Legality and legitimacy in the European Union

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‘L’Union...a su faire le saut technologique du pouvoir supranational, mais il n’y a toujours pas de légitimité supranationale.’ (Pascal Lamy, Le Temps, 28.8.09)

A shorthand version of this paper would give the EU 10 points for legality (or maybe 9 to allow for endemic financial irregularities) but only 3 or 4 for legitimacy. Legality is the EU’s essence: set up by international treaties, operating through regulations and directives, and with its own legal corpus and court as one of its most successful institutional achievements.

Legitimacy is, however, another matter. In theory, the national and the supranational should complement each other in the EU like the two sides of a Euro coin. (We could complicate the image by thinking of a polyhedron to represent multi-level governance.) In practice, I suggest, the national and the European levels are not just in tension, which is to be expected, but undermine and delegitimate one another. This has serious implications for projects, which I endorse, to encourage the development of a form of constitutional patriotism which can work for the European Union as a whole.¹

What sort of polity is the EU becoming?² The shift in nomenclature, from ‘Communities’ to ‘Union’, suggests progress towards the official goal, as stated in

¹ As Habermas, in his reply to a recent collection of articles, believes it can. ‘The establishment of a European civic identity can be understood as the continuation of a process which takes place initially within the national state. Even within these limits a well-understood constitutional patriotism has developed as a foundation of civic integration, in reaction to challenging historical experiences and along with the political-cultural incorporation of immigrant groups who remain connected with their countries of origin.’ Habermas Reply, in Niesen/Herborth (eds), Anarchie der kommunikativen Freiheit, p. 457. One might of course question both this account of what has happened at the level of the national state and its possible transnational extension. See also Nanz, Europolis, esp. ch. 6. For a more optimistic neo-Milwardian view of all this, see Menon/Weatherill, Transnational Legitimacy in a Global World. The authors (p. 411) recognise the problems identified by Vivien Schmidt, which I discuss later. Conversely, while disagreeing with them overall, I agree that ‘the starting point of any interrogation of legitimacy in (but not simply of) the EU is properly the flaws of the member states.’ (p. 404).

² For a fuller discussion of this theme, see my recent book, Outhwaite, European Society, on which I have drawn here. I am grateful for comments when I delivered versions of this paper at Onati and again at a conference at Sussex organised by Gerard Delanty and Paul Blokker to mark the tenth anniversary of the European Journal of Social of Theory; this took place just a week after the ‘no’ vote in the Irish referendum on the Lisbon Treaty. My thanks also to David Spence for comments on an earlier version of this chapter.
the treaties, of ‘ever closer union’, and there has indeed been such progress. But rather like the development of social democracy in the twentieth century, the positive achievements tend to go alongside a scaling-down of the ultimate goals. European federalism, like socialism, now seems to many Europeans either unattainable in the form in which it was originally conceived, or anyway undesirable.

We should however go back to the beginning and ask what a European federation or confederation would be, and why Europeans might have wanted it in the second half of the twentieth century. The idea has of course a much longer history, but one important motivation for the project of European integration was in fact to prevent the Second World War happening again. Two thirds of a century later, this aim seems quaint, and the idea of achieving it by, as a first step, coordinating the production of coal and steel between the former axis powers and some of their victims seems a roundabout route. Yet this is what happened, and it substantially shaped later developments.

It was also of course possible to want integration for its own sake, on the basis that, as Willy Brandt once said of divided Germany, that ‘what belongs together should grow together’. Europeans, on this view, have the basis for the sort of solidarity aspired to, and often achieved, by its national states, and this calls for an institutional expression of a similar kind, as in the great nineteenth century projects of German or Italian unification. Somewhere between these two poles one can locate views about the need to form larger economic units, to solve economic and other problems for which the national state was too small.

Postwar European integration began, then, with a fudge between motives of these kinds – an ambiguity which persists to the present. The original institutional model of the Coal and Steel Community has shaped the whole subsequent evolution of the Union: a ‘high authority’ of nine members, a council of ministers and a parliamentary assembly. Finally there was a court and an advisory committee of what we would now call stakeholders. The assembly and the court subsequently had their scope extended to the EEC and EURATOM. Half a century later, we now have a larger European Commission, a larger set of councils of ministers and the European Council of heads of state and government, a larger court and a ten times larger, directly elected parliament with substantially extended, though still very limited powers.6

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3 Shore, Building Europe, ch. 1.

