emerges from truly exceptional moments of collective crisis and mobilization, which are indeed rare – the product of a number of more or less principled compromises. At first, these compromises result in a *modus vivendi*. Over time, and by the effect of common and continuous engagement both in the business of ordinary politics and in ongoing deliberative and decision-making, such a *modus vivendi* may consolidate in a shared framework, which is always open, however, to different

constitutional politics will include abstract, doctrinal and symbolic issues. In contrast to normal politics, therefore, constitutional politics can provide an arena for the discussion, contestation and resolution of different demands for recognition.

Second, constitution-making ought not to stand outside and above politics. Constitutional compromise, as Bellamy and Schönlau point out, is not necessarily a bad thing. Compromise can be regarded as a matter “of principle, reflecting a willingness to ‘hear the other sides’”, and deliberation, accordingly, “works more like a filter, weeding out purely self-interested moves in order to reveal those positions that ought to be accommodated and those that should not” (Bellamy and Schönlau 2004a:59). According to this view, the aim of the constitutional process should be to devise institutional structures “that reflect the spirit of compromise and that will allow further compromises to be negotiated in future” (Bellamy and Schönlau 2004a:74). Furthermore, as Keating and Bray (2006) convincingly argue, the ideological and symbolic are often shorthand for more complex substantive issues that cannot otherwise be addressed. Rather than insisting they be kept off the agenda, therefore, ideological and symbolic issues should be regarded as “summary indicators of fundamental questions about identity and the location of political authority” (Keating and Bray 2006:348). The idea that the legitimacy of the constitutional process should hinge on a “fundamental consensus” is, in this view, more problematic than the absence of such a consensus.<sup>123</sup>

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interpretations or to sudden collapse – as the experience of constitutional democracies amply testifies” (Castiglione 2004:405).

<sup>123</sup> The comparison with the European Parliament’s debates on BSE is interesting. In some respect, the parliamentary inquiry into BSE succeeded where the constitutional debates failed. The parliamentary inquiry adopted a common, if not consensual, strategy of institutional reform. Political conflicts were toned down, and, taking existing institutional structures as their starting point, the members of the European Parliament asked how the shortcomings of the EU regulatory regime ought to be addressed. Thus, the BSE crisis demonstrated both that there are a number of shared interests and concerns which may, if properly identified, guide institutional reform, and also that normal politics may be more than log-rolling, bargaining, voting and so fort (cf. Eriksen and Fossum 2000a).

In this light, the BSE crisis might be cited in support of a more pragmatic approach to constitutional reform. According to this view, the effectiveness of the parliamentary inquiry and the ineffectiveness of the parliamentary debates merely confirm the lessons of fifty years of integration. “As in the past, Europe will evolve only to reach precise objectives, not on the basis of an abstract model of what good European government should look like” (Dehousse 2006:162). The way forward for European integration, according to Dehousse, lies in the identification of concrete projects, the specification of particular public goods which respond to the interests and expectations of EU citizens, and which therefore can provide justification for further integration and institutionalisation. The specification and delivery of particular public goods, such as defence or environmental protection is, he suggests, a more persuasive justification for further integration than the all-encompassing approach of the Constitutional Treaty (Dehousse 2006).

This begs the question of whether effectiveness should be the sole, or even the main, measure of a successful constitutional process. A comparison between the two cases reveals that the constitutional debates served a function that the parliamentary inquiry did not. In the constitutional debates issues of identity and recognition took centre stage, in the BSE crisis they were kept off the agenda. Put alternatively, the parliamentary inquiry into BSE toned down the abstract ideological and symbolic issues that animated the constitutional debates. Thus, the effectiveness of the pragmatic approach comes at a cost. Whereas the constitutional discourse provided an arena for the discussion of identity claims, the parliamentary inquiry offered

Finally, there is another sense in which the equation of legitimacy with consensus is problematic. The deliberative model, Bellamy (2006b:735) points out, “makes an assumed European demos the pretext for attempting to bring it into existence. Any failure for this putative *demos* to emerge gets attributed to shortcomings in the current ground rules.”<sup>124</sup> The issue is not merely the circularity of the argument, but also its use of legitimacy. In line with Bartolini (2005), I have argued that issues of legitimacy emerge in conditions of no unanimity or no exit. The deliberative model, however, assumes that there is consensus on the ends and means of European integration, and that this consensus permits participants in the constitutional discourse to formulate a constitutional settlement that can be said to be in the interest of all. The identification and formulation of this consensus, moreover, is premised on the representation in the discourse of all relevant or concerned arguments. In this light, Bartolini’s criticisms of the governance approach also apply to the deliberative model. To the extent that the goals are accepted and appreciated, Bartolini (2005:171) explains, “the problem of legitimacy is already resolved *ex ante*”. And, to the extent that legitimacy stems from “the participation of all (or almost all?) the affected interests, the need for legitimacy is actually reduced, as we have seen in the elementary rule that the more inclusive the input, the less necessary any legitimacy of the output” (Bartolini 2005:171).

