



RECON

Theory in Practice

Erik O. Eriksen and John Erik Fossum (eds)

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RECON – Theory in Practice

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Cover picture: Plato and Aristotle.
Excerpt of the fresco painting *School of Athens* (1511) by Raphael, Stanza della
Segnatura, Apostolic Palace in the Vatican.

Preface

Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research, Priority 7 'Citizens and Governance in a Knowledge-based Society'. The five-year project has 21 partners in 13 European countries and New Zealand, and is coordinated by ARENA – Centre for European Studies at the University of Oslo.

RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at www.reconproject.eu.

The present report is part of RECON's work package 1 'Theoretical Framework'. WP 1 seeks to develop an overarching theoretical approach to the study of European democracy and should ensure overall coherence and integration of the project. WP 1 leads the work of operationalising three models for democracy, establishing indicators and linking them to the particular analytical challenges raised in the policy fields and issue areas addressed. The purpose of the present report is to move from theory to practice. Each contribution applies the RECON framework to its subject area with due attention to the particular methodological issues and the main lines of debate.

Erik O. Eriksen
RECON Scientific Coordinator

Table of contents

Introduction

<i>Erik O. Eriksen and John Erik Fossum.....</i>	<i>1</i>
--	----------

Chapter 1

Europe's challenge

Reconstituting Europe or reconfiguring democracy?

<i>Erik O. Eriksen and John Erik Fossum.....</i>	<i>7</i>
--	----------

Chapter 2

Democracy and European constitution-making

<i>John Erik Fossum and Agustín José Menéndez.....</i>	<i>43</i>
--	-----------

Chapter 3a

A RECON-inspired democratic audit

<i>Christopher Lord.....</i>	<i>77</i>
------------------------------	-----------

Chapter 3b

The EU's multilevel parliamentary field

Analytical framework

<i>John Erik Fossum and Ben Crum.....</i>	<i>101</i>
---	------------

Chapter 4

Applying the RECON models to gender democracy in Europe

<i>Yvonne Galligan and Sara Clavero.....</i>	<i>131</i>
--	------------

Chapter 5

Between norms and practices of the public sphere

Assessing the infrastructures for democracy in Europe

<i>Ulrike Liebert and Hans-Jörg Trenz.....</i>	<i>163</i>
--	------------

Chapter 6

Integration without democracy? Three conceptions of European security policy in transformation

<i>Helene Sjursen.....</i>	<i>197</i>
----------------------------	------------

Chapter 7

Reconfiguring the complex socio-economic constitution of the Union

Agustín José Menéndez..... 229

Chapter 8

Reconstituting democracy in Europe and constituting the European demos?

Magdalena Góra, Zdzisław Mach and Hans-Jörg Trenz..... 273

Chapter 9a

Reconstituting democracy in Europe's post-national constellation: By dint of conflict of laws

Christian Joerges and Florian Rödl..... 307

Chapter 9b

Cosmopolitanisation in the EU and Canada

John Erik Fossum..... 335

Introduction

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Europe is the cradle of the so-called Westphalian order, which refers to a global system of sovereign states. This system is undergoing deep changes, and notably so in Europe. One of the most manifest changes is the development of the European Union (EU), a *supranational* entity with far-reaching effects on the values and the interests of Europe's citizens and states. The EU embraces democracy as a founding norm, and has during the last decades undergone a marked change - from a largely economic organisation whose legitimacy was derived from the Member States - to an entity that asserts it is an independent source of democratic legitimacy today.

RECON (Reconstituting Democracy in Europe) is a five-year integrated project whose main purpose it is to clarify whether democracy is possible under conditions of pluralism, diversity, and complex multilevel governance. This includes taking proper heed of the challenges to democracy as they manifest themselves at EU, national and regional/local levels. In order to get a proper handle on the democratic character and quality of what is unfolding, we need a set of proper democratic benchmarks. RECON does so by spelling

out three different models for democratic reconstitution. The first model-solution posits that democracy can be reconstituted as a combination of audit democracy at the Union level and representative democracy at the member state level. The second model posits that democracy can be reconstituted through establishing the EU as a *multinational* federal state. The third posits that European democracy can be reconfigured through the EU serving as a regional *post-national* Union with an explicit cosmopolitan imprint.

RECON seeks to establish which approach to democratic reconstitution is the most viable – in empirical and normative terms – through analysing the EU's constitutionalisation process; the institutional complex at the EU, member state, and regional/local levels; the role and status of gender within the enlarged Europe; the democratic quality and governing capacity of the Union within tax/fiscal and foreign/security policy; and the multilevel configuration of civil society/public sphere. It analyses the enlargement process: the transition and consolidation of democracy in the new Member States. RECON also examines the effects of external transnationalisation on the EU and the broader challenges that globalisation poses to established democracies. RECON also discerns democratic lessons from comparison with non-European complex multilevel polities.

Studying the question of democracy in the EU by means of three models for democratic reconstitution across a broad range of subject areas brings up major challenges pertaining to research approach, research design, and research coordination. RECON draws on the theory of deliberative democracy in the effort to understand and evaluate the democratic implications of contemporary patterns of transformation of systems of governing and modes of community in Europe and beyond. The open-ended character of the transformations and the fact that the discussions of democracy in Europe operate with several distinctly different democratic model solutions have shaped the research design: RECON has formalised this into three democratic polity models and possible developmental trajectories. We seek to hold European developments up against these and do so as systematically as possible. Such a systematic assessment requires a coordinated research effort, where the best effects would come from all project contributors relating to the same overarching research framework. The need for such a coordinated effort is underlined by the sheer breadth of RECON's research agenda. A coordinated

approach is necessary to understand the democratic implications of what takes place in fields as diverse and specialised as foreign/security policy, tax and fiscal policy, and civil society/public sphere. RECON's ambitious approach requires specialists in all its subfields to direct their research attention to the democratic character and implications of what takes place. This effectively means that the development of the research design must itself be a collective undertaking. This report is part of such a collective effort.

The purpose of the report is to provide some of the elements in this coordinated research approach through the application of the RECON models to all the project's relevant subfields. An important issue is that of proper identification: how can we recognise the different models across the different institutional, constitutional and policy areas of the project? The way these models manifest themselves in empirical terms will differ from one subject area to the next. This also pertains to the ease with which we can, and can not, discern the models within a given subject area: When addressing constitutional and institutional issues it is quite easy to establish what are the relevant polity models in play, whereas when analysing public sphere or the EU's foreign and security policy and its external relations in more general terms, this is not as straight-forward and requires special attention. Therefore, although our intention with this report is to move from theory to practice, the contributions in the report are not mere instances of mechanical operationalisation of the three RECON models to the different subfields. Instead, each contribution applies the RECON framework to its subject-area with due attention to the particular methodological issues and the main lines of debate within its particular subject-area.

The report is organised in line with the basic project outline, with chapters roughly corresponding to work packages, with two exceptions: work packages Three and Nine have two subprojects, and contributions from these are included.

In Chapter 1, Erik O. Eriksen and John Erik Fossum set out the overall framework of the project. Three *democratic polity models* are discerned from applying the baseline model of democracy to the EU – with due attention to the main positions in the scholarly debate on EU democracy. These democratic polity models contain a set of more specific indicators for better discerning model traits in the complex

multilevel configuration that makes up the EU. The framework thus provides three distinctly different ways of adapting democratic theory to the EU. At this stage we posit that the third model, regional-European government, holds the greatest potential. This model requires modifying, albeit not profoundly altering, democratic theory. We conclude by arguing for the need to test this model out more properly against the complex EU.

In Chapter 2, John Erik Fossum and Agustín J. Menéndez adapt the three RECON models to the highly contested EU constitutional realm. The RECON framework lends itself well to the sorting out of the basic question, namely: What constitution for what kind of Union? The chapter programs the RECON model framework along the lines of constitutional synthesis, a distinct EU approach to constitution making.

In Chapter 3a, Chris Lord programs his system of democratic audit along the three RECON model lines. This includes using the RECON models to outline a detailed three-pronged set of specific indicators to assess the Union's democratic performance. Lord also provides justifications for the audit approach and the use of models in general. Lord's chapter is specifically attuned to the institutional dimension of the EU, but the democratic audit is also an overarching project concern.

In Chapter 3b, John Erik Fossum and Ben Crum adapt the RECON framework to the representative dimension of the complex multilevel configuration that makes up the EU. The chapter spells out the distinct features of the EU's representative system as a multilevel parliamentary field and discusses what the nature of the EU's Multilevel Parliamentary Field tells us about the character of the EU polity.

In Chapter 4, Yvonne Galligan and Sara Clavero spell out the RECON framework to the questions of gender, justice and democracy in the EU. The authors point out that whereas there is a growing concern with gender and this is reflected in research, the link to democracy has been underdeveloped. The same applies to the lack of systematic assessment of the implications for gender justice of different institutional configurations of democracy. The chapter provides a framework that addresses these research lacunae.

In Chapter 5, Ulrike Liebert and Hans-Jörg Trenz devise the RECON models as a diagnostic tool for identifying and assessing different sets of communicative presuppositions and as an evaluative tool for discerning democratic implications. With a particular focus on constitution making they spell out three modes of Europeanisation of the public sphere and of civil society, each of which captures a distinct communicative linkage between citizens and elites in EU-constitutional politics, including mass mediatisation as well as civil society mobilisation.

In Chapter 6, Helene Sjørnsen focuses on the transformations that are taking place in the EU's foreign and security policy; transformations that clearly move beyond an intergovernmental conception of the EU. Through delineating three conceptions of EU foreign and security policy along the lines of the three RECON models the author provides a template and a set of indicators for discerning the democratic implications of different institutional choices, which are briefly held up and assessed against present-day EU. It is made clear that integration and democratisation in this important issue-area do not follow suit.

In Chapter 7, Agustín J. Menéndez devises the RECON model framework to the EU's political economy, with emphasis on tax, fiscal, labour and social policies. The author is particularly concerned with using the RECON framework to discern the distinctive features of the Union's socio-economic constitution, which consists in the ideological understanding of what European integration is about, the underlying institutional configuration and the means of social integration. This framework lends itself to the next step, namely to discern the democratic implications from the EU's development.

In Chapter 8, Zdzisław Mach, Magdalena Góra and Hans-Jörg Trenz devise the RECON framework to link the study of collective identity transformation in Europe to democracy, with a view to how EU enlargement contributes to the reconstruction of collective identities. The authors translate the RECON polity models into representations of collective identity and distinguishes between zero-sum (Models 1 and 2) and positive-sum relationships between collective identities (Model 3). The latter represents an incomplete democracy narrative as a 'shared humanity' does not allow for distinctions which are what make up collective identity.

In Chapter 9a, Christian Joerges and Florian Rödl underline the need for any integrated project to be truly multi-disciplinary in the sense that different academic disciplines (law and political science) can equally find the project to relate to their vocabulary and disciplinary concerns. The authors thus first accordingly transpose the RECON models to European constitutionalism and assess their relative merits. They thereafter focus specifically on model III and provide an innovative approach to its conceptualisation, namely through the notion of 'conflict-of-laws'. This approach brings up (as did chapter 7), the important question of the role of the social – social freedom – in the post-national context.

In Chapter 9b, John Erik Fossum focuses on the cosmopolitan dimension which is associated with RECON model III. The chapter is concerned with the prospects for cosmopolitan post-national convergence between the EU and (non-EU) states. This requires attention to different paths for cosmopolitanisation, three of which are outlined: global; regional-EU; and state-based. These paths provide the framework for comparing and contrasting the EU with cosmopolitanising states. The chapter shows the merits of comparing Canada as a case of state-based cosmopolitanisation with the EU.

Chapter 1

Europe's challenge Reconstituting Europe or reconfiguring democracy?

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Introduction

The European Union is widely held to harbour a democratic deficit. This raises the issue of *forging* a viable democracy at the supra-national level. This must however also be considered in relation to the question of *sustaining* national democracy within an altered European and global context. The point is that the European integration process has reshaped the workings of the Member States' democratic orders to such an extent that we must take the EU's influence directly into account to understand the character and the quality of, member-state-based democracy. The EU, initially a creature of the Member States, has contributed to transform them, directly through legally binding actions, and more indirectly, through unleashing processes of mutual learning and adaptation. European states' identities and even state-ness have thus come to resonate with their *European-ness*, as national law has become so entangled in EU law practice that the Member States no longer operate as independent nation states. To dismantle the EU to forge a Europe of wholly independent nation states today will be a transformative project of near-revolutionary proportions.

How then to ensure democracy in Europe? Many supporters of integration argue that supranational democracy is necessary to handle the problems of interdependence. The standard solution they propose is for the EU to develop into a federal European state, where the nation states are transformed into Member States akin to (German) *Länder* or provinces. Critics counter this by arguing that European integration is the problem, as it contributes to the hollowing out of national democracy. They see the issue as one of *rescuing* national democracy from the throes of European integration.¹ Both of these proposals see the issue of democracy in Europe foremost as a *political* challenge. The solutions are well-known; the issue is to find the will or the means to apply them.

But is the main challenge merely political? If we look at the German Federal Constitutional Court's ruling on the compatibility of the Treaty of Lisbon with the Basic Law (June 30, 2009), the plaintiffs presented the EU as a state-based federation whereas the German Constitutional Court presented the EU as an association of sovereign states. From this we might at first glance assume that the debate revolves around familiar conceptions of democracy steeped in the sovereign state. But European integration reshapes sovereignty, which was also recognised by the German Constitutional Court:

The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers.²

Much of the scholarly community has long argued that the European integration process reshapes state sovereignty and that this has profound democratic implications. Properly entrenching democracy in Europe is therefore not merely a political challenge; it requires explicit attention to democratic theory. But what kind of a theoretical challenge is this? Is it a matter of adapting state-based democratic

¹ For a selection of Eurosceptical writings, see Holmes 1996.

² See par. 220 of the German Constitutional Court's ruling, 30 June 2009.

theory to the more complex European setting, as would be the case with the intergovernmental and federal solutions that were mentioned above? Or does the EU require major changes in democratic theory? This is precisely what transnationalists and cosmopolitans claim: they argue that Europe's experiment challenges democratic orthodoxy, which holds the nation state as *the* institutional-communal mainstay of democracy.³ The question they pose is whether democracy in its nation-state trappings is an adequate foundation for Europe. To properly appreciate what a democratically viable EU entails in today's transnational world James Bohman (2007) argues, requires revamping democratic *theory*.

The question is whether we must abandon or whether we can still rely on state-based democratic theory. Is it possible to devise a democratically viable constitutional and institutional framework that continues to rely on state-based democratic theory? Such a solution could be labelled *reconstituting Europe* because it would entail changing the existing order in Europe. Or is it rather necessary to reconfigure a new theory of democracy that is either suitable to the particular transnational character of the EU or to an increasingly cosmopolitanised world?

In order to address this, we need to compare and contrast the main alternative democratic solutions. What are they? In the below we present three such, two of which are state-type and one of which is not a state-type configuration. To assess their respective democratic character and relevance to the EU, we need to find a way to compare them. This in itself represents a major challenge both in theoretical and methodological terms. Theoretically speaking it is a matter of appropriate democratic standards. If we rely on state-based standards, we rule out transnational options by definition. Our resolve has been to establish a set of minimum standards that retain core democratic tenets but is not confined to the organisational configuration of the state or to the mode of community steeped in the nation. We apply this model to the complex multilevel configuration that makes up the EU. But rather than ending up with one model of EU democracy, this yields three democratic polity models or representations of the EU (all of which are innovations on existing scholarship).

³ See for example Bohman 2007; Cohen and Sabel 1997, 2003; Dryzek 2006.

The first model-solution posits that democracy can be reconstituted as a combination of audit democracy at the Union level and representative democracy at the Member State level. The second model posits that democracy can be reconstituted through establishing the EU as a *multinational* federal state. The third posits that European democracy can be reconfigured through the EU serving as a regional *post-national* Union with an explicit cosmopolitan imprint. Note here on the third model that when we apply our democratic criteria to the EU we end up with a democratic polity model that differs from the one that transnationalists propound. We then consider which of these models is the most robust in relation to the fundamental requirements of a democratic order; we also consider which of these is most feasible. We argue that the third model holds the greatest potential, notably because it is the model that the EU most closely resembles. This is however also the least known and institutionally developed model. Establishing its democratic merits requires further elaboration of the model; it requires a systematic mapping effort to establish the extent of EU proximity to the model and whether the EU is developing in this general direction; and it requires a resultant assessment of the overall democratic quality of this.

Democracy

Legitimation principle and organisational form

Democracy is a contested concept, and notably so in a rapidly changing world. Every democratic system harbours an inevitable gap between principle and practice. Every actual institutional arrangement that claims to be democratic is at most an approximation. Real democracy has never been realised. The idea of democracy as a system of self-governing citizens does not come wrapped up in an explicit and exclusive institutional package, and democratic orders always contain non-democratic elements; hence, the quest for democratisation through constant trial and error of institutional forms, rather than for conclusive settlement through embrace of one particular institutional form of democracy.

We therefore need to make a distinction between justifying reasons for political orders, and forms of institutionalisation. This can be generalised into a distinction between democracy as *a legitimation*

principle on the one hand, and democracy as *an organisational form*, on the other. Only by adhering to democratic procedures can power holders justify their decisions, and the citizens subject their rulers to critical tests; only by employing the democratic procedures can collective goals be achieved legitimately; and only through these procedures can laws be changed and new laws enacted correctly. In other words, democracy is not identical with a particular organisational form, but is rather a principle, which specifies what it means to get political results right. The democratic principle is operative as an ever-present critical standard. The *credo* of government by the people preserves its critical status as the principle through which proponents and opponents can come to understand and assess each other's claims.

Understanding democracy foremost as a legitimation principle has several important implications. First is the onus on justification. Second, is that the effective operation of the democratic principle has to take an organisational form, but the democratic principle can take *different* forms of institutionalisation. This also helps explain why democracy has, historically, come in many different forms and shapes, even within the state-based frame (direct or participatory democracy, and indirect, representative forms, such as parliamentary and presidential democracy), and has also helped to pave the way for the transnational version of democracy.

In practice, democratic legitimacy cannot be based on the direct participation of all the citizens in the making of all the laws, as the people, is never present to make the choices. Hence, under modern conditions, representative democracy has been held up as key. It is however difficult to pin democratic legitimacy to voting, as it is virtually impossible to find a democratic method that allows for the just aggregation of individual preferences to a collective decision. The principle of majority vote represents the winners, not the common will. It does not guarantee full political equality as the prevalence of permanent minorities testifies to. The counting of votes is an effective method for reaching decisions, but this is a method that does not test the quality of the preferences. It is a poor substitute for deliberation (Goodin 2005: 12). Hence, we opt for deliberative democracy.

Deliberative democracy comes in several forms and trappings. In its epistemic variant (which is close to the transnational position), it holds that deliberation is a cognitive process for the assessment of

reasons in order to reach just decisions and establish conceptions of the common good (Cohen 1997; Estlund 1993). From this perspective, the main argument for deliberative democracy is to be found in the presumption that a free and open discourse brings forth qualitatively better decisions, and that the decisions are justified to the affected parties. A form of *political autonomy* is constituted, when actors have to seek justification in relation to what others can approve of, that is, everyone who is subject to collective decision-making must be able to find an acceptable basis for such decisions. Deliberation thus carries moral weight, as a political system that guarantees conditions for autonomous public deliberation, gives us better reasons to believe that its decisions are correct. The theory of deliberative democracy is then an answer to the requirement that political decisions should be right.

We here operate with an alternative *institutional* variant of deliberative democracy (Eriksen, forthcoming). Its point of departure is that democratic legitimacy derives from the public justification of the results to those affected. This constitutes the normativity of the democratic principles of *autonomy* and *accountability*. But we label our theory institutional because justification takes place according to standards the actors consent to and because we recognise that these standards can only be properly entrenched within certain institutional contexts. Consider autonomy which refers to the basic democratic principle that those affected by laws should also be authorised to make them. This criterion is more institutionally committing than what the transnationalists see it as. It posits that publicly authorised bodies of decision-making react adequately in the determination of the political community's development, insofar as the citizens can be seen as acting upon themselves. With regard to accountability it designates a relationship wherein obligatory questions are posed and qualified answers required. This principle also comes with distinct institutional requirements: It speaks to a justificatory process that rests on a reason-giving practice, wherein the decision-makers can be held responsible to the citizenry, and where, in the last resort, it is possible, to *dismiss*, incompetent rulers (Held 1995: 16; Bovens 2007: 107). In other words, these principles, to be effective, presuppose representative democratic arrangements and explicit sanctioning mechanisms.

Thus, for a modern democratic order to be legitimate, given its scale and scope, it must *reconcile* the need for rational deliberation with proper representation of affected interests. Public discourse, inquiry, and criticism improve the knowledge basis, increase the level of reflection, as well as the responsibility and accountability of the decision-makers, and are, together with party-competition and periodic elections, the best means for realising popular sovereignty (Gutmann and Thompson 1996: 144).