4 As Dario Castiglione points out, the EU remains ‘both open with regards to the forms of integration, and indeterminate in relation to its historical movement’, Castiglione, Reflections on Europe’s Constitutional Future, p. 393.

5 Stråth, A European Identity. To the Historical Limits of a Concept.

6 As Brunkhorst notes, the Parliament’s formal powers are actually quite extensive. The problem is
Whatever the merits of this design, it is clearly not the most obvious for a federation or confederation, where one would expect the executive authority to be subject to parliamentary control and for legislation to be passed by the parliament. Something like this was in fact proposed in the drafting of the European constitution, and the downgrading of the Council of Ministers was probably the proposal least acceptable to many member states. In this, of course, they could justifiably claim to be following the majority views of their electorates whose main focus of attention and loyalty remains the national state.

Should we just bite the bullet and call the EU a state, perhaps with a qualifying adjective such as ‘network’ or ‘regional’?7

[T]he EU has developed a single currency, a single market, a single voice in international trade negotiation, a single anti-trust authority, common policies on environmental protection, worker safety and health, a common foreign and security policy, and even the beginnings of a common defense policy. [Thus] While the use of the term state may … be difficult for classically trained IR theorists, there is no other word that does justice to the growing power and developing sovereignty – however contingent – of the EU.8

Schmidt’s preference is for the term regional state; the focus of her book is on the impact of the EU on member-state polities. Clearly one has to think of the EU polity or state as significantly constituted by its interrelations with national and subnational levels. In this sense, ‘multi-level governance’ is simply a fact. To invert Marx’s phrase: ‘Europe has changed; the point is to understand it’.

Attempts to understand the European polity are however bound up with arguments for particular institutional designs, and it may be helpful to look at three of these. One of the boldest recent contributions is the political philosopher Glyn Morgan’s defence of The Idea of a European Superstate. Morgan deliberately takes the strongest and most provocative term in the ‘Eurosceptic’ vocabulary, demolishes some of the arguments for and assumptions about the desirability of a European state and then, in a startling volte-face, argues that we need it after all because only a unitary European state can provide the best available guarantee of security. Morgan admits however that ‘…a federalist European superstate is further from being a viable option today than at any time in Europe’s postwar history’.9

its lack of a public profile. See Brunkhorst, Zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung, pp. 343-4.

7 Schmidt, Democracy in Europe, p. 10
8 Schmidt, Democracy in Europe, p. 14
An obvious alternative response is to abandon the already stalled integration project or to wind it back in an inter-governmentalist direction. A comparably bold proposal on these lines is offered by the historian John Gillingham. Gillingham’s strategy of ‘hibernation’ and downsizing goes so far as to propose half-seriously the sale of some of the EU’s real estate in Brussels. A rather more likely scenario, which may be what Gillingham really wants, would be limits to the expansion of EU activities and a future of stagnation. Whether the EU bicycle, in Walter Hallstein’s memorable image, could stand up without moving forward, is another matter.

There is however a third way, a growing body of literature which is accommodated to the EU in something like its present state. John A. Hall (2006) invokes the old Gaullist slogan of ‘l’Europe des patries’ in his argument for a steady state. For Rainer Lepsius, too, the national state remains the ‘central political object of identification’; the EU lacks the ‘interactive density and linguistic homogeneity’ required to make it an appropriate site for working out economic and cultural conflicts. ‘The integrative capacity of a society organised as a national state cannot be replaced by the new European structures’.

Hall and Lepsius are historical and political sociologists but, not surprisingly, much of this literature is produced by interdisciplinary legal experts such as Joseph Weiler. Weiler, in a classic discussion of Europe’s Sonderweg or special path, writes that ‘Europe has charted its own brand of constitutional federalism. It works. Why fix it?’ Weiler’s focus here is on constitutional law, but his view seems to be shaped by the relatively smooth operation of European legal integration as a whole.