In conclusion, even if the members of the European Parliament had been able to formulate a “fundamental consensus” on the EU constitutional architecture, it is not obvious how this consensus would contribute to legitimacy. Nor is it obvious that failure to reach such a consensus makes the constitutional process less legitimate. What is clear, however, is that the constitutional debates did not produce the kind of agreement that (some of) its participants had hoped for, and which the deliberative model presupposes. The question is how the absence of such an agreement affects the European Parliament *qua* strong public. If the strong public does not have recourse to a “fundamental consensus”, how can it be assured that its deliberations will be representative of EU citizens?

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no outlet for such issues. Given that the ambition of the latter was to deal with the causes and effects of a major crisis in EU food policy, it is not only understandable but also commendable that the effectiveness of the response is given priority over ideological and symbolic issues. For institutional and constitutional reforms more generally, however, the answer is less clear cut. In the constitutional debates, for instance, it was argued that the EU could offer a “third way” for national minorities (European Parliament 2003c: MacCormick, Verts/ALE, UK). In a similar vein, Keating (2001a; 2004) argues that because the very nature of the EU involves rethinking sovereignty, European integration has transformed minority nationalism by offering a new arena in which nationalities can express themselves.

<sup>124</sup> Accordingly, the thesis “builds its conclusions into its premises, and in practice puts the cart before the horse. Though both the normative and empirical bases for the postnational argument are questionable, the plausibility of each rests on the truth of the other” (Bellamy 2006b:735).

## 6.4 Strong public, weak accountability

Inherent in the characterisation of the European Parliament as a strong public is the notion that it has the authority to deliberate on behalf of EU citizens. In the deliberative model, emphasis is not on the institutions that initiate and terminate representation, but on how representation “contributes to the refining and enlarging of opinions by passing them through the deliberate concern of chosen members of the *demos*” (Eriksen and Fossum 2002:411). Given that a consensus on the ends and means of European integration has not been identified, the issue is how the deliberations of the European Parliament can be linked to the concerns of EU citizens. Eriksen and Fossum (2002) have formulated three criteria for the assessment of strong publics, criteria which could also be seen as guidelines for the European Parliament. First, the presence of institutionalised arenas for discussion and decision-making. Second, decision making is preceded by, and justified through, reason giving. Third, all those affected by decision have their say, and/or can dismiss incompetent leaders. The first criterion corresponds to the European Parliament’s institutional ambition and is reflected in its call for enhanced powers, the second falls outside the scope of this study,<sup>125</sup> leaving us with the question of accountability.

According to the deliberative approach, accountability presupposes a public sphere. In order for all those affected to have their say, the deliberations of strong publics must be linked to the processes of justification that goes on in the public sphere (Blichner 2000). The problem is that a genuinely European-wide public sphere is embryonic at best. Consequently, the establishment of the European Parliament as a strong public will not in itself guarantee the “vital interplay between the public sphere based in civil society and institutionalized will-formation in parliament” (Eriksen and Fossum 2002:406). Unless the European Parliament is compelled “to justify the decisions to the ones affected by them” (Eriksen and Fossum 2002:405), it cannot claim that its deliberations are representative of EU citizens. This raises two questions: First, how can the formation of general publics be encouraged? Second, what mechanisms of accountability are available to citizens in the absence of a vital European public sphere?

Proponents of integration through deliberation claim that the emergence of strong publics has spillover effects on and helps spur the generation of general publics (Eriksen and

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<sup>125</sup> As this study contents itself with examining what the members of the European Parliament argue, not how they argue, no attempt is made to measure deliberation. For one attempt at formulating a programme for measuring political deliberation, see Steiner et al. (2005).

Fossum 2002). Strengthening the role of the European Parliament will, in other words, contribute to the formation of a European public sphere. In this light, the European Parliament's strategy of enhancing representation through more transparency, more co-decision and more communication should be viewed favourably. Previous experience of institutional reform, however, casts doubts on the efficiency of this strategy. So far, the empowering of the European Parliament has not had the desired effect on visibility. In fact, as Warleigh (2003) points out, the effect has been the opposite. Even if the European Parliament is an increasingly important actor in various policy networks, its influence largely goes unnoticed by the public.<sup>126</sup> This does not imply that the notion of spillover effects ought to be dismissed altogether. It does, however, indicate that, at present, strengthening the position of the European Parliament will not suffice "to inject the logic of impartial justification and reason-giving into the system of a given polity" (Eriksen and Fossum 2002:419)..