A democratic political order

Although there are many different theoretical conceptions of the EU in the literature,⁴ these offer less guidance than what might have been expected to the task of clarifying what is at stake for democracy in Europe. There is still a certain disconnect between general democratic theorising and the European case. Many of the innovative proposals to capture the EU's complex character are *not* properly attuned to democracy. Hence, proposals such as *consortio* and *condominio* (Schmitter 2000), *deliberative supranationalism* (Joerges and Neyer 1997), *cosmopolitan empire* (Beck and Grande 2005: 81ff), *republican empire* (Offe and Preuss 2007), *empire* (Münkler 2005: 245ff), and forms of *multilevel governance* (Hooghe and Marks 2003), such as *hierarchical and plurilateral* (Zielonka 2007), are mere descriptive categories.⁵ None of the forms of consortio, condominium or empire is democratic, and adding 'cosmopolitan' or 'republican' to the latter makes it an oxymoron. Further, how deliberative supranationalism or multilevel governance can be democratic, remains to be demonstrated. Their democratic point of reference is either absent, or underdeveloped.

One contentious issue in this debate is how much 'state-ness' a viable European democracy presupposes. Is it the exclusive type of territorial control and recourse to force that we associate with the modern state; or can deliberative democracy be ensured within a more general notion of political system, akin to for instance Easton's

⁴ Abromeit 1998; Beck and Grande 2005; Beetham and Lord 1998; Bellamy et al. 2006; Gerstenberg 2002; Grimm 1995; Haas 1968; Joerges and Neyer 1997; Majone 2005; Schmitter 2000; Siedentop 2000. See also Hooghe and Marks 2003; Jachtenfuchs and Kohler-Koch 1996; Middlemas 1995; Milward 1992; Moravcsik 1998; Morgan 2005; Olsen 2007; Scharpf 1999; Schmidt 2006; Weiler 1999.

⁵ The most sophisticated assessment of the EU's democratic quality to date, Christopher Lord's book on auditing democracy in the EU (2004), assesses 'modified' consociationalism and concurrent consent. Neither of these complies wholly with the democratic idea of freedom as collective self-determination.

(1971: 134) definition as 'the authoritative allocation of values for society as a whole'? As an organisational form, modern democracy, at a minimum, requires both a *polity* and a *forum*:

- Authoritative institutions equipped with an organised capacity to make binding decisions and allocate resources; and
- A common communicative space located in civil society, where the citizens can jointly form opinions and put the power holders to account.

The *public sphere* located in civil society holds a unique position, because this is where everyone has the opportunity to participate in the discussion of how common affairs should be handled, and where decision-makers can be held to account. It signifies that equal citizens assemble into a public. It is constituted by a set of civil and political rights and liberties, where the citizens set their own agenda through open communication, and address an indefinite audience. Public discourse is the medium, through which members can reflexively address themselves, and form collective opinions. But this has little bearing on will formation unless it connects to the polity; normally this takes place through different channels of communication. Further, a set of institutions and procedures equipped with the ability to convert goals into practical results is required. At a minimum, then, a democratic order requires a legally entrenched governmental system of *representation*; some version of a common *identity*; and popular *legitimacy* in order to approximate the criteria of autonomy and accountability.

The criterion of autonomy posits that legitimacy cannot simply mean acceptance or support for an order, but that there are good reasons for *why* a political order deserves obedience. Legitimation serves to make sure that a polity is fit to make binding decisions on behalf of a *demos*; that is, the policies and decisions chosen protect the integrity of the society and realise its vital values and goals in an adequate manner, and this is why the citizens have a duty to comply. A system of power is not legitimate only because actors believe in its legitimacy, but because it can be justified in terms of their beliefs (Habermas 1976: 276ff). In democratic states, there is a presumed link between the normative validity of a political order and the social

acceptance of this order.

To function in accordance with the criteria of autonomy and accountability, a modern democratic polity also requires some form of collective identity, representation and governing capacity. In modern polities, public deliberation is wed to systems of representation, as no system can accommodate the participation of all the relevant stakeholders. Representation refers to procedures and processes for citizens to influence political decision making and the actions of public officials in manners generally considered to be legitimate. The modern conception of representation can be said to be parasitic on deliberation, as no person can consider herself to be legitimately represented unless the mandate and accountability terms are spelled out, and the represented are offered acceptable justifications for decisions that affect them. But representation may also be seen as a precondition for political rationality, as it secures institutional fora removed from local pressure, in which elected members of constituencies can peacefully and co-operatively seek alternatives, solve problems and resolve conflicts on a broader basis.⁶

To sustain a governmental entity a range of functions must be carried out. Such are resource acquisition and territorial control.⁷ For ensuring *exclusive territorial control*, military and police powers are required. The question of democratic quality hinges on the communicative and justificatory relationship between the polity and the forum; on the character of this structure; and on citizens making use of it. In addition to the notions of legitimacy, identity and public sphere that pertain to the civic-democratic aspects of a political order; a modern democratic polity relies on functional requirements pertaining to sovereignty, coercive ability, authorisation of collective decision-making, resource allocation, membership/border setting, and thresholds for territorial exit (See Table 1.1).

⁶ This principle of parliamentary representation can be stated as follows: 'no proposal can acquire the force of public decision unless it has obtained the consent of the majority after having been subjected to trial by discussion' (Manin 1997: 190). See Pitkin 1972; Mansbridge 2003.

⁷ Consider Stein Rokkan's model of state-formation and nation-building which is modelled on these two dimensions (Rokkan 1975; Flora et. al. 1999). Schmitter (1996) was the first to apply these to the EU. See also Bartolini (2005) for a more detailed attempt to apply Rokkan's model to the EU.

Properly reconstituting democracy in Europe presupposes that the functional and normative requirements are fulfilled. But a major lesson from the European debate is that these can be combined in different institutional ways. In other words, when we apply the basic requirements of a democratic order to the complex 'constitutional essentials' of the multilevel constellation that makes up the EU, we find considerable scope for variation. The EU multilevel constellation's essentials are made up of intergovernmental, supranational and transnational governing structures, which differ with regard to the main locus of the democratic unit. Intergovernmental structures point to the national level; supranational to the European level; and transnational to structures of civil society and cosmopolitanism.

Three models for reconstituting European democracy

The EU is a dynamic and contested entity; hence to understand the debate and the choices facing Europe – notably whether what is required is reconstitution along familiar institutional-constitutional lines or rather along a reconfigured theory of democracy – we spell out three polity models. These have been developed from the three main positions in the debate on the EU: as an intergovernmental organisation, as a federation or as a transnational system of governance, but are all innovations on existing scholarship.

Model 1: audit democracy

The first model envisages democracy as being directly associated with the nation state. The presumption widely shared by Euro-sceptics is that it is only the nation state that can foster the type of trust and solidarity that is required to sustain a democratic polity. On the basis of a well-developed collective identity, the citizens can participate in opinion-forming processes and put the decision-makers to account at regular intervals, as well as continuously through public debate.

The model implies that the EU must be institutionally fashioned in such a manner as to ensure that the institutions at EU level are accountable to the Member States, which continue to serve as the main vehicles for ensuring autonomy.

In this model, the emerging structure at the European level is seen as

a regulatory regime deeply embedded in extensive institutional arrangements of public (or semi-public) character (Eberlein and Grande 2005: 97). The EU-level structure is envisaged as a *functional regime* that is set up to address problems, which the Member States cannot resolve when acting independently. The model posits that the institutions at the Union level be mandated to act within a delimited range of fields. The relevant determinant for establishing which fields resides in the EU's ability to offload and compensate for the declining problem-solving ability of the nation state in a globalising context. This pertains, in particular, to the ability to handle cross-border issues (such as economic competition, environmental problems, migration, terrorism and cross-border crime, etc.).

The model presumes that the Member States delegate competence to the Union, a competence that can in principle be revoked (cp. Pollack 2003). Although this entails a form of self-binding on the part of the Member States, such delegation can come with a powerful set of controls imposed by the Member States, in order to safeguard that they remain the source of the EU's democratic legitimacy. The Member States both authorise EU action and confine and delimit the EU's range of operations through the provisions set out in the treaties, as well as through a set of institutions that permit each and every Member State to exercise the power of veto. The model can thus be understood as a way of addressing the democratic problems that complex state interdependence and globalisation bring forth, through establishing European institutions that are accountable to the national democratic systems.

The Union's *own legitimacy* would be based on its ability to produce substantive outcomes in line with the principle of Pareto optimality, which states that only decisions that no one will find unprofitable and that will make at least one party better off, will be produced, and hence lend legitimacy to international negotiations (Scharpf 1999: 237). According to Giandomenico Majone (1998, 2005), such a regulatory regime does not need popular legitimation proper, as politically independent institutions, such as specialist agencies, Central Banks, judicial review, and the delegation of policy-making powers to independent regulatory commissions, would provide the required legitimation of a unit constructed to resolve the perceived problems of the members.

Some scholars understand democratic authorisation by Member States to take the form of intergovernmental bodies in which the contracting partners strike bargains on behalf of nationally fixed preferences and interests (Moravcsik 1998). However, the present level of discretion for decision makers at the European level leaves open the problem of *agency drift*: what assurances do Member States have that the Union – whose decision-makers need decisional freedom to solve problems rationally – operates in accordance with their interests? The other problem is that of EU integration-fostered technocracy and executive dominance: under such conditions democratic institutions at both the Union and Member State level would be by-passed.

We therefore find that the proper application of the democratic principle to this institutional configuration requires the presence of an EU-wide representative body. But to ensure the continued prominence of national democracy, the body's democratic purpose would be delimited to serve as an agent of *audit democracy* not representative democracy. The representative body – the European Parliament – would, together with supranational institutions (such as a court and an executive), be set up to help Member States supervise and control the Union's actions. These would be specifically mandated to hold supranational decision-making bodies to account. They would be constitutionally barred from legitimising and authorising law-making, as well as from expanding Union competencies. In accordance with the logic of democratic delegation, that is, which issues can be delegated without severe loss of democratic self-governing ability, the EU's conferred competences would be foremost in the operation of the Common Market. The scope for common action in other policy fields would be quite narrow, as would be the scope for redistribution. Further, the EU would have a very limited scope for foreign and security policy, and it would be entirely subject to Member States' preferences. The EU's fiscal base would be limited; it would be based on Member State contributions, not EU taxing powers (see Table 1.1).

The EU-level would be based on a problem-solving strategy and a consequentialist notion of legitimacy (Eriksen and Fossum 2004). A problem-solving, derivative entity (from the Member States) handles

problems of a rather mundane, technical-economic nature and preferences that do not invoke moral claims or affect identities. Thus conceived, the EU would be a contractual order, an institutionally unique type of international organisation or regime, where the Member States are the contracting parties. The states not the citizens make up the 'constituencies', and are the sole sources of legitimacy. They act internationally, either on their own, or through their conferring powers on the Union through delegation. The 'constitutional arrangement' is a contract with the 'pouvoir constituant', structured as a juridical relationship among separate parties. It would be akin to a 'gentlemen's agreement', which presupposes individual membership and sovereignty. The signatories represent individual modalities of government, not a social pact among citizens. Contractually based orders do not put up normative criteria of political legitimacy (Frankenberg 2000: 260ff).

Reconstituting member-state-based democracy

The model's core presumption is member-state-based and institutionally entrenched democratic will-formation approximating the criteria of autonomy and accountability. Member States must have the last word; they must be placed on the same line and have the right to veto. The requirement of unanimity prevails; there are neither trumps nor a supreme third party to resolve conflicts.

For this model to work, today's EU will have to go through a process of reconstitution, mainly through a significant *downscaling* of the system at the EU level. It will have to roll back much of the legal order, including removing much of the protective apparatus of human rights and the constraints on aggressive nationalism that have been established in the post-war period.⁸ Moreover, a down scaled order would lack the organised capacity to make binding decisions, such as majority vote and court rulings. It would not be set up to solve deep conflicts, and it would be unable to reallocate resources.

⁸ Today, Union transactions are about far more than functional problem-solving – they have turned 'political'. The EU has market-correcting or positive integration measures, such as certain redistributive schemes and means of standard-setting; there is increased use of qualified majority voting; and there is a constitutionalisation process. These and other traits testify to the EU as revolving around more than the politics of the lowest common denominator. See e.g. Egan 2001; Joerges and Vos 1999. On the role and status of European law and the European Court of Justice, see for instance Alter 2001; Stone Sweet 2004.

Within such a down-scaled order, the internal democracy of the nation states may increase, as the formal conditions for sovereignty would be re-established, but the states would have limited control over the *external* factors that shape their range and freedom of action – as congruence between the actual decision-makers and the recipients would decrease. Without *input congruence*, that is participation in the making of the decisions that affect someone, there can be no self-determination; and without *output congruence*, that is, overlap between the polity and the territory it controls, there can be no effective participation.

It is difficult to strike a viable balance between autonomy/accountability and congruence within a setting of delegated sovereignty: Heightened interdependence among states means that to ensure autonomy, the scope of the constituency must be increased. But this comes at the expense of accountability: Effective democratic auditing requires supranational institutions that are able to ‘open up’ and render transparent the workings of intergovernmental executive bodies. Confining supranational bodies to the role of agents of delegated sovereignty, based on a bound mandate, is notoriously difficult. The members of a supranational body will need leeway and discretion in order to facilitate cogent decision-making. The European Parliament started out as a body of national parliamentarians, and hence bore some semblance to a European-based agent of national audit democracy. Since direct elections were introduced in 1979, however, the European Parliament has emerged as a legislative body proper, a body whose authority to act is not bound up in and confined to acts of delegation by the Member States (Rittberger 2005: 2).

It is also not clear that a process of rolling back the EU will adequately address the democratic challenge facing interdependent nation-states: creeping juridification (the expansion of jurist-made norms to new social domains), executive dominance, and technocratic governance. At a minimum, then, this model’s proposal for reconstituting democracy in Europe presupposes that the Member States upgrade their own political and legal institutions so as to ensure public scrutiny and democratic control of the EU. The conundrum is that the act of rolling back the EU’s political structures may not rescue national democracy under conditions of (economic) globalisation

where the nation-state's autonomy is diminished. The model of audit democracy may ensure procedural accountability, but not substantive accountability, as issue-complexity and issue-linkage always leave discretionary room for delegates. Audit democracy would also be prone to *input-output incongruence*. Since the fate of national democracy is intrinsically linked to developments at the EU level, the other reconstitutive strategy is to argue for the need to entrench democracy properly at the European level.

Model 2: federal multinational democracy

The democratic credo posits that all political authority emanates from the law laid down in the name of the people. The legitimacy of the law stems from the autonomy presumption that it is made by the people or their representatives – the *pouvoir constituant* – and is made binding on every part of the polity to the same degree and amount. This is so to say inherent in the legal medium itself, as it cannot be used at will, but has to comply with principles of due process and equal respect for all. A legally integrated community can only claim to be justified when the laws are enacted correctly, and the rights are allocated on an equal basis. The conventional shape of such a community is the democratic constitutional state, based on direct legitimation, and in possession of its own coercive means.

A federal European state would be institutionally equipped to claim direct legitimation, and entrench this in legally binding form. Federal state structures not only heighten autonomy and accountability, but can also greatly reduce the incongruence that globalisation and complex interdependence produce.

A legally integrated state-based order is often seen as premised on the existence of a sense of common destiny, an 'imagined common fate' induced by common vulnerabilities, so as to turn people into compatriots willing to take on collective obligations to provide for each other's well-being. In some contrast, the European Union is multinational. The federal model must therefore be modified to accommodate to the fact that nation-building at the EU level would be taking place *together with* nation-building at the Member State (and partly even regional) level. The modified version would be a *multinational federal European state*. In its institutional design, such an entity would have to coordinate the self-government aspirations and the rival nation-building projects that would occur within the

European space. In constitutional terms, a multinational federation presupposes that the principle of formal equality be supplemented with particular constitutional principles. These are intended to provide some form of 'recognitional parity', for national communities at different levels of governance (in the EU at Union and Member State levels). Wayne Norman (2006: 163-9) cites seven such principles: (a) partnership; (b) collective assent; (c) commitment and loyalty; (d) anti-assimilationism; (e) territorial autonomy as national self-determination; (f) equal right of nation-building; and (g) multiple and nested identities. This model is premised on the tenet that a uniform national identity is *not* a core precondition for the democratic constitutional state (Habermas 1998, 2001). The multinational federal state requires citizens' allegiance in the form of a *constitutional patriotism*, which portrays loyalty in political terms; it hinges on the validity of legal norms, the justification of policies, and the wielding of power in the name of fairness.

The multinational federal model of democracy, as set out here, implies that the EU will be distinguished by a commitment to direct legitimacy founded on basic rights, representation and procedures for opinion and will-formation, including a European-wide discourse. The basic structural and substantive constitutional principles of Union law, as well as coercive measures required for efficient and consistent norm enforcement and policy implementation will be institutionalised at both core levels of government (Member State and European). The model presupposes that schooling, symbolic measures and social redistributive means at both levels so as to render the process of socialising the people of Europe into 'Europeans', compatible with citizens retaining distinctive national identities will be established; as will be a set of clearly delineated criteria for who are Europeans and who are not. There will be onus on positively identifying Europe, and on distinguishing Europeans from others so as to make up the requisite social basis and 'we-feeling' for collective action – for regulatory and redistributive measures, and for a common European foreign and security policy. The EU will be legally recognised as *a state* with the right to police and military force for territorial control and protection of sovereignty, and with provisions for legal secession of any sub-unit from the Union (see Table 1.1).

Reconstituting the EU as a federal democracy

The model's core tenet is for the Union to entrench in state-based form legally binding democratic will-formation. This requires authoritative institutions at the Union (and Member State) level, organised along federal lines and equipped with final word on those matters that fall under each level's respective jurisdiction.

The EU's peculiar, and distinctive, institutional structure (with great asymmetries and polycentric features), has profound effects on its democratic legitimacy. In the EU, there is no real chance for an all-inclusive public debate among all citizens, as the civic-institutional infrastructure is deficient (Grimm 1995; Peters 2005; Trenz 2005). The 'European people' is represented in 'pseudo elections' (often also referred to as second-order elections)⁹ – with low turnout and without a proper European-wide party system – and a parliament that is not a fully-fledged and sovereign legislator. The upshot of all this is that the EU deviates clearly from the democratic nation state. In its present form the EU has some traits of a *multinational non-state-based federation*, with the important provisos that its 'federalism' is organised around other issues and methods of territorial control than is the case with every state-based federation, and that the EU's own vocation is *post-national* as it is set up to fight aggressive nationalism.

For the EU to comply with the tenets of this model, it would have to be reconstituted as a polity. That would not only entail *increased* competencies, but also institutional revamping, including the *establishment of direct, representative, links with the citizens in all* relevant functional domains. This could make for a European democracy that complies with the criteria of autonomy and accountability, but the feasibility is low. Such a reconstitution requires the *consent* of every Member State, which the recent treaty processes show is not easily forthcoming. Any further move in such a statist, national direction, is likely to encounter strong resistance, as many are vehemently opposed to a federal 'super-state'. In today's Europe, the resources required for such an order, for forging a common identity and for making us all good Europeans are in short supply. The model presupposes increased congruence through lifting tasks to

⁹ The main difference between first and second order elections is that there is less at stake in the latter. Since European elections do not produce executive changes, they are really second-order national elections (Reif and Schmitt 1980).

the European level. Insofar as this has occurred, it has been in an uneven rather than in a coherent manner; it has not been properly democratically authorised; and it has not been matched with adequate measures of democratic accountability.

How close to statehood the EU will need to come to comply with the federal model, requires attention to the character of the states system, as this model is premised on a system of democratic states. The multinational federal state model posits a *democratically tamed* Westphalian states system, but where the democratic controls are still mainly internal to each state. In today's deeply interwoven world, where states are becoming increasingly interdependent, 'democracy in one country' is not sustainable. The issue is whether democracy can be sustained through (horizontal) pressures from the system of states, or whether supranational bodies (above the state) that citizens can appeal to when their rights are threatened, are necessary. In today's world, a range of such bodies has emerged. The EU, albeit deficient, is the most elaborate case of supranational democracy.

To sum up, the EU's commitment to universal principles suggests that it has a communal vocation that is broader and more universal than even that of the multi-national state. The question brought up by the EU is whether the state model can still be seen as an adequate harbinger of democracy and solidarity in today's world. This pertains to the mode of allegiance, as well as to the institutional-structural make-up that democracy requires in a globalised world. Can a move beyond Westphalia, towards cosmopolitanism offer a better, more suitable, version of democracy?

Post-national democracy

The normative yardstick that we have derived from deliberative democracy is not confined to the nation-state template and its presuppositions of sovereignty, demos, territory, and nation; it can therefore also be used to establish a non-state polity's democratic character. International law has changed in a cosmopolitan direction, and the EU has pooled sovereignty in a territory it does not fully control. These developments manifest themselves in an altered conception of sovereignty: from denoting singular state territorial control to a more multi-dimensional and disaggregated conception

(Morgan 2005; Slaughter 2004).