I agree with Habermas that law and democracy have to be seen in conjunction, and it is at the democratic end of the European polity that matters become more problematic. The attention of European citizens is primarily focussed on national or regional, rather than European politics, and the transfer of power to the European level has mostly not been stressed by member state governments, except when they are seeking an excuse for unpopular policies. Where the policies are popular, national governments tend, not surprisingly, to take the credit themselves. Vivien Schmidt, in her exceptionally innovative study of the interface between European and national politics, concludes that ‘while the EU has policy without politics, the member-states end up with politics without policy in EU-related areas. And this makes for major problems for national democracy.’

10 Gillingham, Design for a New Europe.
12 Lepsius, Prozesse der europäischen Identitätsstiftung, p. 5.
13 Weiler, Europe’s Sonderweg.
14 Schmidt, Democracy in Europe, p. 33.
The democratic deficit, in other words, is not only in the relatively unpolitical (though of course politically relevant) spheres of EU policy-making, with their confusing interplay of parliamentary, executive and legislative entities, but back home in the member states themselves, and also in non-members like Norway, who participate in the European Economic Area, Schengen etc. without even a formal place in EU non-politics.

National elections tend to be focussed on substantive policy issues that increasingly can only be fully addressed at the EU level, such as immigration, food safety, environment, or economic growth, while European Parliamentary elections tend to focus more on general polity issues that can only be resolved by nationally based actors, such as how to reform EU institutions – where, that is, they are concerned with EU issues at all …

This is not so much a ‘joint decision trap’ as what, borrowing from Bachrach and Baratz (1970), one might call a ‘non-decision trap’ — at least from the citizen’s point of view.

To speak of the European polity, then is to address not just the EU and the individual member states (including close associates like Norway and Switzerland) but, crucially, the interplay between them. Schmidt shows how essentially unitary states like the UK and France interact differently with the EU from more decentralised ones like Germany: ‘Europeanization … has been more disruptive to simple polities with unified structures like France and Britain. 18

15 As Schmidt argues: ‘[N]ational partisan politics has been marginalized. Ministers speak in the Council more in the name of the national interest than for governmental majorities. Members of the EP speak more in terms of the public interest than for electoral majorities. Citizens have more influence in Brussels when lobbying as organized interests than when voting or protesting in national capitals’ (Schmidt, V, Democracy in Europe, at note 7, p. 2).
16 See, for example, the Norwegian Study of Power and Democracy, part of a larger series of Nordic studies: www.sv.uio.no/mutr/english/index.html
17 Schmidt, Democracy in Europe, p. 33
18 Bachrach and Baratz, Power and Poverty.
19 The UK, like Spain, has of course now substantial devolution (to Scotland and to a lesser extent to Wales), and the Blair government reversed Thatcher’s abolition of metropolitan institutions in London and elsewhere. Its political style however remains essentially unitary, reinforced by a strongly majoritarian voting system in which coalitions have historically been rare. This may of course be about to change, with Brown, the British Medvedev, visibly running out of steam.
20 Schmidt, Democracy in Europe, pp. 54-5. The details of Schmidt’s analysis of her four states do not concern us here, but her concluding recommendations give a flavour of it: ‘The French need to rethink their vision of leadership in Europe … given that they know that France no longer leads Europe, are in crisis over national identity, and increasingly blame EU “neoliberalism” for their economic problems. The British need to develop a vision of Britain in Europe, given that the discourse of economic interest does not respond to growing concerns about sovereignty and identity, while the idea of British separateness in Europe could very well lead to the reality of British separation from Europe … The Germans need to
Schmidt’s diagnosis may seem worrying, but her conclusion is relatively optimistic. As long as we recognise that the EU should be seen as a regional state and do not try to democratise it according to the model of national democracies, we can live with something like its present arrangements. ‘Its “federal” checks and balances, its voting rules ensuring supermajorities, its elaborate interest intermediation process with the people, and its consensus politics go very far toward guaranteeing good governance for the people.’\(^\text{21}\) All that is needed is for the member states to recognise this and adapt their political discourse and practices accordingly.