The possibility of dismissing incompetent leaders is proposed as an alternative mechanism of accountability (Eriksen and Fossum 2004). Thus, the deliberative approach reverts to electoral accountability. The reintroduction of majoritarian standards is surprising. After all, it exposes the deliberative approach to the same criticisms as the model it rejects. Nevertheless, until a consensus is reached on the "institutional and constitutional essentials" (Eriksen and Fossum 2002:418), the deliberative approach does not substantiate alternatives to electoral accountability. "Absent any consensus, then," Bellamy (2006b:735-6) notes, "disagreement standardly gets overcome through majoritarian decision-making – but that assumes a *demos* of the kind that post-nationalists seek to do without."

Given that the European Parliament's constitutional experience differs from the deliberative ideal in several respects, and that no alternative to the fundamental consensus is established, it is tempting to argue that the deliberative model is irrelevant both as a normative ideal and as an empirical description. Such a conclusion, however, would be premature. To the European Parliament, as an institution, the deliberative model is convenient. It allows the European Parliament to argue for an expansion of its powers and prerogatives while avoiding

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<sup>126</sup> Contrary to the deliberative perspective, Warleigh (2003) contends that the European Parliament has some difficulties establishing itself as a debating parliament. Dann makes a similar observation. His argument is based on the distinction between debating and controlling parliaments. The first, he (2002:21) explains, "is centred around its plenary which serves as the forum of the nation and draws its importance from mirroring different opinions in society within the parliament"; the latter, in contrast, "receives its character and power from being fairly separated from the government and from operating as a counter-weight to it". The European Parliament, he concludes, is best characterised as a controlling parliament, a distinct sub-category of working parliaments: "As such it employs basically the same instruments as a working parliament (such as the US Congress), but its powers are generally more of a negative, controlling and preventing nature than an autonomously creating one" (Dann 2002:23).



the difficult questions pertaining to its legitimacy. This, I argue, is the main problem with the notion that we can define our way out of the democratic deficit. It provides the European political elite with a vocabulary for investing EU institutions, actors and policies with democratic legitimacy, but not with the tools necessary for mending the legitimacy deficit.

### ***6.5 The problem in theoretical discourse***

The notion that democracy ought to be redefined to suit the EU context is understandable. From the vantage point of normative theory and politics alike, the conclusion that the EU cannot or ought not to be democratised is unsatisfying. Democracy has become the obvious means of legitimising political associations. The persistence of the democratic deficit, therefore, is believed to negatively affect popular support for EU institutions, processes, and policies. Although the relationship between the democratic deficit and popular discontent may be questioned, the end of the “permissive consensus” is commonly interpreted in terms of delegitimation. Politicians, Føllesdal (2004:6) explains, “came to fear that Europeans might refuse to accept future steps toward deeper European integration, and otherwise hamper governability”. To pre-empt such scenarios, he continues, the feeling is that something has “to be done to secure future popular support”.

The perceived need for democratisation, coupled with a growing suspicion that parliamentary democracy may not be appropriate for the EU, has spurred attempts at rethinking EU democracy. Considerable attention has been devoted to the question of what democracy beyond the nation state might look like. The efforts to re-define EU democracy discussed in this study can be categorised under the heading of non-majoritarian democracy. Two approaches can be distinguished: First, approaches describing the EU in democratic terms. The regulatory state and the governance approach belong to this group. Although they offer some concrete proposals as to how legitimacy can be improved, the ambition of both is to formulate a democratic justification for the status quo. Second, approaches formulating an alternative programme of democratic reform. The deliberative model is a case in point. Though not antithetical to parliamentary democracy, it proposes another path to EU democracy. Rather than emphasising democracy’s institutional dimension, the deliberative model focuses on the conditions under which EU citizens may be expected to forge a common will. The challenge, according to this model, is to inject the logic of deliberative legitimacy

into EU decision-making. The problem with the attempts at rethinking democracy, as discussed in this study, is that both the definitions of democracy and the uses of legitimacy are problematic.

The main problem, I have argued, is the tendency of the positions to confuse legitimacy with democracy and legitimacy with consensus. First, the attempts at establishing non-majoritarian solutions to the democratic deficit define democracy in a manner that does not privilege mass engagement, and generally seem less eager to address the democratic deficit than to describe the EU in democratic terms. Rather than exploring how popular control and political equality can be enhanced, the theories direct attention to the output of collective decision-making and emphasise the ends and values that EU democracy ought to serve. However, even though there are compelling arguments for limiting the use of majority rule in EU decision-making, it is difficult to accept arguments for limiting popular input as democratic. Democracy presupposes a certain level of popular control and equality. So far the attempts at defining non-majoritarian solutions to the democratic deficit have not succeeded in substantiating democratic alternatives to popular participation or representation.