Transnationalists such as Cohen and Sabel (1997, 2003) and Bohman (2007) argue for the normative validity of a *polycentric system of directly-deliberative polyarchy* modelled on the European system of governance. They see the EU as a multilevel, large-scale and multi-perspectival polity based on the notions of a disaggregated democratic subject and patterns of diverse and dispersed democratic authority. Their claim is that transnational civil society, networks and committees, NGOs and public forums, all serve as arenas in which EU actors and EU citizens from different contexts – national, organisational and professional – come together to solve various types of issues and where different points of access and open deliberation ensure democratic legitimacy. Local problem-solving, the institutionalisation of links between units, and agencies to monitor decision-making both within and between units make this structure conducive to democratic governance. In his most recent work, Bohman seeks to reconcile this with the notion of the 'democratic minimum'.¹⁰ This notion is intended to render a normatively viable, yet not confined to the state conception of democracy. But, as Rainer Forst (2007: 93) has noted this is a minimum foremost in name, as its proper realisation requires a comprehensive set of institutions. Bohman does not spell these out, but it is clear that spelling them out would reshape his theory. The democratic minimum requires stronger institutional supports and is less foot-loose than what Bohman assumes. Barring such institutional supports, Bohman's conception of rule beyond the state cannot adequately deal with the challenge of weak coercive means. How can goals be realised and rights protected *without* the sanctioning capacity of the state? Would such a system be able to 'deliver'; how can it bring about changes required by justice? Further, can it ensure equal access and public accountability in the complex multilevel constellation that makes up the EU?

¹⁰ 'The central feature of this democracy as I understand it is that it is a reflexive order, an order in which people deliberate together concerning both their common life and the normative and institutional framework of democracy itself. Democracy in this view is popular control over decision making in a specific sense: it is the interaction between communicative freedom as it is manifested in the public sphere and the normative powers, by which people create and control their rights, obligations, and deontic status' (Bohman 2007: 5).

The crucial question that this debate brings forth is whether the state form and a state based collective identity are necessary preconditions for democracy to prevail, or whether a leaner structure made up of legal procedures and criss-crossing public discourse can ensure democratic legitimation. In short, can democracy prevail without state and nation? However conceived of democracy requires some minimum institutional requirements, as deliberation in itself cannot bear the burden of democratic legitimation.

The minimum institutional requirements we have discerned in the above do not require a state-type structure but they clearly *exceed beyond* and are *different* from the transnational governance networks that Cohen, Sabel and Bohman put their trust in. They draw on the theory of deliberative democracy because they see it as particularly equipped to account for the particular experimentalist form of democratisation that they identify with the EU. But this is a misnomer: the EU's democratisation unfolds along representative democratic lines with clear resemblance to national arrangements.

Model 3: regional-European democracy

In a globalising world, the nation states suffer democratic deficits, as their citizens are in so many ways affected by decisions taken outside their borders, beyond national control. The agenda over which the body of citizens exerts exclusive control is greatly diminished. *Decreased output congruence* underpins the case for supranational government. As noted above, cosmopolitans and transnational governance scholars envisage democracy *beyond* the template of the nation state and the states' system. Europe is then also held up as a particularly relevant site for the emergence of cosmopolitanism (Archibugi 1998; Beck and Grande 2005; Delanty and Rumford 2005). This multidisciplinary cast of scholars draws variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU's global transformative potential through acting as a 'civilian power' (Rumford 2005; Manners 2002). Even though cosmopolitanism 'is not part of the self-identity of the EU' (Rumford 2005: 5), scholars nevertheless recognise the EU as a part of, and as a vanguard for, an emerging democratic world order.

Little systematic effort has however been put on specifying *how* a

European Union imbued with cosmopolitan norms can comply with the core democratic principles of autonomy and accountability. Our point of departure is that the core tenets of autonomy and accountability presuppose congruence between political and social space, but need not sum up to *exclusive territorial control*. According to R. M. MacIver (1928: 277), we should 'distinguish between the government and the state and regard constitutional law as binding, not for the state, but the government. It binds the legislator in the making of law itself'. *Government* refers to the political organisation of society and to the fact that a state is not merely a Hobbesian coercive order, as Weber's definition alludes to, but notably also an expression of the common will and public opinion (Hegel 1821; MacIver 1928; Arendt 1969; Wendt 2003). The characteristic feature of governmental power is not coercion, but the ability to act in concert and to be recognized. Political power emanates from citizens coming together in public forums and reaching agreement on the rules for social coexistence and the collective goals they should realise. Power is collective, communicative and inter-subjective by nature; it is created in the interaction between agents; it is only in operation and is only strong so long as the people are assembled and agree (Arendt 1958: 200; Habermas 1996: 149). Thus, it is also possible to understand modern constitutions as disconnected from the state form, from a coercive Leviathan - insofar as they remain linked in with the project of modernity, whose normative telos is to make the addressees of the law also their authors (Frankenberg 1996). A true republic presupposes democracy, but democracy need not presuppose the state. A non-state entity can make up a system of government insofar as it performs the functions of authorised jurisdictions. By government we therefore refer to a system of authorised rule which depicts the political organisation of society, or construed in more narrow terms, as the institutional configuration of representative democracy and of the political unit.

From this we posit that whereas the Union can be set up as a *non-state entity*, it must nevertheless also retain some of the hierarchical attributes of government. The idea is that since 'government' is not equivalent with 'state', it is possible to conceive of a non-state, democratic polity with explicit government functions. Such a government-type structure can accommodate a higher measure of territorial-functional differentiation than can a state-type entity, as it does not presuppose the kind of 'homogeneity' or collective identity

that is needed for comprehensive resource allocation and goal attainment. Such a governmental structure is based on a division of labour between the levels that relieves the central level of certain demanding decisions.

The EU has then also obtained competencies and capabilities that resemble those of an authoritative government. It embraces democracy as a founding norm, has representative institutions, and the parliamentary principle has become more strongly institutionalised. Its institutional setup is complex but 'still it legislates, administers and adjudicates. The legitimacy of these processes also has to be assessed according to the same standards that one would apply to any government' (Chalmers et al. 2006: 87).

When further entrenched in this direction, the EU can be a post-national government, a system whose internal standards are projected onto its external affairs; and further, that it will be a system of government that subjects its actions to higher-ranking principles – to 'the cosmopolitan law of the people'.

The problem (currently experienced by the EU) is how an entity with a nascent government-order can be effective: implementing decisions against a dissenting minority, in the absence of state-type coercive measures. When it is the Member States that keep the *monopoly of violence in reserve*, such an order can only be effective to the degree that actors comply on the basis of voluntary consent. But how to ensure compliance in a polity that lacks the enabling conditions of sovereignty that confer stability on social relations in the form of a 'centralized authority to determine the rules and a centralized monopoly of the power of enforcement' (Nagel 2005: 116)? Proper procedures are imperative: When decisions are properly made, when they follow the authorised procedures of the constitutional state, the likelihood that they be respected is high (Tyler 1990). This model therefore seeks to graft the authorised procedures of the constitutional state onto the European level but within a more limited remit of action than the sovereign state. Precisely because it does not regulate some of the core state functions, it can operate with a broad repository of mechanisms to ensure compliance and consent. These include 'soft' mechanisms, ranging from a moral consensus on the

protection of human rights; via consultancy and deliberation in transnational structures of governance and their concomitant civil society mechanisms of shaming and blaming; to institutionalised procedures for *authoritative* decision-making in intergovernmental and supranational institutions, which come with direct sanctions.

The EU's own institutions for territorial control are *at their weakest* in the core state functions: military security, taxation, and police. The EU is still first and foremost a humanitarian-type power, as its own military capabilities are almost non-existent (although the Member States possess very significant military capabilities) (Sjursen 2006a). But whereas the institutions at the EU-level are equipped with far weaker coercive measures than those of states, it nevertheless wields quite substantial influence with notable effects, because the *Member States* carry out the joint decisions. Collective decision-making and implementation in the EU take place within a setting of already legally institutionalised and politically integrated orders, which help to ensure compliance.

The model of European democracy that we can discern from these observations, seeks to reconcile transnational insights with institutional conditions, notably the need for a government-type organisational structure. The model, thus, posits that the European Union's democratic legitimacy can be based on the credentials of criss-crossing public debate, multilevel democratic decision-making and enforcement procedures and the protection of fundamental rights to ensure an 'autonomous' civil (transnational) society. This is the clearest manifestation thus far of democracy as a principle based on a post-conventional form of consciousness, one seen to have been generated by the struggles and processes that produced modern constitutions. Whereas such an entity holds traits that undermine the distinction between states and international organisations, it cannot do away with the modern legitimating principles that were established through democratic revolutions. The concept of government highlights the *moral authority* of the procedures entrenched in the democratic *Rechtsstaat* – as a legitimating, trust and compliance-generating mechanism.

Two implications follow from how we apply these insights to the EU: first, that reconfiguring democracy in Europe entails decoupling *government* as the democratic form of rule, from the *state form* – as a

coercive system of power relations that is sovereign due to the codes of international law. A post-national-type EU would be based on non-violent settlement of disputes, the entrenchment of institutions, rights and legal principles that subject actors to the constraints of a higher-ranking law – the cosmopolitan law of the people – and that empowers the citizens to take part in law-making processes at different levels. Policy-making, implementation and law enforcement would then take place through a variety of organisations, and the EU would be a sub-set of a cosmopolitan order that does not hold the means of legitimate violence in reserve, but is rather embedded in a system of multilevel commitments and constraints.

Second, the model posits that the borders of the Union are not drawn on essentialistic grounds. The EU can, therefore, only justify itself through drawing on the principles of human rights, democracy and rule-of-law – even when dealing with international affairs. The ensuing order would not aspire to become a world organisation, but would be cosmopolitan in the sense that its actions would be subjected to the constraints of a higher-ranking law and be committed to the fostering of similar regions in the rest of the world.

Regionally situated authoritative government within a cosmopolitan, non-state-based framework raises questions pertaining to institutional design and make-up. One particularly tricky issue is how to ensure democratic autonomy and accountability within such a system. The short answer is that this requires a polity with a *pyramidal* structure of autonomy and accountability, i.e., where the global level contains certain fundamental legal guarantees, the EU level handles a limited range of functions over which it has final authority, and the Member States the rest. Autonomy has a different status in this model than in the previous ones, as it cannot simply refer back to a delimited democratic constituency but must always balance the requirements of a given constituency with the universal principles embedded in cosmopolitan law. The accountability issue is also very complicated here. The ‘many accounts’ that such a system necessarily fosters, presupposes a more central role for civil society and the public sphere in demanding and ensuring proper justificatory accounts; hence locates democracy more explicitly in civil society/public sphere than is the case in the previous two models.

Reconstituting the EU as a regional democracy

This model's core presumption is that European citizens will be able to consider themselves as self-legislating citizens within the functional domain that is the exclusive preserve of the European government, that is, human rights protection, risk regulation, environmental policy, and social security (see Table 1.1).

The model requires reconfiguring democratic theory. But for the EU to fully comply with this model, it also needs to be reconstituted. Present-day EU does not fully comply with the standards of a proper *government*. Its enforcement mechanisms might still be too weak to qualify as government proper. On the other hand, the self-proclaimed democratic system of law-making and norm interpretation at the European level, constrained by the Member States, has built-in assurances that the EU not become an unchecked entity – an eventual 'world despotic Leviathan'.

Present-day EU does not contain the balance between economic rights and social protection that the cosmopolitan model sees as required for effective citizenship: to approximate such a balance there is a need for retrenching market integration and drawing clear bounds on the operation of the market; whilst *extending social guarantees* across Europe. In this sense the cosmopolitan model presupposes clear bounds on integration, whereas the Union is marked by problems of democratically unauthorised 'creeping competence' (Pollack 1995) and *juridification*.

The debate on the EU's bounds and who should be offered EU membership reflects on the one hand that reminiscences of primordial ties are weakly reflected at the European level, and a similar argument holds for collective identity. On the other hand, the debate on where to draw the borders of the EU pits cosmopolitans against communitarians, where some of the latter argue for the need to *confine* the Union to European Christendom. The debate on Turkish membership offers one important take on the Union's value-basis (Sjursen 2006b). There is clearly no political consensus on a cosmopolitan vocation for the EU.

The instantiation of a regional-European version of democracy along cosmopolitan lines raises questions for cosmopolitan-democratic theorising: viable regional-European democracy requires a form of re-

balancing of the membership in a community of compatriots with the inclusive requirements of the cosmopolitan society. Cosmopolitanism holds individuals as morally ultimate in both domestic and global contexts; they are the only legitimacy basis of political orders. But democracy presupposes some form of distinction between members and non-members. Democratic sustainability requires some form of identity, and identity thrives on exclusion, boundary-drawing and distinction. Identities are both a condition of, and a constraint on, justice. Boundary construction, the dual processes of inclusion and exclusion, aims at establishing a particular balance between contextualised identities, democratic practice and global justice. Further, the outline of a given functional constituency must be considered in light of a collective identity's key role in instilling allegiance and loyalty. What is valuable to us, what we share with one another and not with all the others, is what makes us special; something that arouses feelings and emotions, that we are committed to and that can motivate us to collective action, trust and solidarity. Collective identity stems from membership in a community of compatriots. Such is rather weak in an all-inclusive society. The world citizens do not have much in common apart from shared 'humanity' (Habermas 2001: 108).

We have seen that the EU holds traits suggestive of a nascent sub-type of cosmopolitan order. However, its effectiveness in pursuing cosmopolitan principles hinges not only on internal resources but also on external. There are no equivalent orders established in the world. Insofar as the EU is an agent for a cosmopolitan world order, the EU faces the problem of becoming overburdened with tasks and normative expectations.

Conclusion

The basic question that this article has addressed was that of ensuring democracy in today's Europe. In this article, our main concern has been to clarify what kind of a challenge this is. What is clear simply from a cursory look at the EU and the scholarly debate is that this is not simply a political challenge in the sense of applying a set of established and well-known solutions to the complex EU. This is not to deny that political factors figure centrally in every conceivable effort to entrench democracy across Europe. But the question of

ensuring democracy in Europe today is clearly also a major intellectual challenge: it pertains both to how we understand democracy and to how we understand political rule in today's world.

The tight interweaving of states in Europe under the two headings of Europeanisation and globalization underlined the need to think of this as a major intellectual challenge. But what kind of intellectual challenge was this: Was it that of modifying established theory of democracy to suit the complex European Union, or was it more radical, namely that of coming up with a new theory of democracy? We found the basic choice to be that of either somehow reconstituting democracy in Europe or that of somehow reconfiguring democratic theory to suit the complex multilevel European configuration.

The former option was tailored to an understanding of democracy as basically tied to the constitutional state but which still had to be modified to suit the EU. This option we found encompassed two democratic polity models (audit democracy and federal multinational democracy). The first audit democracy model implied retrenching the EU in order to re-equip the Member State as the stalwart of democracy within an intergovernmental (rather than a supranational) context. It sought to reconstitute democracy, through installing a system of *audit democracy* at the EU-level coupled with representative democracy at the nation-state level. The basic intention was to rescue nation-state democracy. Doing so would require a significant element of EU retrenchment, a major transformation, of the current European political landscape. The problem was that even if such a transformation were to be successfully carried out, it would bring up the question of what would guard against Europe becoming privy to the limitations in nationalism and the Westphalian order. In complying with this model Europe might yet be saddled with the problem that helped spark the European endeavour in the first place. The second possible way of reconstituting democracy was through *multinational federal state* democracy. But we found that even this model could not accommodate Europe's institutional diversity, the asymmetries built into its institutional configuration, and its polycentric character. The Union does not only fall well short of this model in territorial control and contiguity; in its present form, it has also entrenched a set of institutions that clearly deviate from key tenets of this model.

This left us with the second more radical option, namely the need to somehow reconfigure democratic theory to suit the complex EU. Transnationalists argue that the question of democracy in Europe requires a new conception of the presuppositions of democracy, in effect, a new democratic theory tailored to the European circumstance of multiple demoi. This required decoupling democracy from the presupposition of a state and a fixed demos. But when doing so, we found that the minimum requirements for democracy that we spelled out above both exceeded and differed from what the transnationalists pinned their hopes on. Our ensuing conception of democracy, the third model labelled regional-European democracy, is configured not as a system of transnational networks but rather in the procedures of the modern form of *government* within authorised jurisdictions. This can be understood as a regional cosmopolitan arrangement because its viability hinges on accommodating global developments of which there are some today: post-war legal developments in the wake of the UN which have helped to make state sovereignty conditional on compliance with basic human rights. The post-national regional-European *government* model configuration retains much of the core tenets of the democratic constitutional state, albeit in a somewhat reconfigured form: it retains authorised jurisdiction but relaxes sovereign territorial control.

The upshot is that the search for democracy in Europe need not preoccupy itself with a radically new democratic theory but rather opt for a better specification and spelling out of what it takes to realise democratic principles under post-national conditions.

Table 1.1 Requirements for three democratic orders in Europe

Requirements	Audit democracy	Federal multinational democracy	Regional-European democracy
Sovereignty	The Member States are formally sovereign entities The Union is derived from the Member States	The Union is recognised as a sovereign state, in accordance with international law	Polity sovereignty is multi-dimensional and shared among levels, subject to cosmopolitan principles of citizens' sovereignty
Coercive capabilities	The Union level has no own coercive capabilities Military and police forces are controlled at the Member State level	The Union level has state-type military and police capabilities The Member States have police functions	Military and police authority shared among all levels.
Authoritative decision-making	Constitutional limits on Union-level competencies Union-level: Problem-solving on the basis of delegated authority; Union-level: Decision-making and sanctioning ability confined to Common Market matters Member-States: Sustain final authority in all matters, in accordance with national constitutions	State-based constitution delineating the competencies of the Union and the Member States. Institutions for authoritative decision-making at both core levels (Union/Member States) within their respective areas of competence Sanctioning ability available for norm enforcement and policy implementation, at both core levels of government (Member State and European)	Constitutionally entrenched delineation of powers and responsibilities along both horizontal and vertical lines, Union sanctioning ability is limited; Union subjects its actions to higher-ranking principles Authoritative law-making through democratically regulated deliberative procedures
Resource acquisition and allocation	EU-level: no independent taxing powers and limited scope for redistribution Member States decide autonomously over tax and redistribution within their territories	EU-level: redistributive measures; independent fiscal policy and taxing ability Member-state level: redistributive and taxing powers	EU level: no independent taxing powers and limited redistributive powers All levels: committed to global redistribution

Requirements	Audit democracy	Federal multinational democracy	Regional-European democracy
Membership/ border-setting	The Union is open to all European states that qualify in functional terms	The Union's borders are set in accordance with designation of European-ness	The Union's borders are drawn in accordance with democratic criteria for a self-sustainable democratic entity and with regard to the development of similar regional associations.
Territorial exit	Provisions for exit – subject to approval from Union (majoritarian support required)	Provisions for legal secession of any sub-unit from the Union – subject to constitutional provisions	The Union has provisions for territorial exit for sub-units (subject to the constraints of cosmopolitan law)
Mode of legitimation	Audit (derivative) democracy at Union level Representative democracy at Member State level	Popularly elected bodies based on representative democracy at all levels; competencies divided in bi-polar federal manner	Popularly elected bodies within a system of legally 'hierarchicalised' competences
Public sphere	Public sphere confined to the nation state	European-wide public sphere	Multiple overlapping (European and global) discourses

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Chapter 2

Democracy and European constitution-making

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Introduction

The work in RECON under work package 2 on ‘The Constitutionalisation of the EU, the Europeanisation of National Constitutions, and Constitutionalism Compared’ departs from two seemingly simple, yet profound, questions: Is the European Union fit for a full-blown constitution, for a fundamental law similar even if not identical to that of nation-states? If so, can such a constitution warrant the label democratic? To summarise the two, the main question that preoccupies this work package is: *What constitution for what kind of Union?*

A key hypothesis that propels the work in this work package, is that the protracted, disparate and rather confusing debate on the future of Europe which started in earnest in 1979 and has yet to come to a conclusion, is best understood as a search for an overarching answer to two key constitutional questions that continue to beset the EU: its constitutional suitability on the one hand, and the type of political entity or polity that it is, on the other. The debate is marked by the presence of several – distinctly different – readings of the EU *qua polity*. Each such reading is however only compatible with or comes with a limited number of possible answers to the constitutional

question. Concomitantly, there are different ways of understanding the European constitution; each such is only compatible with a certain understanding of the European Union as a polity. In other words, how we understand constitution has bearings on the type of entity we refer to, and conversely, how we understand the European Union has bearings on the type of constitution it can equip itself with.