In a related approach, Jan Zielonka and others have presented a vision of the EU as a kind of empire, more specifically a neomedieval one in which political authority is divided and multiple, not clearly nested as in idealised descriptions of feudalism, but a messier picture of competing sovereignties, statuses and rights. Zielonka’s book is substantially concerned with Eastern enlargement, since ‘it is the European integration project that needs to be adjusted to enlargement, and not the other way around.’\(^\text{22}\)

Claus Offe and Ulrich Preuss adopt a similar answer to ‘The Problem of Legitimacy in the European Polity’. They start from a similar point to Schmidt: ‘the problem is not primarily that the EU must become democratic; it is that member states must remain democratic’.\(^\text{23}\) They suggest the deliberately paradoxical image of a republican empire.

The appeal of a model of this kind is of course its flexibility, which Ulrich Beck and others have linked to a cosmopolitan vision that transcends old-fashioned oppositions between inside and outside, us and them.\(^\text{24}\) Against this happy vision, however, the negative votes on the European constitution in France and the Netherlands, two states involved from the beginning in the integration project and generally reckoned among the most favourably inclined to it, carry a powerful lesson.\(^\text{25}\)

update their vision of “German-as-European” in light of the changes related to unification and fading memories of World War II, especially since they increasingly question the benefits of membership and worry about the EU’s impact on the social market economy. The Italians … need to concern themselves not so much with their vision of Italy in Europe as with their implementation of European rules in Italy, since their pride in being European is likely to suffer as a result of the fact that the EU “rescue of the nation-state” is no longer enough to rescue the nation-state.’ \(^\text{26}\)

\(^{21}\) Schmidt, Democracy in Europe, pp. 22-3.
\(^{22}\) Zielonka, Europe as Empire. This book is also a superb guide through recent literature on the EU. See also Verdun/Croci, The European Union in the Wake of Eastern Enlargement.
\(^{23}\) Offe and Preuss, The Problem of Legitimacy in the European Polity.
\(^{24}\) Beck and Grande, Das kosmopolitische Europa; Lavenex, EU external governance in “wider Europe”.
\(^{25}\) Van der Pijl, A Lockean Europe? p. 36.
The problem, then, as many see it, is that it may be impossible to democratise the EU without undermining the democratic states which make it up. Yet other federal polities manage this, with only occasional grumbles in Bavaria, Texas or the Valais about goings-on in the national capitals. But to speak like this, Euro-realists would say, is to fail to grasp the reality of the EU, where legitimating structures are inevitably embedded at national level and the pursuit of a stronger European identity is a dangerous diversion.

The problem of the EU polity, then, is essentially that of its decoupling from society, which reproduces in spades the alienation of the national political sphere diagnosed by Marx in the nineteenth and by Régis Debray in the twentieth century. Delanty and Rumford point to the similarities between European and global politics: ‘In Europe, as in the world polity more generally, cultural control is exerted by those who are seen to work for the common good rather than self-interest, framing their calls for development, progress, standardization, and rational organization in terms of the potential benefits to everyone.’ The European polity thus displays in microcosm the tension between the rhetorical cosmopolitisation and democratisation of modern politics, the latter marked also by the informal style of leaders like Blair, Bush, Sarkozy and Berlusconi, and the increasing alienation of marginalized and excluded populations, which in the European context tends to be expressed at best in hostility to the European project and at worst in a generalised xenophobia. The pursuit of European integration was always, in a phrase applied to fascism, an ‘extremism of the centre’. In its well-meaning but arrogant elitism it has now generated an anti-European extremism which may be spreading from the extreme right to the mainstream. Something, I think, does have to be done.