Second, the attempts at rearticulating EU democracy and legitimacy misconstrue, or even abuse, the concept of legitimacy (Bartolini 2005). The regulatory state, multi-level governance and integration through deliberation assume that the deliberations of experts, interest groups or concerned parties respectively will contribute to the legitimacy of outputs. This could mean either that a decision is legitimate because all relevant actors or arguments have been consulted, in which case the legitimacy of any given decision is based on a particular form of input rather than output, or that the goals are widely accepted and appreciated, in which case the issue of legitimacy is already solved *ex ante* (Bartolini 2005). In the first case, legitimacy does not extend beyond a narrow circle of involved actors. In the latter, legitimacy is substituted for general consensus.

Similar tendencies can be observed in political discourse. Most notably, whereas the rhetoric of the European political elite suggests that increasing popular participation is a priority, their actions do not. In its White Paper on Governance (2001), the Commission refers to the importance of participation and civil society involvement, but its concrete proposals are confined to stakeholders and the “actors most concerned”. The promise of an open and inclusive constitutional process involving the citizenry at large has not been fulfilled.<sup>127</sup>

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<sup>127</sup> Indeed, Castiglione (2004:402-3) observes, there “has been little concern over both the low level of public interest shown in the work of the Convention, and the fitful way in which the press and the media has covered its proceedings. Some of the initiatives organized to give it public visibility have mostly been perfunctory, as in the

Finally, as discussed above, the European Parliament appears to have turned its back on the parliamentary model, if not the parliamentary rhetoric, in favour of an approach in which neither problems of representation nor accountability are satisfactorily dealt with. The positions, moreover, are commonly justified with reference to either the participation/consultation of concerned interests or some putative European consensus.

Thus, theoretical and political discourses resemble one another in their use of legitimacy. This is not to say that the shortcomings of political discourse ought to be attributed to the state of normative theory. Nevertheless, it provides European political elites with justifications for bypassing difficult questions pertaining to democratic representation and accountability, while permitting them to dress up their proposals in the language of democracy. The conflation of democracy, legitimacy and consensus might prove counterproductive. For one thing, the democratic rhetoric serves as a continuous reminder of the limited role democracy plays in the EU. It is possible therefore that, rather than bringing the EU closer to its citizens, the attempts to redefine “non-political” democratic procedures will add to popular dissatisfaction with EU institutions, actors and policies. Moreover, to abuse the concept of legitimacy, Bartolini (2005:175) warns, “generates the risk of miscalculating the extent to which true legitimacy surrounds the European institutions and their decisions. This miscalculation may lead to the overestimating of the capacity of the EU to overcome major economic and security crises – if and when they will emerge – particularly if it supports the idea that ‘the area of effective European action may still continue to expand as agreement is reached on additional purposes and means of European action’<sup>128</sup>”. Herein, I argue, lies the main problem of the attempts at re-defining EU democracy in non-majoritarian terms.

The legitimacy deficit cannot be remedied through the re-definition of the concept. The theoretical discourse on democracy and legitimacy has succeeded neither in establishing a new basis for EU democracy nor in identifying different and new forms of legitimacy (Bartolini 2005; Bellamy 2006b). As Bellamy (2006b:742) points out, this leaves us with two alternatives: “If an EU *demos* can be said to exist, then a move should be made towards enhancing the role played by directly elected majoritarian decisionmaking bodies within the EU. If, as seems more likely, an EU *demos* and public sphere remain absent with little immediate prospect of being established, then means need to be found for enhancing the

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case of the youth convention, while the attempt to involve citizens more directly through the participation of civil society organizations has been largely symbolic and not properly thought out.”

<sup>128</sup> Scharpf (2000:20)

democratic accountability of EU decision-makers within the established democracies of the Member States". From this, it can be inferred, first, that the EU democratic deficit is structurally determined and unlikely to be removed by institutional reforms in the short term (Grimm 2004). Second, the persistence of the democratic deficit also means that there are democratic limits to what the EU should do (Bellamy 2006b). Contrary to the current strategy of an expanding political agenda (see for example: European Council 2001), the legitimacy deficit requires a thorough debate on the scope of EU competences. Finally, given that European integration already has important implications for member states' sovereignty, the question for integration theory is, on the one hand, how to engage national actors – parliaments and the media – more effectively in the European project, and, on the other, how to accommodate different claims to identity and political authority.

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