But before structuring the range of alternative conceptions (of polity and constitution), it is necessary to look at definitions because on numerous occasions, participants in the constitutional debate have simply talked past each other. They might use the same terms but will still have different realities in mind. Many decision-makers and analysts alike insist that the European Union does not have a constitution (and indeed does not need one, or at least, can survive, even thrive, without one). Thus the European Council claims that the Lisbon Treaty even if comprising a good deal of the substantive contents of the Constitutional Treaty, is not a constitution in a relevant sense, and thus should be qualified by national constitutional law as an ordinary international Treaty (rendering parliamentary ratification adequate and avoiding the *piege* of national referenda). This statement however conflicts with the well-established and already decades-old opinion of legal scholars and practitioners that the European Union already has a constitution (the founding Treaties of the three Communities having been declared a constitution of sorts by the German Constitutional Court as early as 1967). A similar argument has been set forth by social scientists who have studied the Treaty reform procedure: they argue that it increasingly resembles a constitutional reform procedure. These positions appear as polar opposites, but we can untie this Gordian knot through disentangling the notion of constitution into three different notions: formal, material and normative. When doing so, we see that most lawyers have argued that the EU has a material constitution, but not a formal or a normative one. What apparently was a deep-seated disagreement might at closer look come down to conceptual imprecision.

But clarifying this does not settle the issue; neither does it adequately respond to the question of what constitution for what polity, because much of the disagreement resides in widely different conceptions of the type of entity that the EU is and should be. Some see the EU as a special case of international organisation (Milward 1992; Moravcsik 1998); others see it as an emerging state (Morgan 2005); and others

again see it as a fledgling regional-cosmopolitan entity.¹ The first notion of the EU as a special kind of international organisation is conducive to an international treaty, not a state-based constitution; the second conception of the EU as a multinational federation is conducive to a formal democratic constitution that also works as such in practice; whereas the third conception of the EU as a regional-cosmopolitan construct speaks to the need for disconnecting constitution from state. This fundamental disagreement can be seen at work in the interpretation of the ratification failure within the Laeken constitutional process (2001-5). The rejection of the Constitutional Treaty by the Dutch and the French electorates was taken as the ultimate proof of the hopelessly flawed character of the project of giving the European Union a Constitution. Still, opinion polls have showed that a clear majority of Europeans (including in France and the Netherlands at the time of the negative referenda in 2005, and consistently up to the present) support the establishment of a European Constitution (Eurobarometer 2004: 30). One could indeed argue that French and Dutch citizens took the pains of voting *no* because they took seriously the possibility of a European constitution, although they wanted *another* text. At any rate, both interpretations of the same outcome *cannot be* correct at the same time.

There are two underlying substantive problems, then, in properly grappling with the issue of what constitution for what kind of EU. The first is that decision makers, analysts and even publics, subscribe to widely different notions of what the EU is and what it should be. These notions come with qualitatively different, albeit still under-articulated or underspecified conceptions of its constitutional nature and status. These notions of the EU are so different as to contain qualitatively different answers to the question as to whether the EU is an entity that is equipped to have a constitution (and what democratic status this should have). Second, some of the notions of the EU, notably that of the EU as a regional-cosmopolitan entity, may be so different from established state-based forms of polity that the conceptions of constitution they contain may also exceed beyond orthodoxy.

¹ For different versions consider Bohman 2007; Held 1995; Delanty and Rumford 2005; Manners 2002.

What is required, and which this chapter aims at providing, is a conceptual 'map' that spells out the constitutional-democratic character and status of the main polity configurations in the EU debate. In order to get at this we must: (a) establish the appropriate range of conceptualisations of the Union which encompasses the main positions in the debate on the EU; (b) clarify how these relate to the debate on the EU constitution; (c) explicate the constitutional status and character of each position; and (d) consider each of these up against the Union's development. This includes considering whether or the extent to which the EU requires us to adjust or modify the mainstream state-based conceptions of constitutional thought.

This chapter is set up to address these four sets of issues, through establishing the constitutional impetus of each of the three different conceptions of the EU as a polity that inform the RECON project.

An important issue with regard to the transposition to these models to the constitutional realm is whether or the extent to which these need to be adapted to serve as proper representations of the European constitutional dimension. On the one hand, it is open to question whether we should rely on state-based vocabulary, state-based standards, and state-based constitutional theory when depicting the EU. Democratic constitutionalism has been equated with state-based constitutional theory (assuming a necessary connection between constitution and nation-state). Can there be a democratic constitution for a polity that is not a nation-state? On the other hand, the EU is made up of Member States, each of which is a constitutional democracy. The development of the European polity has thus not only taken place within a setting of *already existing constitutional democracies*, but may be seen as a constitutional union of constitutional states. This sets the Union apart from all other examples of social and political integration through constitutional law. What is indeed the nature of the 'meta' constitution through which constitutional polities may unite? Both questions compel us to pay particular heed to whether the European context is compatible with either of the two main traditions of constitutional thought, the evolutionary and the revolutionary, but indeed also compels us to query whether the European experience is giving rise to a new and distinct tradition of constitutional thought.

Conceptions of constitution and constitution-making

In order to spell out the constitutional character of the three RECON polity models, it is necessary first to clarify the different understandings (or dimensions) of constitution (material, formal and normative).

Three conceptions of the constitution Formal, material and normative

The *formal constitution* can be defined as the set of legal norms contained in a document (or compilation of documents) that is referred to as the constitution according to social practice. The idea of a formal constitution is intrinsically modern. Modernity came hand in hand with the identification of law with written law.² The formal conception stresses three basic features: written character of the document, singularity of the constitution, and that the social practice that refers to the document as the constitution is relevant.³

² Hart (1961: 95) associates modernity and legality: '[T]he first is the mere reduction to writing of hitherto unwritten rules. This is not itself the crucial step, though it is a very important one: what is crucial is the acknowledgment of reference to the writing or inscription as authoritative, i.e. as the proper way of disposing of doubts as to the existence of the rule. But one could argue that pre-modern law might not be written, or only partially written, and still it was founded on a social practice which regarded as authoritative certain sources of law. Liberal revolutions in continental Europe further tightened the concept of law to the idea of systematic bodies of legislation (the Code Civil being the archetypical example of such association)'. See, among others, Van Caenegem 2001: 1ff.

³ Firstly, there must be a physical object which can be referred as the constitution, be it a piece of paper or parchment, or stone engraving, or in some other peculiar form. Secondly, the formalistic understanding of the Constitution comes hand in hand with a monogamous relationship between a document identified as the constitution and the constitution of a given political community. We could say that it implies the belief in one legal system, one constitution. This is closely associated, as Kelsen (1945: 124) noted: '[A] solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which is to render the change of these norms more difficult', with the fact that the formal conception of the constitution brings about legal certainty. Such certainty is not infrequently reinforced by the provision of specific procedures to produce a new document which should be labeled as the constitution. However, such special procedures are based on normative reasons which require rendering the constitution special vis-à-vis ordinary laws. The same normative reasons explain that the formal conception of the constitution tends to be associated with a punctual characterisation of the constitution-making process. There is a point or a reduced number of points in time in which the text of the Constitution is solemnly ratified and proclaimed as such

The material constitution can be seen as the norms that can be considered as basic to the given society's legal order, according to the social practice of legal actors. The material conception of the constitution is based on a different consideration of what figures as prevalent social practice within a given society. Instead of considering the relevance of the social practice that is already labelled under the heading of a constitution, it starts from the other end and focuses on what social practices regard as being the basic norms of a given society. The concept considers social practice in a wider sense, in order to determine the basic rules that structure the society and/or its legal order.⁴ The legal understanding of the material constitution

constitutional text. Only in such a way it is possible to preserve the legal certainty stemming from the specific constitutional form. Thirdly, the formal conception of the Constitution presupposes not only (and even not necessarily) that the authors of the constitution label itself as such, but a widespread social practice that identifies the document with the constitution of the given society.

⁴ The concept of the material constitution emerged either in the absence of a formal constitution (and as such can be said to pre-modern), or in opposition to the concept of a formal constitution (and in such a case is also clearly modern). Firstly, it is not surprising that the concept has been crucial to British legal and political academia. Social practice in the United Kingdom converged around the premise that there was not such a thing as a formal constitution in Great Britain. When legal and political scholarship became a respectable academic enterprise in the XIXth century, British scholars painfully reconstructed the living constitution. A similar kind of motivation can be found in the Germanic area, where the process of codification of private law was unsuccessful until the very end of the XIXth century, something which fostered the scholarly reconstruction of the law. This predisposed German scholars and politicians to distinguish between form and substance. Secondly, the material conception of the constitution also proved a major modern critical tool. Critics of liberal formalism further developed the potential of the material conception. Thus, it is not surprising that a major and influential exposition of such an approach is to be found in Ferdinand Lassalle's 'What is a Constitution?' In his famous speech, the German left-wing politician openly criticised the formal Bismarckian understanding of the Constitution (Lassalle 1977: 57, and especially p. 94): 'De nada sirve lo que se escriba en una hoja de papel, si no se ajusta a la realidad, a los factores reales y efectivos de poder'; also at p. 97: 'los problemas constitucionales no son, primariamente, problemas de derecho, sino de poder; la verdadera Constitución de un país sólo reside en los factores reales y efectivos de poder que en ese país rigen; y las Constituciones escritas no tienen valor ni son duraderas más que cuando dan expresión fiel a los factores de poder imperantes en la realidad social: he ahí los criterios fundamentales que deben ustedes retener'. He was especially concerned about the use of the formal constitution as a legitimising device, as a form that would cover the lack of a constitution proper. Lassalle found that the adequate description of the material constitution will deprive Bismarck of the appearance of legality. Bismarck's decision to avoid Parliamentary approval of the budget could be unmasked by means of showing that this amounted to a transformation of the

is but a variant of the sociological conception. The main difference is that the relevant social practices are not societal at large, but those of legal actors (or scholars) themselves.⁵

The normative conception of the constitution is composed of those legal norms that present certain normative properties. Both the formal and the material conceptions of the constitution identify constitutional norms by reference to social practice. This is the reason why they in themselves do not capture the basic insight of the famous Article 16 of the Declaration of the Rights of Men and of the Citizen,⁶

constitution. See *ibid.*, p. 130. The key ingredient of the material constitution is to be found in the 'real powers of a given country' (*ibid.*: 62): 'los factores reales de poder que rigen en una sociedad determinada'. This leads to the claim that a constitution can only be stable if the formal constitution clearly corresponds to the real constitution (*ibid.*: 82).

⁵ The legal conception of the material constitution is two-fold. On the one hand, some authors emphasise the structural elements of such a constitution. Thus, Hans Kelsen offers a characteristically legal twist to the material conception of the constitution by constitution as '[t]hose rules which regulate the creation of general legal norms, in particular the creation of the statutes' (Kelsen 1945: 124). In the Kelsenian move, this is what allows legal theory to remain pure, uncontaminated by social, political and ideological motives. In the Hartian sense, this is related to a sociological approach, in which the view of the officials of the legal system is determinant. See Hart 1961: 114-5. He assumes that such rules are identified by legal scholars. Under a different conceptual framework, H L Hart came to a similar point. The Oxonian philosopher defined law as the union of primary and secondary rules. Among the latter, he included the rule of recognition, which determines the feature or features that are taken as a conclusive affirmative indication that a given norm is part of the legal order. The other secondary rules in Hart's model are (1) the rules of change, which determine the processes through which primary norms are altered and (2) the rules of adjudication, which empower given institutions or individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken. See Hart 1961: 95-7. The structural material constitution is closely associated to the idea of an autonomous legal system, that is, a system that is able to refer to itself as authority when deciding which norms are part or are not part of the legal system. One thing is for a legal system to be autonomous, and another thing is to be closed. A post-positivism conception of law cannot accept the claim that legal systems are closed to general practical reasoning. On the other hand, other legal scholars stress the substantial elements of the material constitution. Especially in those jurisdictions where courts review the constitutionality of statutes, legal scholars tend to identify the material constitution with those set of norms which constitute the parameter of constitutionality, that is, those norms the violation of which by the ordinary legislator renders statutes void.

⁶ 'Any society in which the protection of rights is not guaranteed and the separation of powers is not established, has no Constitution.' In the original version, article 16 goes: 'Toute société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution.'

namely, that what should be regarded as constitutional is not to be determined by reference to social practice (whatever that be), but to 'ideal' (in the sense of counterfactual) standards, which in the concrete case of the Declaration of Rights of Men and Citizen were the protection of rights, and the separation of powers.

Modern democratic constitutionalism understands these three conceptions as subsections or portions of the aggregate 'constitution'. They are complementary, but they do not weigh equally in the designation of something as a constitution proper. The distinguishing feature here is the normative component; that is what gives ultimate credence to and legitimates the constitution as 'higher law'.

The evolutionary and the revolutionary constitutional traditions

In practice, constitutions vary greatly with regard to how well they embody the three components (formal, material and normative). The literature on how constitutions emerge contains two main constitutional traditions, the evolutionary and the revolutionary. These differ in what portions of the aggregate constitution they highlight. Consider the evolutionary tradition. It is frequently associated with the slow and gradual development of a material constitution where the fundamental laws are established not in one shot, but rather at different points in time. Although it may be possible to fix the date at which certain norms became a part of the Constitution, other norms are customary and their origin is uncertain. Moreover, the bits and pieces that make up the constitution are constructed as a coherent whole (*as a constitutional system*), but this is the result of the *ex-post* systemic interpretation of the congeries of constitutional norms, construed *as if* they formed a system. Evolutionary constitution-making implies that the legal validity of a given norm is to be historically determined, by going back as far as necessary in the constitutional history of the political community. The typical example of an evolutionary constitution is without doubt the British Constitution.

But the constitution can also be the result of an explicit and reflexive process of constitution-making wherein the whole set of constitutional norms is decided upon through procedures which are recognised as carriers of democratic legitimacy. Intense political

mobilisation during a limited period of time then results in a systematic reconsideration and rewriting of the fundamental laws of the polity, a *revolutionary* process. The writing of the Constitution marks a clear break in the political and constitutional history of the political community, or what is the same, to a clear differentiation between the period before and after the Constitution. What happened before is irrelevant to determine the validity of legal norms and political decisions; their legal validity and democratic legitimacy stem from the Constitution and the constitution-making process. The typical examples of revolutionary constitution making are the series of French Constitutions (from the constitutional beginning in 1789 and 1791 to the Constitution of the Fifth Republic in 1958) and the American Constitution of 1787. In both cases, the constitution is the symbolic and substantive embodiment of the break with the constitutional past, and the opening of a new constitutional time based on agreement on a set of constitutional principles.

It is important to recognise that the modern preoccupation with democracy has had the effect of making the differences between these two models less marked over time. The affirmation of democratic legitimacy as the ultimate source of legitimacy in a political community based on the equal freedom and dignity of citizens has created a strong onus on formalising conventional constitutions, and in doing so, has led to explicit constitutional decisions and the softening of the edges of the evolutionary constitutional paradigm. At the same time, revolutionarily established constitutions tend to be adapted to changing political circumstances through the development of constitutional conventions and practices that are not necessarily formalised.

It makes sense however to distinguish between these two models because they presuppose very different conceptions of what turns the constitution *democratically legitimate*. The revolutionary conception assumes that the combination of specific constitution-making procedures through which the existence of a broad general will supportive of the new constitutional norms is systematically tested, and the intense political mobilisation of citizens during the constitution-making process ensures that the fundamental norms of the polity are grounded on a strong democratic legitimacy basis.

On the other hand, the evolutionary conception highlights the democratic legitimacy that emanates from the continuous acceptance of the constitution as a political practice by generations of citizens; it is because the constitution has been an effective frame of political life during decades, if not centuries, that people accept to abide by it, as proven by the fact that they do not change its actual contents. Thus, while the revolutionary conception highlights the connection between democratic agency and legitimacy, the evolutionary conception emphasises the relationship between democratic practice and legitimacy.

When considered in relation to the EU, the revolutionary hypothesis appears *prima facie* attractive because the accession of any State to the European Union seems to have consequences similar to those of a constitutional revolution. Accession to the European Union marks a new constitutional beginning in which the very identity of the state is transformed, from a nation-state to a Member State of the European Union. But what is missing is a proper democratic explanation for how this change can be possible in the absence of a process of democratic constitution-making in the EU in the first place. The history of European constitution making to date shows that at no point in time has there been a successful connection between democratic agency and constitutional revolution. One could argue that the European Parliament tried to do so in 1984 with the European Parliament's Spinelli Draft Treaty. One could also claim that this was what at least some of the actors sought to obtain through the Constitutional Treaty in 2005 – even if analyses show that the latter process has failed to meet with any of these standards (Fossum and Menéndez 2005a).

The shortcomings of the revolutionary paradigm may lead us to explore the adequacy of the alternative paradigm, the evolutionary one. But it is also clearly unsatisfactory, because the sweeping changes in European constitutional integration cannot be attributed to a mere process of evolution. How could three international Treaties simply evolve into the core of the EU's material constitution in such a short period of time? Not only could we think that such a sudden evolution is bound to be democratically problematic (and indeed, the sharpest edges of the evolutionary model have been softened by the triumph of democratic legitimacy), but it is also fair to say that we lack a solvent explanation for how this evolution has

actually taken place. Many legal scholars tend to think that the European Court of Justice was actually the main agent of the transformation.⁷ But how could a handful of judges (who spent years building a common legal language so as to be capable of even operating together as a Court) have been regarded as legitimate by national institutions and national publics to operate such a radical overhaul of national legal and political orders? It is important to note here that national governments, parliaments and even populations (through referenda) have sanctioned this process, not once but through numerous treaty change events.⁸

The European example can be taken to suggest that constitution-making need not be either revolutionary or evolutionary. The European case brings forth a third option: It can be synthetic. Such a designation of the process would take proper heed of the key feature of the European experience, namely that what is being constituted necessarily relies on and draws on a set of already constituted political orders.

This raises the question as to whether what is occurring is not so much a matter of constitution *making*, with making referring to a process that starts from *de novo* but rather one of supranational *reconstitution*. This suggests that what is occurring is not the forging of a constitution from scratch (as the revolutionary tradition suggests), or out of a loosely structured congeries of norms and traditions (as the evolutionary tradition suggests), but rather the forging of a polity through constitutional law out of a set of polities, each of which is already constituted by law. With constitutional synthesis is thus meant the forging of a supranational constitutional order out of a number of already existing national constitutional orders. Through creating a new and common legal order, this system's material constitution becomes composed of the constitutional norms common to the participating states. Synthesis thus also marks a new constitutional beginning for each of the states engaged in the process. But not because of a change in the substantive contents of the constitutional norms (the core of which remains intact), as is typically the case in

⁷ See notably Weiler 1999. Some even cast this as a judicial coup d'état. See Stone Sweet 2007.

⁸ Since the early 1980s these include the Single European Act, the Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty.

exercises of revolutionary constitutionalism, but out of a change in the very scope of the polity, and thus in a radical redefinition of *We the People*. This peculiar new constitutional beginning is moreover decided through a procedure which ensures the democratic legitimacy of the new legal order, not by means of a repeated test of the general constitutional will of citizens, but by means of preserving the constitutional substance of the national constitution, *now* transformed as part and parcel of the common constitution.

It should be clear that the EU at present represents at most a *partial* synthesis. Thus, an important consideration in determining the EU's constitutional status is to clarify *how far* the process of synthesis has proceeded. Each of the three RECON polity conceptions contains a distinct rendition of what kind of constitutional synthesis is possible; how far such a process of synthesis can proceed; and whether synthesis is a constant constitutional requirement for stability or not. We thus posit that constitutional synthesis provides us with a better handle for analysing and reconstructing the European case, but we also acknowledge that it can lead to three different results. The critical issue is whether this process of constitutional synthesis requires direct democratic sanction. Here we will show that the three RECON models differ, with the first and third not being set up to require direct democratic sanction whereas we presume from the logic of the second RECON model that it requires this (which also implies that the process of synthesis then ends).

Three conceptions of a legitimate European polity

In the transposition of the RECON-models we focus in particular on the procedural design and the substantive framing of a European constitution⁹. With regard to the substantive framing, we spell out each adapted RECON model along seven sets of key indicators. These speak to constitutional salience, along the lines of democratic constitutionalism. As such, they are also useful to tap into how far in democratic constitutionalism terms the process of constitutional synthesis has proceeded because they cover key substantive components of what a process of constitutional synthesis should be expected to cover.

⁹ The basic model descriptions are from Eriksen and Fossum 2007. The indicators are revised versions of Fossum and Menéndez 2005b.

At the same time, they lend them to the comparison of different polity models because they cannot be exclusively confined to a specific polity model. These are: (1) the criteria for distinguishing between constitutional norms and statutes; (2) the way in which powers are divided and competences allocated; (3) the structure of law-making procedures; (4) the role and standard of fundamental rights protection; (5) the principles structuring the socio-economic order; (6) the balance between individual and collective rights, and very especially, cultural rights; and (7) the procedural guarantees acknowledged to citizens in the process of implementation and application of laws.