Having outlined the issues as I see them, I shall end with a few remarks more directly on the question of legitimacy. It is not surprising that the discussion of the EU’s legitimation problems has largely repeated two motifs I grew up with as a young academic in the 1970s: output legitimacy, somewhat dismissively treated in the literature of the time as conducing merely to ‘mass loyalty’ rather than legitimacy,” and procedural legitimation. The early functionalist justifications of

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26 As David Bailey points out, studies of European integration might benefit from paying more attention to critical state theory, drawn from, among other sources, Marx and Foucault, which has consistently addressed contradictions generated by forms of governance themselves and what have been called ‘crises of crisis management’: Bailey, Governance or the crisis of governmentality?
27 Weiler, Europe’s Sonderweg; Scharpf, Legitimationskonzepte jenseits des Nationalstaats.
28 Debray, Critique de la raison politique. More recently, see Crouch, Post-Democracy; Ginsborg, Democracy. Crisis and Renewal; Wolin, Democracy Incorporated.
29 Delanty, and Rumford, Rethinking Europe.
30 Bale, Cinderella and her ugly sisters: the mainstream and the extreme right in Europe’s bipolarising party systems.
31 Narr and Offe, Wohlfahrtsstaat und Massenloyalität.
32 Luhmann, Legitimation durch Verfahren.
European integration were cast in terms of beneficial outcomes, and this is continued in the EUROPA site’s current list of ’50 ways forward. Europe’s best successes’. The second, procedural aspect has again, as I noted at the beginning, been central throughout to a union initiated by treaties and substantially advanced by them. Whatever we like to think of as the life-blood of the Union, its sinews are surely legal.

The domestic discussion of legitimation seems to have died out at roughly the same time, in the 1980s, as attention focused on the European ‘democratic deficit’. But as David Spence notes, ’If there is a democratic deficit, there must also be a legitimacy deficit.’ What Europe, in the sense of what was becoming the EU, lacked was something which, following Michael Billig’s brilliant discussion of banal nationalism, we might call banal nationalist legitimation. The composition of many of the member states may have been contested, but except in the case of Belgium (which has not (yet) broken up) and Czechoslovakia (which did), the contestation is largely peripheral, in the sense that it is only on the peripheries (Scotland, the Basque Country, etc.) that the unity of the respective states is radically questioned. On the whole, the identity of the state and hence a sort of zero degree of legitimacy has been taken for granted. In the case of the EU, however, it is not difficult to find voices calling for withdrawal, or even predictions of the dissolution of the Union. [The counterpoint to this secessionist threat is the more Europeanist or integrationist question whether the Union might be better off without some prospective member (e.g. Turkey) or an existing one (notably the UK, whose size makes its incorrigible obstructionism particularly irritating and dangerous).]

The institutional architecture of the EU is also up for grabs in a way which that of the member states is not. The states may move back and forth between PR and majority voting, between less or more centralisation, but radical alternatives such as those represented by Fischer and opposed by Blair in the 2000 discussion, or

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34 Spence, EU Governance and Global Governance: New Rules for EU Diplomats, p. 70.  
35 Glyn Morgan suggests that the issue is not so much of legitimacy as of the basic justification of the European project; see Morgan, European Political Integration and the Need for Justification.  
36 Fischer’s speech is reprinted and commented in Joerges, C, Mény, Y and Weiler, JHH, ‘What Kind of constitution for What Kind of Polity? Responses to Joschka Fischer: http://www.eui.eu/RSCAS/OnlineSymposium/JoschkaFischer.shtml (2000). Fischer envisaged a second chamber of the European Parliament made up of ‘elected deputies who are also members of the national parliaments’ but left open the question whether a future European government should emerge from the Council or from the Commission (with a directly elected President). No doubt his preference, like mine, would be for the latter. This classically Weberian proposal for the presidency is of course open to familiar objections, but perhaps with less reason at the European level. Italy might elect a Berlusconi, or Poland a Kaczynski, but Europe as a whole is surely less likely to. Blair’s characteristically Thatcherite response was that ‘The primary sources of democratic accountability in Europe are the directly elected and representative institutions of the nations of Europe, national parliaments
between Morgan and Gilligan in the more recent past, are largely absent. The principle of majority voting, which is largely unquestioned within the member states, is a permanent bone of contention at the European level. The option of withdrawal for dissatisfied minorities, which is presented as hypothetical in the domestic context and a serious possibility only for minorities of regional separatists, remains a real option at the European level, where it cannot be taken for granted that we are together for ever.