With regard to procedural design, constitutional synthesis will stand out from the other two constitutional traditions: the evolutionary tradition's gradual and meandering process on the one hand and the revolutionary tradition's constitutional moment on the other. There is of course no available template that will spell out how a process of constitutional synthesis will unfold, because the theory of constitutional synthesis has been devised to capture the distinctive traits of the European Union process. We are therefore at present dealing with a case of $N=1$; thus the theoretical model must be constructed through direct engagement with the specifics of the European case. But we need process markers. Such markers are necessary to clarify how a process will unfold from within a given polity model; they are also vital for comparison across models. We have decided to use a set of markers that tailor the process to an explicit instance of constitution making. Such a process can be said to contain five phases: (a) Signalling; (b) Initial Deliberation; (c) Drafting; (d) Agenda-settled Deliberation; and (e) Ratification. This is a design that is of course far closer to the revolutionary tradition's constitutional moment than to the evolutionary tradition's gradualism. There are three reasons for taking this design as our point of departure. First is that this is the set of process markers that is most closely associated with democratic constitutionalism and is also the set of markers that is most explicitly set up to consider the vital issue of democratic sanction. Second is that the federal model as we understand it, is one where the process of constitutional synthesis eventually will require direct democratic sanction; thus tailoring the process in these terms will help clarify how far from such a process of democratic sanction the Union is. Third is that the Union has developed through Intergovernmental Conferences which have been understood as

major decision moments and which also have been devised in more explicit constitutional terms over time (the latest Lisbon Treaty event being here the main exception). In the presentation of each polity model we will clarify how we expect the process of synthesis to unfold within that particular model, and this will then be considered up against the five-stage system of process markers to clarify how the model stands out from more standard constitutional procedures.

In the following we use these stages as analytical (not evaluative) devices which help us to spell out how each model envisages the dynamics of the process of constitution making.

Audit democracy

This model conceives of the EU as a functional organisation set up to address problems which the Member States cannot resolve when acting independently. The Union is mandated to act within a delimited range of fields.¹⁰ A critical determinant for establishing which fields is the EU's ability to offload and compensate for the declining problem-solving ability of the nation-state in a globalising context. This can also be conceived of as a model of *stymied constitutional synthesis*.

The point is that rather than authorising a European constitution, the Member States insist that the Union's legitimacy is derived from the democratic character of the Member States; they also take active measures to retain core decision-making power within the Union's institutional structure. This does not rule out the label supranational institutions at the Union level but these are not autonomous; on the contrary they are best understood as agents that serve the Member States. They are thus subservient to the members and help to ensure that the Union carry out its tasks in a manner that is consistent with and respectful of the democratic arrangements in the Member States; hence the onus on audit democracy.

¹⁰ This description is shared by intergovernmentalists, neo-functionalists and regulatory scholars (Moravcsik 1993, 1998; Haas 1958; Schmitter 2003; Majone 1996), albeit they differ in their analysis of the causal mechanisms behind integration and the normative basis of the process. Thus, intergovernmentalists would claim that Member States are the main agents of integration, and that the Union is justified when serving the interests of its Member States. Regulatory variants would stress that the legitimacy of EU institutions and legal norms would be based on performance – output legitimacy (Scharpf 1999; Majone 1996, 1998).

The Union is barred from claiming own democratic legitimacy; the legitimacy the structure at the EU-level can draw on relates to its ability to produce substantive outcomes, i.e. output legitimacy (Wallace 1993: 100; Scharpf 1999). This pertains in particular to its ability to handle cross-border issues (such as for instance environmental problems, migration and cross-border crime). The Member States authorise EU action and confine and delimit the EU's range of operations through the provisions set out in the treaties, as well as through a set of institutions that permit each and one of them to exercise veto-power, either individually or aggregatively.

This conception of the Union is associated with an instrumental, functional approach to the EU's legal order. EU constitutional law has Treaty-type character, which corresponds to intergovernmental principles. However, for the Union to serve as an effective problem solver, its legal order has to be grounded on a set of legal norms of material constitutional nature, which ensure a modicum of autonomy to its legal order. This entails that the Union has a material constitution, which regulates the production of legal norms and sorts out conflicts between norms within specifically delineated realms of action. This material constitution is, however, enshrined in an international treaty, as there is no need for a formal, procedurally approved constitution. To put it differently, the proponents of this conception of the EU are not overly concerned with the direct democratic legitimacy of the constitution-making process; their main concern is with the material norms that frame the EU legal order and ensure the power position of Member States. In the following we will outline this model of the EU along the seven indicators presented above (and summarised in Table 2.1).

First, with regard to the criteria for distinguishing between constitutional norms and statutes, it follows from the Union's derivative status that constitutional norms proper only exist within the national constitutions; hence this distinction is sorted out within each national realm. Discrepancies between Member States of relevance to the Union will be ironed out in Union bodies, among representatives of the Member States.

Second, the Union's legal order will be established on the basis of a flexible and open allocation of competencies to the Union, within the confined set of issues designed as relevant to Union action. Thus, the

Union has enumerated powers, but their determination is left, as much as possible, to the Member States, and is not subject to procedural or substantive requirements besides the requirement of agreement among Member States. This allows Member States to increase or decrease the realm of Union action in relation to the set of problems to be solved, or to be sorted out, at the Union level.

Third, the problem-solving conception of the European Union presupposes an efficient and expedient law- and decision-making process at the Union level. This requires the constitution to assign decision-making roles both to the Member States and to the Union institutions. The reason for assigning decision-making roles to the latter is (a) to increase the specialised or technical knowledge basis of the decision (knowledge-enhancing), and/or (b) to facilitate decision-making by means of finding and proposing solutions likely to be accepted by Member States (efficiency-enhancing). The Union has been attributed powers, but the ultimate decision-making power rests with the Member States. This is ensured in different ways, depending on the scope and intensity of the common action. In some areas, Member States retain national veto power, and the role of European institutions is confined to making proposals. In a limited number of other areas, Member States' veto power can only be exercised jointly, and is matched by an equal veto power granted to Union institutions. Finally, the realm within which the institutions of the Union have exclusive decision-making power is very limited.¹¹ Which of these is the right operationalisation depends on the will of the Member States, and on the need for rendering their commitment to Union action credible.

Fourth, the material constitution of a problem-solving Union would include those fundamental rights whose protection at the European level is considered as instrumental to the Union's problem-solving ability, on efficiency or expediency grounds. The protection of economic freedoms empowers persons, especially legal persons, to become decentralised guardians of European Union law (Coppel and

¹¹ The material constitution should determine, in a rather flexible way, the requisite majority of Member States that is needed to adopt a piece of legislation or to take a decision. However, in line with the above, majoritarian decision-making would be explicitly mandated (through national veto) and justified with reference to expediency. Extensions in the range of issues handled by the Union thus reflect the Member States' increased commitment to the common organisation.

O'Neill 1992). Moreover, the protection of certain rights may also be considered necessary to ensure the social legitimacy of the institutional structure or of the substantive norms that are essential to problem-solving. A good example in that regard could be data protection norms, which facilitate the free flow of data across borders by means of reassuring citizens that their fundamental rights are protected at the same time. The enshrinement and protection of political, citizenship rights, is not a functional necessity, and these remain entrenched and exercised at the national level.

Fifth, from the material constitution of a problem-solving Union, we would be able to discern an economic constitution where questions of redistribution take place either at the national level or at the Union level but then with the Member State as the welfare reference unit.

Sixth, the material constitution of a problem-solving Union could be expected to be rather circumscribed on cultural issues. It will affirm the respect for national and regional identities and provide safeguards for their retention. Consistent with the characterisation of the EU as a functional organisation, the only necessary cement of the Union, so to say, is its problem-solving ability. There is no need for forging and renewing a 'we-feeling' among European citizens, as the Union is confined to deal with pragmatic issues.

Seventh, the procedural rights guaranteed to physical and legal persons in the process of application of Union law should be those necessary to ensure the ongoing commitment on the part of Member States to a common organisation and legal system. The protection of procedural guarantees turns (natural or legal) persons into decentralised monitoring agents for national compliance with Union law (Harding 1992). This might also require granting individual rights limited rights to contest compliance of Union legislation with basic Treaty principles.

Taken together, these criteria reveal that this model is set up to *limit* synthesis at the European level precisely because the model understands democratic constitutionalism to continue to be situated in the Member States.

Audit democracy

Fostering treaty-making/change and limiting synthesis

This is further underlined by the fact that the notion of the Union as a system of audit democracy presupposes a treaty-based legal order, which at most is of a material constitutional kind. This neither qualifies as a formal, nor as a democratic constitutional arrangement. The procedures are set up to effectuate treaty-making, not constitution making. The process has to be intergovernmental in character throughout because it has to be such set up as to ensure that each national constitutional community can sustain its democratic integrity. The body in charge of treaty-making/change will therefore have to be composed of Member State representatives, who act on behalf of and through explicit instructions/mandates from their national legislatures.

There is no explicit constitutional signal, and the threshold for initiating treaty-change is low because the process of treaty making/change is not attributed with constitutional dignity. At the same time, the threshold for ratification is high because each Member State must be equipped with veto.

In principle (albeit not in practice), this way of conceiving of the process has obvious parallels with the EU's Intergovernmental Conference. We therefore use the IGC as our point of departure to set out how this model conceives of the process. In so doing we rely on a formalised account of the IGC; *not* a factual reconstruction.

The model understands the Intergovernmental Conference to be organised as a system of intergovernmental 'Summitry'. It is set up as a set of meetings among heads of state and government that hammer out agreements among themselves. Any Member State can initiate such a process, and the process of treaty change/amendment will be launched when a majority of Member States agrees to this. There is no need for a European-wide deliberation over the terms of treaty change; this is left to national parliaments which discuss and formulate national mandates for the government representatives that meet during the IGC. The intergovernmental executive body, which is made up of the heads of state/government of each Member State is the formal treaty drafter. Here each Member State has veto; the IGC must thus find consensus or reach a compromise for a draft treaty to come about. The draft treaty is thereafter presented to the national

general and strong publics. The final, ratification, stage is one where each Member State ratifies according to its own national constitutional provisions. Ratification is a case of unanimous aggregation of national wills, expressed through nation-specific ratification procedures.

The magnitude of treaty change, notably with regard to possible democratic implications, affects the choice of national ratification procedure: the greater such magnitude, the greater the need for direct national popular sanction. National referenda thus serve as important democratic safety valves. If the treaty is rejected in one national referendum, it cannot be accepted because it would have transgressed the integrationist license afforded the Union by that Member State, and by implication the Union as a whole. This process can therefore also be understood as one of working out an acceptable level of international legal integration within a procedure bent on national constitutional protection.

A federal multinational Union

The federal model conceives of the EU as an emulator of the nation-state but organised along federal lines (and modified to sit with multiple national identities). This conceptualisation portrays the Union as a political community based on a set of ethical values, shared by European citizens, and typically embedded in a common culture.¹² As such, the EU is an entity to which Europeans should demonstrate their allegiance. It presupposes that they will show a strong allegiance to the EU sufficient to ensure social integration. A common identity, this strategy posits, not only helps to stabilise the Union's goals and visions, but is also necessary for securing trust.¹³ For this to be fully entrenched it has to take place through a two-staged process. In the first stage the Union's legal-institutional arrangement is imbued with those very principles and arrangements as can be synthesised from the common constitutional traditions of

¹² According to communitarians, being a citizen is not a mere act of will, but something which is rendered possible by the pre-politically sharing of 'something' (i.e. a 'culture'); turning individuals into next of kin predisposed to make sacrifices for others. (Benda 1993; cf. Weiler 2003)

¹³ Trust is an essential condition for deep and binding cooperation and for the settlement of conflicts by neutral procedures (Schmalz-Bruns 2005). A critical source of trust is a common cultural substrate, which can help foster allegiance and respect for laws. Cf. Taylor 1985, 1989; Grimm 1995; Miller 1995; Sandel 1982).

the Member States. Once this process has expended the legitimacy licence afforded by the national arrangements, it moves to second stage which consists in a process of *direct democratic sanction*. It is possible to conceive of a less democratically demanding process but for a full-fledged federal state to emerge we posit that such democratic authorisation is required.

This conception of the EU draws on a democratic conception of legitimacy, but one that is also grounded on that community's particular set of common ethical values. As such it is basically consistent with Habermas' notion of constitutional patriotism (Habermas 1994, 1996, 1998). The federal model requires the Union to have a constitution that symbolises and reflects the existence of a European community of values. Thus, the constitution is a 'rooted' constitution, i.e., the constitution is the legal embodiment of the community of values. The constitution-making process critically contributes to the clarification of the Union's value basis. Constitution-making establishes the set of common traditions and memories that can be seen as constitutive for Europe. These are typically understood and interpreted through the lens of the common constitutional traditions of the Member States. The moment at which the constitution receives democratic sanction (stage two) is also one where people's hearts and passions are appealed to, so as to permit them to understand themselves as compatriots, willing to embrace collective obligations essential to each other's well-being.¹⁴

First, the constitution of the federal union espouses the principle that the distribution of competencies should follow core community traits. With this is meant that all competencies which are central to the forging and maintenance of the Union as a state should be located at the central level. In other words, because the Union can only be sustained through a system of defence, a system of redistribution of economic resources, and a system of cultural maintenance, these competencies should be allocated at the Union level. Member State

¹⁴ If there is no common pre-political identity, it has to be created. Constitution making in this perspective is not only a forward looking creative act where the main task is to establish a set of institutions that shape the ensuing community. Constitution making is as much a backward looking creative act, in the sense that certain aspects of the past are made explicit and attributed normative value. History is interpreted in the light of amplifying those traits that speak to a common sense of origin and a common sense of destiny.

nations and regions could have auxiliary competences on what concerns the regulatory and administrative implementation of such policies. On other issues, competencies can be shared among all relevant levels of government.

Second, it expects the Constitution to delineate law and decision-making procedures in which active citizens can be socialised into common Union values. This requires combining citizen participation at the European, national and regional levels. Citizens' involvement at all levels of government is needed in order to ensure the sustenance of an active community of values, and to ensure that citizens internalise such values. This entails majoritarian decision-making procedures, in which representative Union institutions have the final say. But this is to be combined with multiple veto points, which ensure sub-communities and protect the central institutions from being overloaded.

Third, the federal union's constitution will contain a catalogue of fundamental rights that places equal emphasis on fundamental rights and fundamental duties, as both, and especially the latter, reflect the common values that bond citizens together. The constitution will also draw a clear line between rights of citizens and of non-citizens. Similarly, it will delineate law and decision-making procedures that ensure citizens' active political participation, so as to sustain the Community's value basis and sense of self. Given the Union's sheer size, this requires procedures for active participation at all key levels: European, national and regional. But given that these are also in some sense distinct communities; there will also be a multitude of potential veto points, so as to ensure communal allegiance, as well as to protect against trans-communal transgressions.

Fourth, the Constitution will frame a socio-economic order which is reflective of citizens' mutual obligations, of what they owe to each other as members of a value-based community. Consequently, there should be a strong element of redistribution at the European level, which will reflect Europeans' allegiance to the Union. This ensures the necessary we-feeling – required for sustaining the community – and that also has to be forged and renewed on a continuous basis, for this to constitute a value-community. It will conceive individuals as welfare reference units.

Fifth, it expects the Constitution to contribute to the fostering of a European identity. The Constitution itself should be turned into a symbol of the political community, and for such a purpose, it should make explicit reference to the common symbols and to the Union's foundation as a community of fate. The Constitution will contain provisions to ensure the ongoing socialisation of persons into 'Europeans'; there will be a set of clearly delineated criteria for who are Europeans, and who are not; and these criteria will reflect cultural aspects and a common identity. The onus will be on positively identifying Europe, and distinguishing Europeans from others, rather than on what Europeans have in common with others.

Sixth, in line with the federal principle, the Member States would sustain important collective rights, pertaining to the sustenance of a distinct identity for each Member State, but where such cultural rights are subject to compliance with constitutionally entrenched individual citizenship rights.

Seventh, the federal multinational union's constitution will favour politicisation of the mechanisms of constitutional review.

Federal multinational Union: constitution-making

The federal multinational model presupposes a European constitution. But, as noted, this model has to be adapted to suit the peculiar character of the European Union, notably the fact that the development of a European constitution takes place within a setting of already existing constitutional democracies. This sets the Union apart from all other examples of constitution making, and places particular requirements on how the process of constitution making unfolds. The critical element is that the 'deep' constitution of the supranational legal order must be defined by reference to the collective of national constitutions. In particular, the fact that the institutional shape and the constitutional order were determined by reference to national ones provided the new political animal and supranational norms with the necessary modicum of democratic legitimacy, which was *transferred* from the national to the supranational level thanks to the 'synthesising' character of the process. This synthetic process only however offers a measure of surrogate legitimacy to the European constitution. A constitutional order grounded on common constitutional norms is bound to see its legitimacy basis erode over time *unless* either a strong constitutional union evolves out of existing

practices, or an exercise of revolutionary constitution-making leads to the establishment of democratic legitimacy on new grounds.

In its most explicit version, once the process of synthesis proceeds to the limit of its surrogate legitimacy, the federal model requires a democratic constitutional impetus. This is made the most explicit through the act of signalling, where the promoters of a democratic constitution portend to speak in the name of 'We the People', so as to mobilise the requisite popular support for a democratic reform of the constitution. The initial deliberative phase is where the claim raised by those launching the constitution-making process is put to the test of public opinion, and where (eventually) an agenda for constitutional reform starts to take shape. This phase is brought to an end with an institutional decision to prepare a draft constitutional project. The drafting stage speaks to the articulation of the will to have constitutional reform, i.e., to forge a coherent will to have a specific new constitution. Strong publics are responsible for this step. They explore how to render the will of citizens coherent through public debates. Their deliberations result in the designation of a specific representative body (a Constitutional Assembly) or an already existing body that is to be convened to draft a constitutional proposal. Such an Assembly must have a direct sanction from the people. The work of the Assembly ends when a draft constitution is put forth. This reflects the consensus among the members of the Assembly that they have managed to synthesise the citizens' desire for constitutional change into a coherent will, in draft proposal form. It goes without saying that the third phase ends in failure if it is agreed or acknowledged that there is not sufficient support for any single draft constitution.

In the fourth phase of the constitution-making process, a wide debate on what is now the draft constitutional proposal forms centre-stage. The debate has to be focused on the overall merits of the draft constitution, so that the final decision as to whether to endorse it or to reject it can be properly made. The debate must go on for long enough time so as to allow the public to assess the constitution in a proper manner.

Democratic legitimacy does not stem from the mere fact of decision, even of majoritarian decision. The legitimacy of a constitution rests to a large extent on the richness and quality of the debate prior to

voting, from the reasons that move people to vote. However, there is no alternative to the testing of the common will that is normatively superior to voting. Thus, a proper form of consultation is required, in order to determine what the common will is. The standard form of such a consultation is a referendum. However, it can take other forms, such as a parliamentary election, the campaign of which has been basically devoted to the constitutional draft (or, in exceptional cases, a special vote in Parliament, preceded by widespread social debate can also be legitimate). At any rate, a proper and thorough previous deliberation must precede it. The choice of procedure could be made to depend on the intensity of constitutional change: the more comprehensive the type of change, the more need there is for the referendum option. This model being federal entails that the threshold for constitutional acceptance is not veto, but rather some version of majoritarian decision (some version of majority in the federal parliament and in the number of Member States).

A regional-European Union

This model is premised on democracy beyond the nation-state. It envisages the European Union as a political community based on the citizens' mutual acknowledgment of their rights and duties, but where these are embedded at the supranational level of *government* in a Union that is neither a state nor a nation. The EU forms one of the regional subsets of a larger cosmopolitan order. In its internal make-up, it is a federally structured system of non-state based government.¹⁵ This model is also compatible with a process of constitutional synthesis, and as such draws on the normative standards embedded in democratic constitutionalism. But the different (non-statal) governmental configuration that underpins the regional-cosmopolitan arrangement will place a greater onus on constitutional synthesis: as will be made clear, for this system to retain stability the process of synthesis has to be *continuous*.

In a globalising world, the nation-states suffer particularly pronounced democratic deficits, in that their citizens are affected by decisions taken outside their borders, and beyond national control. This underpins the case for supranational government. But to re-establish democracy, the new level of government must itself meet with the requisite standards of democratic legitimacy. From the vantage-point

¹⁵ Note that there is no requirement for a federal entity to be a state. Cf. Elazar 1987.

of this model, such standards refer to the rights of citizens to participate in the deliberation and decision-making processes through which common action norms are established. Applied to the EU, laws adopted and decisions taken at the European level deeply affect citizens. This presupposes that the Union's democratic legitimacy be based on the democratic credentials of its decision-making procedures and on its protection of fundamental rights. The Union's democratic legitimacy is based on citizens who see themselves, not only as the addressees, but also, as the authors, of the law.¹⁶ This system of government is premised on a very thin sense of allegiance, based on a post-conventional form of consciousness. This model presupposes a public sphere steeped in and upheld by the essential conditions of freedom, inclusion, equality, participation, and open agenda. Its support resides in a reflexive notion of constitutional patriotism,¹⁷ which posits a set of legally entrenched fundamental rights and democratic procedures, embedded within a particular socio-cultural context, but where the ensuing political affect and identification is constantly subjected to trial by discussion. This strategy rests on the moral value of deliberation; it propounds a rights-based, procedural notion of legitimation.

This conception of the Union sees the constitution as reflecting the fundamental legal norms of the European Union. As a consequence, the constitution must uphold a set of rights that enable participation in opinion- and will-formation processes, and thus make for public autonomy (i.e. political rights), as well as a set of rights that protect the integrity of the individual, her private autonomy. The two sets of autonomy presuppose each other and are mutually dependent on each other. But within the Union setting, this is effected in a particularly complex and multi-leveled manner, so that the Union level only handles a limited range of issues. To ensure this, the constitution has to contain a set of institutions that realise the public and private autonomies of citizens, organised in a multi-level manner.

¹⁶ A central tenet of discourse-theory is that only those norms that are approved in free and open debate are valid (Habermas 1996: 107).

¹⁷ Markell (2000) has discerned a more critical, less identitarian mode of constitutional patriotism in Habermas' political writings. See also Fossum 2007. For the standard formulation of Habermas' conception of constitutional patriotism, see Habermas 1994, 1998, 2001a, 2001b.

First, the regional-European Constitution is expected to lay the ground for an allocation of competences among different levels of government that ensures that each level retains decision-making capacity over those issues that mainly concern its citizens; at the same time that it ensures the political influence and relevance of each level of government, which is a basic pre-condition for ensuring active political participation. The criteria of allocation of competences could be flexible, but their reform should be subject to procedural and substantive limits, i.e., the criteria need to be properly constitutionalised.

Second, the Constitution is expected to delineate a law and decision-making procedure that is such set up as to ensure that legal norms and concrete decisions can be supported by the common will of European citizens.¹⁸ This entails designing a law-making procedure that assigns a decision-making role to institutions that are representative of the will of European citizens, so as to ensure that decisions are responsive to social demands. This presupposes a procedure that is sensitive to concerns in the various European public spheres, that is, mutual interaction between strong and general publics.¹⁹ This implies a majoritarian decision-making procedure, in which veto power rests exclusively with citizens through their European or national representative institutions.

Third, the regional-European Constitution will include commitments entrenched in the Member States' constitutions of the indivisibility of fundamental rights (including civic, political, but also social and economic rights). Central are the rights that permit European citizens

¹⁸ This requires that law and decision making procedures will block initiatives that are supported by sectional interests, i.e., are not representative of the common interest of Europeans (that is, procedures that avoid false positives) at the same time as to ensure the translation of the common will of European citizens into legal norms (that is, avoiding false negatives). There is also the recurring issue of ensuring adequate minority protection.

¹⁹ Strong publics refer to institutionalised deliberations whose discourse encompasses both opinion formation and decision making. In institutional terms, strong publics alludes to parliamentary assemblies and discursive bodies in formally organised institutions imbued with decision-making power, yet constrained by the logic of arguing and impartial justification. Weak or general publics refer to public spheres whose deliberative practice consists exclusively in opinion formation and does not also encompass decision making. See Fraser 1992: 109-42; Eriksen and Fossum 2002; Brunkhorst 2002.

to mutually acknowledge each other as citizens, because these constitute the core precondition for European democracy. Those rights should be equally protected within the scope of Union law, something which entails that fundamental rights should be the main constitutional yardstick of European legislation, of the action of EU institutions, and also of national legislative and executive organs when applying, or claiming exceptions to Union law.

Fourth, the Constitution should reflect the condition of the Union as a community of rights and duties. This also entails the notion of the Union as a community of risks (including economic ones). The sustenance of the EU entails the allocation of costs and benefits among Member States or regions, as well as among individuals. The pattern of distribution depends on the good to be allocated or the cost to be covered. This also entails that the Union's market-making dimension should be complemented with a market-correcting one.

Fifth, the rights-based notion does not depict the Constitution as rooted in a set of pre-political values. The Constitution could lend symbolic support to any given set of identities, notably a European one, but it would then also underline the multiple identities of Europeans, for instance as regional, national and European citizens. The Constitution however, in line with what has been said above, would be such set up as to render cultural identifications *reflexive* – and as contingent on compliance with fundamental individual rights.

Sixth, this model contains the weakest rights of collective actors of all the three models, as the legitimacy of the entire construct is conditioned on compliance with individual rights.

Seventh, this model expects the Constitution to provide European citizens with procedural guarantees which ensure the correct implementation and application of Union law. The concrete breadth and scope of such guarantees will be directly related to the breadth and scope of rights to political participation. Thus, the insufficient democratic character of law-making procedures could be partially compensated for by the granting of individual subject rights to contest the constitutionality of Union laws.

Regional-European Union: continuous constitutional synthesis

This model is, as noted, premised on democracy beyond the nation-state. It posits that the Union is a subset of (or perhaps more appropriately a vanguard for) an emerging cosmopolitan order. Within a cosmopolitan context, the constitution of a particular supranational (regional-cosmopolitan) entity must actively relate to two sets of legal orders: the global-cosmopolitan and the Member-State based one.

This model shares with the previous federal one that the process of constitution making in Europe will take on the form of a process of synthesis. In fact, the existence of several legal orders – at different levels – only serves to underline the central role of constitutional synthesis. But the process of synthesis that unfolds within this model has two features that make it qualitatively different from that of the federal model. In this model the process of synthesis is *continuous*; it is a functional requirement for the viability of the constitutional arrangement. The regional-European model is based on a process of constitution making that actively relates to a multitude of legal orders – steeped in different levels and systems of governance. The EU ‘downloads’ its cosmopolitan impetus through the manner in which the system of global-cosmopolitan norms is actively allowed to permeate the EU. The EU further sustains the state-based constitutional impetus through ‘uploading’ inputs from the constitutional traditions of the Member States. This makes the process of synthesis a far more open-ended and ongoing reflexive undertaking of incorporating inputs from different systems – national, regional (ECHR) and global (UN) – than the setting up of one self-standing constitutional arrangement that reflects merely upon the common constitutional traditions of the Member States.

But whereas this is really a model of two-way synthesis across global-regional and national levels, the signalling phase is nevertheless bottom-up in the sense that the initial impetus must be traced back to the supranational order’s need to relate to the democratic-constitutional arrangements of the Member States. Typically, this starts by Member States including provisions that open up their national constitutional orders to a fledgling international legal order. This opening up is both to the formation of a legal order at the European level and its harmonisation with international legal provisions. This sets the process of synthesis in motion; thereafter the

process unfolds in an ongoing manner. This may be through intermittent decision 'moments' but the distinguishing feature of this model is that these will recur at regular intervals.

The ensuing process of synthesis is one where the supranational arrangement seeks to harmonise the common constitutional traditions of the Member States with the legal provisions and orders at the regional and global levels. This makes the issue of democratic legitimacy a built-in challenge for the model. It is a problem that cannot be resolved at any one point in time but has to be handled through a substitute mechanism of ongoing synthesis. Thus, the entire construct is quite fragile; it hinges on the process of synthesis striking the proper balance between the constitutional constraining and enabling conditions for democracy embedded in legal orders attached to different levels and systems of governance.

Concluding comments and reflections

In the above, we have transcribed the three RECON models to the European constitutional realm. On the one hand, it became clear that such a transcribing could not draw on either the evolutionary or the revolutionary constitutional tradition but required rethinking *how* constitution making will unfold in a setting made up of already constitutionalised entities. The existing constitutional arrangements form a kind of organisational field with strong isomorphic pressures. We sought to capture this structure with the notion of constitutional synthesis. But the three models were not all set up to harness this constitutional synthesis. On balance the first audit democracy model could be better construed as a model that set explicit limits to synthesis; hence when considered in relation to the existing EU it could also be construed as a model for re-nationalising the constitutional realm. This first model of audit democracy sees the EU as a kind of intergovernmental organisation, and the legal framework as a special case of international treaty, which prescribes an intergovernmental approach to treaty-making/change, where the heads of state and government are the key actors. This model stands in marked contrast to the second, federal multinational model, which is based on an initial process of synthesis that eventually leads to an explicit process of constitution making. The model understands constitutional law as the higher law of the land on account of its reinforced democratic legitimacy. Hence, the constitution-making process

should be structured in such a way as to test repeatedly and sequentially the breadth and depth of the citizens' will to have the constitutional norms enacted or amended. The third, regional-European, model, also conceives of the supranational legal order as a constitutional arrangement but here as part of a broader multi-level constitutional architecture that offers a set of multi-pronged inputs to the process of synthesis, which has to be continuous.

Table 2.1: The polity models applied to the constitutional realm

	Audit democracy	Federal multinational union	Regional-European union
Polity type	International organisation	Federal State	Federal-cosmopolitan Union (harbinger of a cosmopolitan order)
Status of the European legal construct	Member state-based treaty	Democratic (state based) constitution	Regional-cosmopolitan constitution
What the constitution-making process should focus on	Safeguarding of national democratic orders	Democratic sanctioning of constitutional synthesis	Forging cosmopolitan rights and democracy through constant synthesis
Division of powers and competences	Member State-based principle	Federal-communal principle: lower levels support the Community	Federal-pyramidal principle: 'democratic congruence'
Fundamental rights: status and range of	Civil and economic rights only	Political, social and cultural rights	Political equality rights
The EU's socio-economic order	Limited taxing and redistribution at EU-level	European: full state-type ability	Organised across levels
Cultural community and diversity	No cultural identity required	European constitutional patriotism	Rights-induced reflexive political culture

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Chapter 3a

A RECON-inspired democratic audit

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Introduction

The Democratic Audit of the EU proposes a means of operationalising each of the RECON models as a set of indicators of the democratic performance of the Union. To a certain extent it begins with a deliberate attempt 'to re-invent the wheel'. It returns to philosophical basics by taking a position of its own on what indicators of democratic performance should be like and what they should do, all in the hope that a strategy of *reculer pour mieux sauter* may help with the vexed question of whether standards should be any different when it is the European Union, and not states, that is the object of evaluation.

The full case for the proposed indicators is to be found in Lord (2008) which also traces the concept of a Democratic Audit back to the work of David Beetham and his collaborators (Beetham 1994). This chapter is limited to a brief justification of the following claims.

1. In defining indicators of democratic performance, priority should be given to their normative justifiability over their empirical measurability.

2. The preceding point notwithstanding, any set of normatively derived indicators will be under-specified.
3. The RECON models provide a good basis for converting generic indicators of democratic performance into specific tests of the EU.
4. One reason for the foregoing claim is that the resulting indicators allow the democratic performance of the Union to be assessed against alternative equally reasonable understandings of what would count as a democratic European Union.
5. A bonus – given that empirical measurability is not the priority – is that the resulting indicators are also surprisingly operationalisable.

Normatively derived indicators

Ever since Robert Dahl (1971) – whose own preferred criteria were free and fair elections, universal suffrage, the election of key office holders, popular control of the political agenda, and access to alternative sources of information – political scientists and organisations concerned with ‘good governance’ have debated what indicators might best be employed in evaluating the democratic quality of political systems. Recent suggestions are to be found in Bertelsmann, Democratic Audit, the *Economist* and Freedom House.¹

There is a temptation only to define indicators that are measurable. However, that to my mind is a temptation that needs firmly to be resisted if we are to strive after indicators that relate to reasons for valuing democracy in the first place; or, indeed, if we are to avoid the error of assessing the supposed democratic quality of a polity against a set of conditions that are not individually necessary and collectively sufficient for democracy itself. So, what I propose for the Democratic Audit of the European Union, is a strategy by which indicators are normatively derived by considering what core definition is required by the main justifications for democracy, and what minimum conditions are then required to meet that core definition.

¹ See the Bertelsmann Transformation Index, available at <<http://www.bertelsmann-transformation-index.de/11.0.html?&L=1>>; Democratic Audit, ‘A Do it Yourself Guide to Democratic Auditing’, available at <<http://www.democraticaudit.com/download/DIY-Auditing-v2.pdf>>; Freedom House, available at <<http://www.freedomhouse.org>>; The Economist, ‘The Economist Intelligence Unit’s Index of Democracy’, available at: <http://www.economist.com/media/pdf/Democracy_Index_2007_v3.pdf>.

Whilst, to repeat, full details are to be found in Lord 2008, the following salient points are worth mentioning to give the reader a firmer idea of how I think indicators can be normatively derived through the steps just mentioned. It is often observed that justifications for democracy are of two kinds. Some are intrinsic: others are consequential. Democracy, in other words, is either justified on the grounds that it is and of itself desirable that individuals should as far as possible govern themselves as equals; or, alternatively, it is justified less on its own merits and more on account of its assumed consequences for other 'goods' such as rights protection, human development, peace and so on. Political philosophers argue about which is the better justification. But that need not overly concern us here, since, as is explained more fully in Lord (2008) both justifications require the same core definition which holds democracy to be inconceivable where citizens cannot act together as equals to exercise public control. In his contribution to the RECON opening conference James Bohman (2007: 66) described democracy 'as that set of institutions by which citizens are empowered as free and equal citizens to form and change the terms of their common life together, including democracy itself'.

Bohman also makes extensive use in his work of the notion of a 'democratic minimum'. If public control with political equality can, indeed, be taken as a 'democratic minimum' then any further conditions which are either directly entailed by that definition, or which follow from it on assumptions that would be hard to dispute, can surely be taken as generic indicators of democratic performance that any polity can be expected to meet, even if, of course, there is room for a great deal of variation in exactly how they might meet them? My own attempt to formulate such a set of generic indicators is summarised in Table 3.1 (again, see Lord 2008 for a full justification of each proposed indicator).

Quelque chose en Plus?

Or why any set of normatively derived indicators will be under-specified

Although they can be taken as generic tests that any political system must in some way satisfy if it is to be classified as democratic, indicators based on a 'democratic minimum' can only tell us a part of what we need to know if we are to make a satisfactory assessment of democratic rule in a particular time or place.

Table 3.1: Summary of all RECON Democratic Audit indicators.

The Indicators based on a democratic minimum

1. How far, how equally and how securely do citizens enjoy rights of free speech, association and assembly?
 2. How far and how equally can citizens exercise public control through free and fair voting?
 3. How far can representatives elected by the people require all public bodies to account for their actions and exercise ultimate controlling power over them on a day-to-day basis?
 4. How far do political parties structure voter choice in ways which help citizens exercise public control as equals?
 5. How plural and how independent is the range of social groups, organised interests and communications media that seeks to influence the polity? How equal is their access to public institutions and how equally accessible are they themselves to individual citizens?
 6. How far are the decisions of the polity deliberated within a public sphere that allows all points of view to be considered, justified and decided in relation to all others, free of inequalities in power and resources?
 7. How far and how equally do citizens enjoy civic capabilities needed for them to exercise public control over the polity?
 8. How far does the polity rest on a rule of law that itself encompasses no more and no less than those conditions required for citizens to author their own laws as equals?
 9. How far is the polity accepted as a unit whose citizens can (themselves and through their representatives) make decisions that are morally and legally binding on one another? And how far can citizens acting as equals exercise public control over the design of the polity itself?
-

First, it is possible to have varying value preferences for how public control with political equality should be delivered. Perhaps the foremost example here is the argument between those who believe that there is inherent value in civic participation (since the citizen only develops and becomes a citizen through participation) and those who believe, to the contrary, representation is to be preferred (since it frees citizens to pursue other values and get on with the rest of their lives). But it also seems likely that when people argue how choice, competition, and consensus, aggregation and justification should be combined in delivering public control with political equality it is, in part, because they consider those ingredients of democratic life to have different relative value.

Second, it is likewise possible to have different preferences for how democracy should relate to other values and identities that are not themselves explicitly democratic. Democratic rule often involves trade-offs between with values that are not themselves explicitly democratic in the sense they could conceivably be secured by other systems of rule. Those trade-offs may, in turn, be made more acute by technological limits to what is institutionally and socially feasible in any place at any one time. Minority protections, certain individual rights including rights to administrative fairness, and even certain technical aspects of governing performance (such as how to achieve certain outcomes that are 'time-inconsistent with the electoral cycle) are all values that different people believe should, to different degrees, be ring-fenced from the normal operation of the democratic process.

Third, as long as we accept that somewhat different justifications of democracy are possible, we have also to accept that there is room for putting different relative weight on those justifications, and that too has implications for standards of how democracy ought to be practised in any one place at any one time. Whilst it makes little sense to suggest that values of autonomy have nothing to do with justifications for democracy, it is up to any one historically situated group of individuals, precisely because they are assumed to be autonomous, to decide how far they *also* value democracy for its consequences, and, if so, which consequences.

Yet it is not just on account local variations in value preference that indicators based on a democratic minimum will always need further

specification in context. A further consideration is that we cannot afford to wait until we have agreed standards in order to make empirical judgements. To a significant degree we also need to make empirical assumptions – even if they are only of a provisional and defeasible nature – before we can set standards. Why is this? One answer is provided by Albert Weale's observation that for any 'non-utopian political theory ought implies can' (Weale 1999: 8-9).

Another answer is to be found in Hilary Putnam's deconstruction of the fact-value distinction that has blighted so much of our thinking about social life. Amongst Putnam's arguments for holding that we will 'misunderstand the nature of fact as badly as we misunderstand the nature of value' if we do not recognise the degree to which they are 'mutually entangled' (Putnam 2002: 46) is a pragmatic view of how we arrive at values. Far from it being the case that values are somehow 'mysteriously embedded' in individual minds prior to encounters with the empirical world, 'we make ways of dealing with the problematical situations' and then 'discover which ones' we think 'are better and which are worse'. In other words we discover our values through 'learning and experience'; and all forms of 'inquiry' work through revisable 'value *presuppositions*' as much as they work through revisable 'factual presuppositions'. 'Changing ones values is not only a legitimate way of solving a problem, but frequently the only way of solving a problem.' (ibid.: 97-8).

This, though, could not be further from implying that we can play fast and loose with our values by abandoning them as soon as they encounter awkward facts. To the contrary the need to ensure that our assumptions of fact and value are individually justified and collectively coherent is a harsh discipline indeed. That discipline, I will argue in the conclusion, points precisely to the need for models that relate value assumptions, standards and empirical collection of evidence one to another in a manner that renders research accountable for the various elements as a package. That argument will, however, be clearer if I first do more to illustrate what I have in mind through the example of the Audit.

Using the RECON models to complete specification of indicators needed to assess the democratic performance of the Union

The previous section implies that indicators based on a democratic minimum will be doubly indeterminate. On the one hand, publics can have varying value preferences for how the democratic minimum should be realised, for how it should be combined with other values, and even for what relative weights should be given to intrinsic and consequential justifications for democracy. On the other, each of those value preferences is likely to depend, in some part, on empirical assumptions that are themselves contingent and changeable.

It follows that any set of generic indicators of democratic performance will be inadequate without further assumptions of fact or value specific to the polity to be evaluated. Moreover, those further assumptions are unlikely just to tweak the generic indicators. To the contrary they are likely to imply fundamental differences in their own right in how democracy can and should be done in local circumstances. This point can be illustrated by considering how assumptions drawn from the RECON models might be used to turn the generic democratic standards in table 1 into indicators specific to the EU. The three sets of indicators that would result would imply markedly different conditions for holding the Union to be adequately democratic.

Consider, first, the different implications of the three models for public control with political equality. Since it assumes that Member States contract with one another to delegate powers to the Union, Model 1 implies that indicators should test for the continued ability of national publics to control those delegations through their national democratic institutions. Whilst it would be consistent with Model 1 for Member States to set up constraining mechanisms at Union level (Eriksen and Fossum 2007) – such as a European Parliament, a European Court of Justice, and an Ombudsman – the only valid test, at the end of the day, of such devices under Model 1 would be how they can help national democratic institutions in *their* controlling powers by, for example, setting off ‘fire alarms’, providing information that is helpful to national parliaments in their scrutiny, or by functioning as ‘proxy actors’ who for one reason or another are likely

to behave as their national equivalents would have done in like circumstances.

In marked contrast, Model 2 requires that public control of the Union powers should be exercised by pan-European majorities of all EU citizens or their representatives. It assumes the Union is or should be a Federal order which has a *demos* of its own and in favour of which Member States alienate – rather than delegate – selected powers. Just as Model 1 does not altogether preclude representative institutions at the Union level, Model 2 hardly implies that national democracies should have no role in controlling Union decisions. Yet, its supporters would probably argue that there are limits to how far the Union could ever be made adequately democratic through national institutions alone, and those limits, in turn, define the extent of powers that would need to be vested in majorities of voters or representatives at the European level if the structure as a whole is to be justified. The following are two examples.

1. Even those national democracies which succeed in securing adequate control over the behaviour of their own governments in the European arena, are likely to struggle to control the whole complex of inter-institutional interactions at Union level. In other words national democratic institutions will be constrained in attempting collective, as opposed to individual, control over EU decision-making, unless, perhaps, they network between themselves to the point at which they arguably become partially Europeanised in their own right.