The tide is flowing fairly clearly in the direction of majority voting, but it is less clear that there is a move towards what we might call a normal democracy at the European level. Three independent but complementary options are parliamentarisation, a directly elected president and a greater use of referendums. The last two can be seen as offering a plebiscitary corrective to an inevitably complex and bureaucratic federal system, where even parliamentary assemblies are at several interrelated levels. Such assemblies, along with multifarious committees, may be optimistically seen as approaching the desiderata of deliberative democracy, but they fail to offer clear-cut choices between political alternatives to a European electorate.

Without serious progress in this direction, the attention to elements and fora of deliberative democracy at the European level, like the comforting efforts of Beck and Grande, in what remains an extremely important contribution the debate, to square all possible circles, risk appearing as a diversion. If there is a European legitimation crisis, as I believe there is, it has at least two elements - in Eurosppeak we might say pillars. One is structural and institutional: it concerns the intergovernmental and technocratic foundations of the original Communities, set up without significant input from European populations who were merely expected to marvel at the cargo of benefits emerging from integration. On the whole this worked: the integration process advanced by fits and starts, and the European economy, even after the oil shock of the mid-1970s, provided a large enough cake to mitigate squabbles over relative shares. But European capitalism has become more

37 An excellent edited collection by Guggenberger and Offe (eds), An den Grenzen der Mehrheitsdemokratie, does address fundamental issues, including those posed by protest movements, but makes no mention of European-level politics, even in the chapter (by Heidrun Abromeit) on federalism. More recently, see Abromeit, Democracy in Europe: Legitimizing Politics in a Non-State Polity.
38 More recently, see Abromeit, Democracy in Europe: Legitimizing Politics in a Non-State Polity.
40 See also the editors’ introduction to Kohler-Koch/Rittberger (eds), Debating the Democratic Legitimacy of the European Union, and the volume as a whole.
41 Beck and Grande, Das kosmopolitische Europa.
42 Along with economic growth, the Soviet threat provided the other crucial element determining the progress of integration.
irresponsible and dangerous and a justified suspicion of European political elites increasingly also takes a dangerous populist form. One Berlusconi government might be an accident; three looks like carelessness. The other element of the crisis is the weakness of European civil society and the commercial degradation of the European public sphere, just as it becomes more pan-European and global in its possible scope. The two elements reinforce one another: a European civil society has nothing to get its teeth into because many of the most important issues of welfare and social policy are still a chasse gardée for the member states.

The question, then, is whether it is possible to have more democratic legitimacy at a European level without further weakening the democracy of the national states and, where they have them, of their regional assemblies. My provisional answer is to say that federal systems are inevitably messy, but the mess can be creative. The question can I think be turned round: the presence of a manifestly undemocratic set of structures at a European level cannot fail to undermine an already shaky identification of modern Europeans with democratic parliamentary politics. The danger is of European politics, like the fish, rotting from the head down.

43 We should not perhaps have been surprised at the collapse of UK and US banks in 2007-8, but to see the irresponsibility and corruption also affecting such apparently respectable institutions as German Landesbanken was genuinely alarming.

44 As Ulrich Haltern writes ‘…European democracy will not work – in that it will not lead to a vibrant transnational political life – unless European citizens understand, and are convinced of, the communal, collective dimension of a European political community’; Haltern, in Kohler-Koch/Rittberger (eds), Debating the Democratic Legitimacy of the European Union, p. 51. On the European public sphere in relation to this issue, see e.g. the report by Sift, et al., Segmented Europeanization: Exploring the Legitimacy of the European Union from a Public Discourse Perspective, and the literature cited there; see also Eder and Trenz TITLE?? in Kohler-Koch/Rittberger (eds), Debating the Democratic Legitimacy of the European Union, and Kohler-Koch’s own chapter in this volume, esp. pp. 267-8.

45 Hauke Brunkhorst sounded an early warning here: ‘The already well advanced state of European constitutionalisation increases the chance of a transition from a weak European public sphere to a really strong one, but also the danger of a constitutionally entrenched de-democratisation of Europe and its nations’. Brunkhorst, Verfassung ohne Staat? p. 531. See also the view in Nanz, Europolis, at note 1, p. 181: ‘Without citizen support for democratic practices and identification with political institutions, the EU risks – at best – creating an environment of post-political consumer loyalty.’
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