2. The very fact that the Union is a transversal polity – that much of its policy is directed precisely at dealing with problems that cut across national boundaries – raises the question of whether arrangements for public control should run only through the national territorial units without opportunity for those of similar preferences and values in different Member States to elect representatives, associate, organise themselves or voice views horizontally with one another at the European level. The more the Union busies itself – as it is enjoined to do by the subsidiary principle – only with those problems that cannot easily be solved at the national level on account of their cross-border implications, the more likely it is that disagreements on whether Union policy should take one form or another will themselves cross-cut Member States. This is likely to create constituencies for different

alternatives, at least some of which might feel very frustrated if they are constrained only to work through national democratic institutions and denied any opportunity to associate and combine with the like minded at a pan European level to influence Union decisions. As Philippe Schmitter (1992: 400) has put it, 'Euro-proletarians, Euro-professionals, Euro-consumers, Euro-environmentalists, Euro-feminists, Euro-regionalists, Euro-youths or just plain Euro-citizens' may seek channels of representation at the EU level that do not always run through their national governments.

Models 1 and 2 also have contrasting implications for political equality. Model 1 implies that individual citizens should count equally when the domestic arena is used to control delegations of power to Union institutions, but all national democracies should count equally in the European arena. Since delegated democracy aims to align the Union with continued control by national democracies, it presupposes each of the latter should be equally capable of exercising ultimate controlling powers over the Union. Only if each national democracy formally or informally retains means of reasserting control, would it be justifiable under Model 1 for it to delegate powers to the Union that can be exercised by procedures that attribute more votes to some Member States than others.

Since, in contrast, Model 2 implies that pan-European majorities of voters or their representatives should have some controlling role, it also implies that individual citizens, and not just national democracies, should count equally in procedures designed to ensure representation and control at the Union level. Now there may well be good reasons for holding that any representative procedure at the Union level should, to some degree, assure some minimum level representation of each Member State. Even the European Parliament does that. Its members may work in transnational ideological groupings but they are elected in Member States which receive fixed numbers of MEPs regardless of how many of their citizens participate in European elections. But, if there is to be some fixed level of Member State representation in representative bodies that are also intended to be weighted to size of population, it follows that the two kinds of equality discussed here – equality in the representation of Member States and in that of individual citizens – will have in some way to be related to one another in allocating seats or voting weights. If that is

so, it seems to me that the relationship should at least be principled and consistent, as, for example, would be the case with a linear or degressive proportionality in the allocation of Council votes and EP seats.

In a sense then Models 1 and 2 can be understood as two different views about the proper locus of democratic sovereignty. The first implies that national-level majorities should exercise public control over the Union; and the second that such control should be divided between national and European level majorities. In contrast to both the others, Model 3 can be understood as resting on a more procedural and less substantive view of popular sovereignty.

In other words it matters less under Model 3 *who* exercises public control with political equality than *how* that is done. Consider the post-state and post-national aspects of Model 3. Its assumption that the Union will develop neither the coercive characteristics of a state (at least not in its own right) nor any *pre-political* form of solidarity implies a polity that is constrained to discover means of voluntary compliance (Eriksen and Fossum 2007: 20). In answer to any charge of utopianism that might be levelled at this, defenders of Model 3 might well reply that it is their critics who are a-historical in not recognising that it is *already* implicit in the democratic idea that only those collective decisions that can be justified in rational discourse are legitimate. And from this, in turn, follows a long and precise list of institutional standards. All points of view should have equal access to the agenda; all should be equally entitled to fair consideration free from inequalities of power and resources; and should be accompanied by a right of justification that requires all majorities to give reasons before setting the view in question aside and so on; and voting in any case should be no more than the fairest way of making *pro-tem* decisions pending the emergence of discursively ideal conditions (Habermas 1996). All of these requirements should, in turn, be tied in two ways to public control with political equality. First, all proposals for new law should pass through procedures with the aforementioned features. Second, the administration of all law should then be tied on a continuing basis to procedures with the same features.

Turning from public control and political equality themselves to their enabling conditions, the three models are, once again, contrasting in their implications. Since Model 1 implies that control through national democratic is sufficient for public control of Union decisions, its supporters only need to make the undemanding assumption that all the enabling conditions for democracy - rights, civil society, public sphere, civic capabilities and political community - are, indeed, present in the domestic arena.

Since, on the other hand, Model 2 assumes that pan-Union majorities of voters and representatives should have some role in the control of EU institutions, it may not be enough for supporters of Model 2 to assume that democratic politics at the European level can just piggy back on enabling conditions already established at the national level. But to what degree would they be committed to the view that the Union can reproduce those conditions for itself? To answer this question it is important not to confuse scope, on the one hand, for flexibility in means of combining what is established in the national arena and what might be original in the European arena with an underlying need, on the other hand, to insist come what may on the standards themselves. Some examples illustrate the point.

Firstly, it is an open question how far the European Union would need to forge an original public sphere of its own - rather than rely on a mutual opening of national public spheres to one another. Yet, either way, the standards of public reason and those to whom that standard is owed would presumably have to be the same. If it really is the case that legitimate majority formation implies that every holder of every contrary view has an individual right to a justification for why that view should, as John Stuart Mill puts it, be 'set aside for what are thought to be better reasons and not by a mere act of will, then assumption of Model 2 that majorities of voters and representatives at European-level should sometimes be decisive, presumably also implies that those majorities should be aware of the range of contrary views from across the Union and be able to justify themselves to all their holders.

Secondly, it is likewise an open question whether any sense of political community required by Model 2 could be as 'thin' as a shared understanding of those norms of mutual recognition and

respect that are needed for individuals to communicate and decide together, or whether political community at the Union level would have to be 'thickened up' at least as far as a 'constitutional patriotism' and possibly as far as more affective ties of shared history, myths and *teloi*. On top of all that, there may be scope to vary procedures for majority formation to lighten the demands of political community formation, perhaps with help of decision rules which aim at the largest and not the smallest possible majority or which follow the adage the 'majority should get its way, but only with difficulty' (Lijphart 1984). But whatever combination is adopted from the many possible ways of constructing political community and the many possible ways of designing decision rules, Model 2 presupposes some level of agreement that all Union citizens can bind one another through majorities of voters and of representatives.

Thirdly, if, indeed, majorities of all EU citizens are to make decisions binding on all, it surely follows that all Union citizens are entitled to some guarantee that the majorities binding on them have been formed with the help of 'fundamental freedoms' of speech, assembly and action' that are adequately secured throughout the territory of the Union? Thus even if the political rights necessary for democratic majority formation in Union institutions originate in the Member States, there would be a strong case under Model 2 for agreement at the Union level on minimum standards and guarantees for those rights.

As if that is not challenge enough, standards of public control are owed – as are all rights under the cosmopolitan assumptions of Model 3 – to all those affected by Union policy and law and not just to that more or less determinate set of individuals who enjoy formal status as citizens of the Union. Whereas Models 1 and 2 are free to reproduce the assumption of state based conceptions of democracy that there is a distinction to be made between 'insider' and 'outsider' rights albeit within different containers (Member States in the case of Model 1 and a European federal state in that of Model 2), Model 3 understands democratic rights as being owed to all addressees of a law and not just those who happen to be the same unit of governance. 'Insiders' can only decide how to use their own rights in particular ways. They cannot expunge the rights of 'outsiders' which must be continuously kept in view within their own internal decision-making.

Pulling the various strands together, Table 3.2 summarises how adherents of the three models might test the indicators of a 'democratic minimum' proposed earlier in the paper. The table is necessarily crude and provisional. It is intended to provoke, rather than close, debate on comparative institutional means of realising and recognising the three models. These qualifications aside, it confirms that any one of the models could indeed make broad indicators based on a democratic minimum more determinate. Yet they do so in such markedly different ways. What would count as adequate evidence of democratic performance under the assumptions of any one model would clearly not satisfy either of the other two.

Why make things complicated by doing everything in triplicate?

To recapitulate thus far, section 2 proposed a generic set of indicators for testing the democratic quality of any polity. Section 3 then used the RECON models to suggest three alternative ways in which the generic indicators might be adapted to the specific task of evaluating the democratic performance of the European Union. In this section I suggest it is not only feasible to appraise the Union simultaneously against indicators derived from all three models. I also argue that is the only defensible approach.

There is hardly space here to deal with all the issues involved in attempting to devise the best measures available for each indicator. However, it is worth making two brief points. First, there are several existing data sets which, although they were obviously designed for other purposes, lend themselves to testing specific Audit criteria as variously adapted to the three models. The following are some obvious examples:

- a) Use of Eurobarometer data to test reasons for voter participation or abstention in European elections, to assess degrees of identification with the Union and its representative structures, and to assess those civic capabilities such as citizens' knowledge of the EU that may, at least in some minimal sense, be needed for a functioning representative politics in the European arena.

Table 3.2: Model specific ways of meeting the RECON indicators of democratic performance

Indicator	Model 1	Model 2	Model 3
How far, how equally and how securely do citizens enjoy rights of free speech, association and assembly?	National freedoms of speech, association and assembly are available to domestic publics in their control of powers delegated to the EU.	Union-wide guarantees of freedoms of speech, association and assembly in each Member State.	EU treats freedoms of speech, association and assembly as cosmopolitan rights to which even those addressees of its laws who are not its own citizens are entitled.
How far and how equally can citizens exercise public control through free and fair voting?	Free and fair elections to national executive and legislative offices which control delegations of power to the Union.	Free and fair elections to executive and legislative office at the Union level	Free and fair elections to all representative bodies that together exercise controlling powers over the Union (see next point)
How far can representatives elected by the people exercise ultimate controlling power over all public bodies on a day-to-day basis?	Effective national parliamentary scrutiny and control of powers delegated to the Union.	A European Parliament scrutinises and controls of the powers of other Union institutions.	Combinations of national and European parliamentary control reproduce aspects of the democratic state (holistic public control and political equality) even in a non-state polity
How far do political parties structure voter choice in ways which help citizens exercise public control as equals?	National party competition allows citizens to exercise control over delegations of power to the Union	Parties structure voter choice so that elections to EU office can be used to exercise control over Union decisions	Networks of party actors at the national, European and international levels support an inter-parliamentary co-operation with a cosmopolitan reach.

How far are decisions deliberated within a public sphere that allows all matters to be justified and decided, free of inequalities in power and resources?	Each Member State is a well-formed public sphere where all points of view have equal access to national procedures for controlling delegations of power to the EU	The EU is itself a public sphere in which all views on the exercise of its powers are considered and justified in relation to one another on a basis of equality	The exercise of EU powers is guided by a commitment to ideals of a cosmopolitan public sphere in which equal consideration is given even to policy addressees who are not EU citizens.
How far and how equally do citizens enjoy civic capabilities needed for them to exercise public control over the polity?	Citizens are able to make informed and deliberated choices in selecting representatives who exercise national procedures for controlling delegations of power to the EU	Citizens are able to make informed and deliberated choices in elections to executive and legislative office at the Union level.	As well as allowing its own citizens to make informed choices, the EU puts no unreasonable obstacles on capabilities that addressees of its laws who are not Union citizens need for the exercise of their rights to fair consideration in the making of EU decisions
How far does the polity rest on a rule of law that itself encompasses no more and no less than those conditions required for citizens to author their own laws as equals?	National procedures for controlling delegations of power to the EU are covered by rule of law principles in all Member States	The European Union develops its own democratic rule of law controlled by majorities formed at the European level	Soft law is sufficient to ensure compliance with all conditions necessary for all the Union's policy addressees to see themselves as equal authors of those laws.

Indicator	Model 1	Model 2	Model 3
How far is the polity accepted as a unit whose members can make decisions binding on all? How far can citizens exercise equal control over the design of the polity itself?	National control over delegations of power to the Union ground public acceptance of the EU polity itself. National procedures for bargaining and ratifying Treaty change allow citizens of all Member States to exercise public control over the design of the EU polity as equals	Majorities of voters and their representatives are widely accepted as having the right to make legally binding decisions in the exercise of powers assigned to the EU. Those majorities can also control the further development of the EU polity as equals in so far as changes affect powers already assigned to the Union.	The EU polity is accepted as a legitimate source of law-making by all addressees of those laws (and not just by citizens of the Union) who are also able to control as equals further developments in how the Union polity will apply to them

- b) Use of Eurobarometer data to test reasons for voter participation or abstention in European elections, to assess degrees of identification with the Union and its representative structures, and to assess those civic capabilities such as citizens' knowledge of the EU that may, at least in some minimal sense, be needed for a functioning representative politics in the European arena.
- c) Use of roll-call and other data from the European Parliament to assess the diligence of different categories of representatives, and to assess the albeit cross-cutting standards of competition vs. inclusiveness in the coalitions representatives form between themselves.
- d) Use of national election surveys to assess the salience of European Union issues in the election of national parliaments and national governments represented in the Council; and, on top of that, use of Conference of European Affairs Committees (COSAC) data on the basic procedural arrangements national parliaments employ for the scrutiny of Union institutions and of the behaviour of their own governments in those institutions.
- e) Use of media studies to assess the degree to which public debate on EU matters takes place within a public sphere defined either at the national or European levels.

Of course, these existing data sets cannot tell us all that we want to know. But, then, a second point is in order. Some further data can be added using existing methodologies that have not so far been used for the purposes of democratic auditing. The present Democratic Audit of the EU will use the funding from the RECON project to develop one major new qualitative data source, namely a series of 'evaluative process traces' of individual EU decisions, covering: a) the Constitutional and Lisbon Treaties; b) the 2006-12 financial perspective and subsequent annual budgets; c) EU climate change legislation; d) the development of The European Security and Defence Policy (EDSP) and e) Justice and Home Affairs (JHA) discussions of criminal liability at the European level.

Of course, process tracing has thus far been used as an analytical tool in order to identify causation, rather than as an evaluative tool to assess standards of democratic performance. Yet the rationale for

attempting to trace particular Union decisions with a view to logging any evidence of scrutiny and debate is clear. Only that can provide evidence of the more qualitative and procedural conditions public control. Since, moreover a definitive evaluation of how far standards are satisfied can only be made by assessing the combined impact of national and European means of exercising public control over Union decisions, there is a strong case for tracing individual decisions through representative institutions at the two levels, logging any evidence of openness/closure of the agenda, scrutiny, contestation, account-giving/public justification and so on.

Why, though, do I claim that the seemingly arduous task of simultaneously evaluating the Union against more than one model of democratic performance may be the most defensible approach? Assume there are, in Rawlsian terms, a range of equally reasonable but not always compatible beliefs (Rawls 1993) about ways in which Union ought to be democratic, such that it is impossible to choose between those beliefs except arbitrarily, or, in other words, without presupposing the superiority of one of the very moral claims in dispute as to what would be a 'good' form of democracy at the European level. Next assume next that something like the RECON models captures that range. Only, then, by simultaneously testing the democratic performance of the Union against all the tests set out in table 2 would we be able to conduct a neutral and complete evaluation. Moreover, it will be essential to insist on this point in so far as surveys of democratic performance are not just conceived as means of appraising polities against fixed standards, but, for all the reasons discussed above, means of deciding on-going standards and broader questions of democratic design.

Relationship of the democratic audit to other projects in work package 3

Whilst the other projects in WP 3 are discrete investigations with purposes of their own, the various tests they make of the models are also of relevance to the RECON Democratic Audit indicators in table 3.2. The following paragraphs explain.

Multi-level parliamentary politics. The role of domestic parliaments in European Union questions has traditionally been analysed within the assumptions of Model 1. In authorising European Union Treaties

national parliaments delegate powers to European Union institutions and their continuing involvement in EU questions is best understood as a monitoring of the initial delegation. In contrast, the European Parliament has usually been analysed using the assumptions of Model 2. Elected at the level of the European Union's political system, organised into transnational party groups which mostly represent at the European level left-right cleavages that cross cut the Member States, and capable of checking and balancing the Council of Ministers as a collective body, it would seem to be sensible to analyse the EP as an arena for the formation of European-level majorities. But is the assumption that national parliaments somehow carry the expectations of Model 1 whilst the European Parliament somehow carries those of Model 2 the only way of understanding parliamentarism in the European Union arena? The team at the VU University Amsterdam (VUA) uses the Sociological concept of a field to investigate a third possibility: namely, that interparliamentary relationships in the European Union may be closer to Model 3 in so far as they lead to shared meanings and norms of parliamentary behaviour.

Multi-level party politics. Even though the EU has party groups in the EP and extra parliamentary parties that are now recognised and financed at the Union level, the EU's party system has traditionally been understood as an aggregation of domestic parties. But under what conditions might the Union's party system begin to escape from, and begin to evolve into something different to, a representative structure that does little more than agglomerate pre-existing domestic parties and cleavages? To examine this question the team at the Austrian Academy of Sciences (OEAW) has developed its own indicators of the RECON models which it will use to test representative claims in the 2009 elections to the European Parliament made by the European parties, and by national parties in selected Member States.

Multi-level electoral politics. Overlapping with the Democratic Audit, the University of Reading (UoR) is also undertaking a Multivariate statistical analysis of the factors which influence participation in European elections. Results from the Eurobarometer survey of the 2004 elections offer some support for Models 1 and 3 but not to Model 2. Under the assumptions of Model 2 propensity to participate in European elections might be expected to rise with levels of

identification with the European Union. Yet individual response data indicates that, to the contrary, there may even a slightly negative relationship between voter identification with the Union and turn-out to vote. On the other hand, there is a positive relationship between turn-out and voter perceptions that their country benefits from Union membership, a factor which fits with the Model 1 assumption that the Union is still best understood as a kind of contractual relationship in which Member States agree with one another to delegate specific powers to the Union in anticipation of individual gains. At the same time, though, the Eurobarometer data indicates that turn-out rises with knowledge of the Union, quite regardless of patterns of relative identification either with the European or domestic levels. This would seem to indicate potential for a Model 3 understanding at democracy at the European level in which it is more important that citizens should understand what issues are involved in regulating aspects of their lives in common at the European level than that they should have specific patterns of identity.

Conclusion: In praise of modelling?

David Held (1996), and before him C.B. Macpherson (1977: 4), argue that the value of distinguishing models of democracy lies in this: understandings of democracy are many and varied, but one thing they have in common is that each makes a number of closely interdependent assumptions about ethics, norms, institutions, human nature, economic and social relations, and so on (Held 1996: 8).

One implication of this is that evaluating a polity against a fixed set of standards is only one approach that can be taken to democracy assessment. Another is to distinguish the assumptions of fact and of value that are implied by any one view of how a polity ought to be made democratic and then evaluate the coherence of the two. If it turns out that some of the assumptions of the fact do not hold – and are most unlikely to do so any time in the near future – that may even be grounds for rejecting the whole of the model even though its assumption of value remain attractive (See Putnam quotation above). Such an approach would be no more than commonplace for epistemologists who have long noted that propositions are not just accepted or rejected on account of their ‘correspondence’ with some external source of data but also on account of their own ‘coherence’ one with another.

Table 3.3: Summary of work package 3 projects and their use of the RECON Models.

	Partner	Research question	Use of RECON models
Democratic audit	ARENA/ UoR	How democratic is the European Union according to the three RECON models?	All 3 models
Parliamentary field	VUA	How far is a 'parliamentary field' developing in relationships between national parliaments and the European Parliament?	Model 3
Representative claims	OEAW	How far are parties at the European level becoming autonomous in filtering the commitments would-be representatives make in European elections?	Model 2
Voters	UoR	How far is participation in European elections affected by various national and cross-national patterns of knowledge and identification?	All 3 models
Agencies	MZES	How far do trends towards 'agencification' in the EU's new executive order have implications for representation and control?	
Country case studies		Czech Republic Baltics	

Indeed, it is precisely once we acknowledge the absurdity of the view that assumptions of fact and value should have nothing to do with one another and recognise, to the contrary, that we need to define them so that they can be defended 'as a package' that a question such as 'how ought the EU to be democratically controlled?' even becomes decidable. We may well need to hold open the possibility of moving between models with somewhat different value commitments as the empirical evidence of what is feasible and with what consequences becomes available to us. But that will, in turn, require a high level of recursiveness in setting standards, reviewing outcomes, reconsidering what is feasible and what is not, before returning to the question of standards *ad infinitum*.

In answer to those who would see this as implying too slippery a view of values I would make the following points. First, I have been careful to distinguish between those standards of democratic performance that can and must be specified endogenously within any one polity and those which any polity must find some way of satisfying if it is to be classified as democratic. Thus the approach to the derivation of indicators proposed here assumes that democracy is only a 'boundedly contested concept'. As such it is a good deal less permissive than those who airily hold democracy to be an 'essentially committed concept'. Second, even if I have defended the view that assumptions of fact and value of what would be best involved in making the Union democratic should rightly be regarded as changeable within the constraints of democracy's core definition, I have also repeatedly defended the view that at any one time those assumptions will need to be made explicit and defended as a package. That is in itself a tight constraint on *ad hoc* reasoning. Third, any decision to discard one model in favour of another in the light of evaluations must be based on some reasoned view, to which assessments using the various indicators can themselves contribute, of why another model is to be viewed as a 'second best' to that originally preferred.

I have illustrated these points with the help of a research design that runs the gamut between normative justification of standards, specification of empirical indicators and collection of the best evidence available. The full Audit will be published as a book supported by two web-based sources, one providing a digest of all

quantitative data used to assess each indicator, and another summarising the results of the process traces.

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Chapter 3b

The EU's multilevel parliamentary field Analytical framework

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Introduction

It is widely held that the European Union (EU) harbours a democratic deficit. Most of the democratic deficit proponents understand it as a representative-democratic shortfall. There are two readings of how this shortfall manifests itself in the multilevel configuration that makes up the EU. One understands the EU as undercutting national representative systems of government, the very harbingers of popular sovereignty (e.g. Kielmannsegg 1996; Grimm 1995); the other recognises that whereas new institutions of democratic representation have been established at the European level, most importantly associated with the European Parliament, this has not been enough to offset European integration's weakening of national (and regional) representative systems (e.g. Føllesdal and Hix 2006).

But there are also those that challenge the very notion that the EU has a democratic deficit. This amounts to a second strand of debate which argues that couching the debate on the EU's democratic character and quality, as an EU-level representative defect, is akin to barking up the wrong tree. Giandomenico Majone (1998, 2005) argues that the Union's distinctive confederal character and relatively limited scope

of competences render Union-level representative democracy unnecessary. Many analysts concur because they hold that international arrangements cannot be evaluated by traditional standards of representative democracy. International systems are still premised on national democratic systems. Hence, they should be evaluated by means of less demanding standards of legitimacy or accountability (Keohane 2002; Dahl 1999; Moravcsik 2002).

A third strand of debate both resists deflating the standards of democracy that we hold the EU-level up against but also holds that instead of insisting on specific terms of representation we must reconsider democracy itself, along transnational deliberative democracy lines. James Bohman argues that, in today's interdependent world, '[t]he main issue is not the real or supposed democratic deficit, but the democratic criterion itself [...]' (Bohman 2007).¹ The upshot is that we need to rethink the meaning of democracy, in particular the presumption that democracy requires a single *demos*. Bohman's alternative, transnational conception of democracy is based on *multiple demoi*. To Bohman, deliberative democracy, when properly institutionalised within a decentred reflexive system, can serve as a democratically viable near-substitute for representative democracy. The EU offers the closest approximation to such a system.

Other deliberative theorists (notably the proponents of deliberative democratic supranationalism: Eriksen and Fossum 2004, 2007; Eriksen 2005) disagree, not so much with Bohman's diagnosis, but rather with his cure. The EU's deliberative traits cannot make up for its representative defects. Thus, in line with the first position listed above, the EU must address these representative defects. At the same time, Bohman is correct in noting that majoritarian representative arrangements are difficult to transpose to the EU without significant frictions, for several reasons, which will be spelled out below. Many of the EU's deliberative traits however serve rather narrow groups of stakeholders and elites, rather than citizens in general; hence they cannot make up for the Union's democratically deficient representative arrangements.

¹ Proponents of directly-deliberative polyarchy (Cohen and Sabel 1997, 2003) also embrace a transnational notion of democracy but are less explicit than Bohman in terms of the need to revise existing conceptions.

This brief overview of the main positions in the democratic deficit debate reveals that the debate is not simply one of how best to transpose a familiar (state-based) representative-democratic system to the EU-level. The debate is far more profound: it pits different conceptions of democracy against each other. These conceptions of democracy differ in what they see the key challenge to consist in; they reside in qualitatively different conceptions of what the EU is (and should be); and they refer back to different normative standards. Accordingly, we cannot disentangle the debate and assess the different positions without clarifying what these underlying conceptions of the EU are. Each such conception comes with its own distinct understanding of the character and the structure of democratic representation in the EU. In order to understand the character and quality of EU democracy, we therefore also need to clarify what these are and hold them up against the character of the representative structure that the EU already has, which as we will show, holds a number of distinct – unique – traits. For this purpose, we propose to conceive of the present-day EU's representative structure as a 'Multilevel Parliamentary Field' (Crum and Fossum 2009). Note that the label 'parliamentary field' has been chosen to highlight the central role of representative bodies within the EU. These bodies, we argue, make up a particular field configuration which forms part of a much broader system of representative arrangements in the EU (cf. Lord and Pollak forthcoming; Pollak et al. 2009). Thus, rather than aiming to provide an exhaustive account of the forms of representation in the EU, we single out representative bodies because of their political importance and their centrality in the theory of representative democracy.

The field as an analytical device is open enough to accommodate different conceptions of the EU's representative-democratic arrangement while at the same time allowing us to identify its distinctive traits. How distinct this pattern of political representation is and will remain hinges on the character and the evolution of the larger political system of which it is part.

The main question we address in this article is: What does the nature of the EU's Multilevel Parliamentary Field suggest about the character of the EU polity? In other words, what we seek to do is to try to discern

which conception of the EU *qua polity* fits best with what we know about its representative structure. Is the nature of the EU's representative structure best understood in terms appropriate to a special purpose kind of international organisation, an entity that is set up to serve the Member States through performing a number of functions that have been delegated to it? Or does the EU's representative structure better fit an understanding of the EU as a federal state in the making? Or does it indeed point to an EU that is a subset of a new emerging global-cosmopolitan system best understood as a regional-European system of *government* (which does not necessarily amount to a state)? These three conceptions are meant to capture the most important polity options and axes of debate on the EU's democratic character.²

Since we are concerned with the 'fit' between what we know about the structure of representation in the EU and the type of political entity it is, it could be argued that our approach has a 'bottom-up' orientation because we seek to clarify the character of the EU polity from what we know about the character of its representative-democratic system. But this would be somewhat misleading since, importantly, representative democracy cannot readily be transposed to all kinds of political entities. Consider the debate on the EU's democratic deficit: those that see the EU as an international organisation do not see any need for representative democracy at EU-level. Similarly, those who understand the EU as a transnational – network-based – system are mainly concerned with directly-deliberative, not representative democracy.

The point as we will demonstrate below is that each major alternative conception of EU democracy (as outlined in RECON) comes with its own distinct understanding of the character and the quality of representation in the EU. These conceptions vary greatly in terms of how accommodating they are to the notion of the Multilevel Parliamentary Field. So to the extent that the field brings to light certain distinctive features of the nature of democratic representation in the EU – most notably its dispersed character across different parliamentary sites at different levels – and these features only figure

² These models draw on the RECON model framework. See Eriksen and Fossum 2007.

within a certain given polity configuration, the field can usefully serve to discriminate between the different models.

Given the EU's complex and contested character, and the sheer range of qualitatively different macroscopic conceptions that figure in the debate on the EU-polity, we thus develop a *recursive* analytical approach. On the one hand, we discern the distinctive features of the meso-level representative configuration that the EU has developed. On the other, we outline the three most relevant macro-level polity configurations in the debate on the EU. Thereafter, we discuss which of the macro-level configurations most suitably encompasses the EU's distinctive representative traits at the meso-level. Thus, in the following pages, we first outline the main features of the Multilevel Parliamentary Field and justify why it is relevant to the study of the EU. Second, we flesh out the three EU polity models, and discuss how they relate to the Multilevel Parliamentary Field. The third and last part holds the conclusion, with the main theoretical implications from this approach to analysing democratic politics in the European Union setting.

Representation EU-style

The multilevel parliamentary field

A distinctive feature of the European integration process is that it takes place in a *setting of already existing representative democracies*. The integration process unfolds amidst these existing arrangements; the forging of the EU takes place *by and through* them: Each Member State is directly involved in the process; it can veto any treaty amendment it does not agree with; the EU is based on consensual decision-making; and the EU itself has very weak sanctioning mechanisms. Whereas the representative structure in the EU is two-pronged – from the EP to a European constituency and from each national parliament to its respective national constituency – this system deviates in important respects from the two channels of representation that we normally associate with multilevel federal systems³: a House of

³ The EU lacks a federal *government*; there is a significant *incongruence* between the tasks allocated to the EU level, and the EP's ability to control these at that level; the EU is a modified poly-centric, not a classical mono-centric, system of governance; and finally, the EU is marked by an almost unprecedented cultural pluralism and institutional heterogeneity. See Crum and Fossum 2009.

Representatives that represents the people directly, and a Senate or *Bundesrat* that represents them through their states.⁴ This serves to underline that even if we side with the majority of researchers who would claim that the EU needs a viable representative-democratic system; we cannot directly transpose a statist or a state-derived mode of thinking representative government to the EU, without first modifying it.

The concept of the Multilevel Parliamentary Field does precisely that. It depicts a system whereby parliamentary-representative governments make up an organisational field, that is, a set of 'institutions that, in the aggregate, constitute a recognised area of institutional life', with some element of connectedness and structural equivalence (DiMaggio and Powell 1983: 148). What keeps the components of the field together are patterns of interaction combined with a shared function and the role perception that comes with it: that of representing people's interests in EU decision-making.⁵ The characteristic features of the EU's parliamentary field are discerned through the character and density of inter-parliamentary interaction;⁶ the character of the field's constitutive units (parliaments); and the manner in which these two dimensions interact to give overall shape to the field. Both main features are distinct: the EU is marked by a whole web of arrangements that link parliaments – at national and EU-level

⁴ These two federal versions differ in their representative modus. The former is based on direct representation by population but from different constituencies (federal and state-based), whereas the latter is a mix of direct representation by population (federal) combined with indirect popular representation through sub-unit (*Land*) state officials at the federal level.

⁵ Our conception of organisational field therefore differs somewhat from that of DiMaggio and Powell. To them 'recognised area of life' has generally been defined in sectoral terms, often understood as a (professional) sector.

⁶ Formal procedures that facilitate such inter-parliamentary interaction include: mechanisms for consultation and sounding-out across levels; procedures for establishing whose responsibility an issue is (cf. subsidiarity provisions); institutionalised meeting-places, exchanges of information, personnel and resources; and procedures for the conveyance of best practices. A prominent example is the Conference of European Affairs Committees (COSAC). National parliaments have established offices in Brussels to monitor the work of the EP and have taken measures to involve MEPs in their work. In turn, the EP has also developed various means to engage national parliaments (Neunreither 1994: 310).

together; at the same time, national parliaments and national representative systems vary greatly across the EU.

An organisational field is an apt analytical device to capture these traits because it does not have to be made up of organisations that are mirror-images of each other. Pierre Bourdieu (1980), the grandfather of the field notion, suggests that whereas each field has its own distinct norms and structure, it is nevertheless also clear that the actors within a given field share certain dispositions that incline them to act in certain ways. All parliamentarians are socialised into the norm-set, the role conceptions, and the ways of understanding their own and other's behaviour that are characteristic of parliamentary-representative bodies. This is not something that emerges through relatively sporadic networked interaction; it is a phenomenon and a process that runs much deeper, and is much more entrenched: in language codes and the standard repertoire of organisational forms that we attribute to modern societies; in normative conceptions; in legal provisions; in cultural expectations; and in organisational forms. Students of organisational fields then also underline how organisational fields are sites of isomorphic pressure that operate through coercion, mimesis and normative pressure.⁷ But we cannot *a priori* assume that isomorphism will be the dominant tendency; notably within the complex and dynamic European setting, there are strong fissiparous and centrifugal forces.

⁷ According to Powell and DiMaggio (1991) *isomorphism* relates to 'formal and informal pressures exerted upon organisations by other organisations upon which they are dependent and by cultural expectations in the society within which organisations function'. Actors also opt for isomorphic change without coercive pressures being exerted. In attempts to reduce uncertainty about their own situation, actors often imitate and mimic established practices and organisational structures, which they perceive as efficient and legitimate. This practice can be referred to as *mimetic isomorphism*. There is of course economy in emulating established practices; when the dominant organisational arrangements within a given organisational field are known, new and newly emerged organizations that enter the field tend to mimic the established ones that dominate the field. Finally, isomorphism can also be said to emanate from the professional standards that govern an organizational field. Such standards shape which practices and behaviours that are considered as acceptable and legitimate within a particular field. Professional associations and guilds yield incentives for *normative isomorphism* among actors within a field.

The EU's organisational complexity is one central feature that renders the EU distinct from the main existing organisational configurations in place when thinking about representative arrangements in complex and composite political entities, namely parliamentary network and two-channelled federal system of representation. All EU Member States are representative democracies, and they are integrated in the EU polity. This helps ensure that the EU's Multilevel Parliamentary Field has a greater level of coherence, if not in organisational structures, then at least in norms and orientations than would be the case for a parliamentary network. The notion of Multilevel Parliamentary Field recognises the normative character of parliaments as the main sites for democratic representation, but it also accommodates to the fact that there are qualitative differences between these parliaments, notably the distinctive role held by the EP.

The Multilevel Parliamentary Field also holds traits that set it apart from mainstream federal representative-organisational models, because the field neither presupposes institutional symmetry among representative bodies, nor that they must fit into a clearly laid-out (hierarchical) organisational structure. The Multilevel Parliamentary Field allows for greater variation among the component units and patterns of formal and informal parliamentary interaction (horizontally and vertically), and hence is compatible with less hierarchical and more loosely coupled patterns of interaction than those of federal states. Still, such coupling is however premised on norms that delineate a set of basic values and a shared democratic practice.

The Multilevel Parliamentary Field notion is thus able to capture the distinctive traits of the EU's representative system. It is also particularly suitable to accommodate recent advances in the theory of representation, with direct bearing on the EU – notably insights in *how* the representatives construct the represented and the *dynamic* interaction between representative and represented. Representative theory, as Michael Saward (2006) has noted, has generally taken the constituency of the represented *as a given*. As a consequence, analyses have focussed on how well the representatives reflect the represented, without questioning who and what may be represented politically. As an alternative, Saward introduces the notion of 'the Representative Claim' – 'seeing representation in terms of *claims to be*

representative by a variety of political actors, rather than ... seeing it as an achieved, or potentially achievable, state of affairs as a result of election. We need to move away from the idea that representation is first and foremost a given, factual product of elections, rather than a precarious and curious sort of claim about a dynamic relationship' (Saward 2006: 298).

This critique may be particularly apposite within an EU context (see also Pollak et al. 2009), marked as it is by the forging of a representative-democratic system on top of already existing representative democracies; a highly dynamic process of integration; underdeveloped representative channels (EP – citizens); European 'second-order' elections; overlapping EU-level viz. national powers and competences; and national parliamentary involvement in EU affairs. Because the European integration process takes place in a setting of existing representative systems, it is also a process wherein a broad range of representatives from European, national and regional levels seek to construct – both in substantive and symbolic terms – their respective constituencies, that is, *who* they represent, and *in what sense* they represent them. This process is not only a matter for the institutions at the EU-level, with the representatives in the European Parliament (EP) and the Council of the Union defining whose Europe they represent and in what sense they represent this Europe; it is also a matter of national (and regional) parliamentarians defining whose nations (or regions) they represent and in what sense they represent this nation (or region) within a tightly interlinked European setting. The process is therefore a complex blend of construction (EU) and *re*-construction of (national and regional) constituencies. Precisely because the field notion is so strongly focused on interaction, it can capture the overall character and effects of these processes of construction and reconstruction.

The field understood as a collection of (competing/overlapping etc.) representative claims helps to make sense of some of the distinctive features of the EU. One such is European integration's interweaving of levels (European and national). This heightens uncertainty as to the nature and the character of the relevant democratic constituency – the represented – that each representative body speaks to. In Europe, national parliaments do not only handle national issues; they also

address issues that are to be decided at the European level. What is then the relevant constituency – is it the national *or* is it the European? The notion of EP elections as ‘second order elections’ (Reif and Schmitt 1980; Marsh 1998) speaks to the dynamic interaction between representatives and represented; how representatives frame the European elections (and fail to do so) and how voters pick up on this: EP elections as second order elections implies that the European constituency is activated, but the processes are such structured as to encourage the citizens in each member-state to use the European-level elections to send signals to their national leaders; hence the elections lose much of their *European* orientation. This is suggestive of a broader tendency, where issues that are formally dealt with at the European level are framed as national concerns and vice versa. These processes can thus be understood as intrinsic features of the ongoing dynamic construction and reconstruction of European and national constituencies. In this connection it could be argued that the greater the ambiguity pertaining to constituency, the more merit there is in assessing representative arrangements through the notion of ‘field’, because the field is not premised on a given constituency and is thus able to grasp the nature of and the interaction among these processes of construction and reconstruction of constituency.

The multilevel parliamentary field applied to the EU

The EU is a highly contested entity. To take adequate heed of this fact we discuss how well the conception of the EU representative structure in terms of a Multilevel Parliamentary Field sits with three frequently used and qualitatively different conceptions of the EU polity. The first position focuses on the EU as a system of audit democracy (Eriksen and Fossum 2002, 2007). In this view, the Member States continue to be the strongholds of representative democracy; the EU-level undertakes tasks that the Member States have conferred upon it but subject to Member State oversight and control; and the EU-level contains democratic audit mechanisms as an additional safeguard. The second position focuses on the EU as a federal state in-the-making (cf. Morgan 2005), made up of representative democratic arrangements at both main levels of governance: EU and Member State, and with a division of powers and competences between them akin to that of federal states. The third position focuses on the EU as a fledgling regional-cosmopolitan – non-state – entity, made up of representative

governing arrangements at multiple levels (Eriksen and Fossum 2007). By including configurations that are modified versions of nation-state based democracy *and* a configuration that is a clear departure from the nation-state, the analysis below can also shed light on whether the multilevel configuration that makes up the EU is *based on* and actively propounds nation-state based presuppositions; or whether it has developed new and non-nation-state-based ones.

Each position involves a distinct model of EU representative democracy, including the proper repository of (parliamentary) sovereignty; the appropriate distribution of authority (or hierarchy) between the institutions; their interaction; and the acceptable level of internal diversity. We discuss the models in relation to the main tasks that parliaments undertake, which (as seen from a deliberative democratic perspective) are: legislation/budgeting; control/accountability; and deliberative forum. Legislative/budgeting refers to parliaments' effective role in the process of decision-making/legislation; and their ability to formulate, pursue and control their own agenda, issues and spending priorities. Control/accountability speaks to representative bodies', such as parliaments' ability to hold the executive to account, and the character, range and effectiveness of mechanisms for audit, monitoring and control. Deliberative forum refers to parliaments as deliberative bodies and fora for public debate: bodies that adopt issues, frame issues, structure debates and provide justifications to the public for legislative and other action.

The model of audit democracy

The first model can be labelled as 'audit democracy' and envisages the EU as a functional regime set up to address the kinds of problems that the Member States cannot resolve when acting independently. This model presumes that the Member States delegate competences to the Union, which contains bodies that ensure (mainly through some form of audit) that the powers thus delegated do not undermine or challenge the Member States' representative-democratic institutions.

The delegation of competence to the institutions at the Union level entails a form of self-binding on the part of the Member States; the presumption is that such delegation comes with controls available to

and imposed by the Member States, in order to safeguard that they remain the source of the EU's democratic legitimacy.

For the EU to comply with the democratic tenets of the nation state model, the Union's structure must be set up in such a manner as to ensure that the Member States retain core decision-making powers within the Union's institutional structure. The audit democracy model concedes that this national democratic authorisation draws on some form of a Union-wide representative body, like the EP. It would serve the task of democratic audit,⁸ and not that of a fully-fledged representative democratic system. The representative body would, together with transnational and/or supranational institutions (such as a court and an executive), be set up to help Member States supervise and control the Union's actions. These would be specifically mandated to hold intergovernmental decision-making bodies to account.

The audit democracy model is based on the notion that the representative-democratic dimension of the EU integration process foremost exhibits a *path-dependent* pattern of change, where no real substantive change has taken place at the national parliamentary level. Insofar as there is a change, it is associated with the European Parliament developing democratic audit functions at the European level. The European-level representatives undertake audit functions; such a delimited type of activity does not involve the construction of an EU-level democratic constituency.

The extent to which this structure can be conceived of as a field hinges on the one hand on the EP's role as an audit body, that is, its role as a further parliamentary check on national executives, in conjunction with national parliaments, and on the other on inter-parliamentary interaction. The presumption embedded in this notion of audit democracy is that the EP will through standing committees and special enquiries, through debates and hearings, and so forth shed light on the nooks and crannies of the EU system, and thereby aid the national parliaments in their efforts to hold their executives

⁸ This term denotes a type of institutionalised discourse – strong publics – that promotes democracy through its monitoring and stock-taking role more than through its decision-making role (Eriksen and Fossum 2002; Fossum 2004).

accountable when they operate at the EU level. The main function of this system at the EU-level would be that of deliberative audit; hence, the EP would be barred from undertaking several of the main tasks that parliaments normally undertake. Little would be expected of it in terms of legislation/budgeting and also its control/accountability function would be limited to soft controls without any substantial sanctions put at its disposal. In contrast, national parliaments would retain all of their traditional roles. They are expected to monitor and control EU decision-making through their governments and also ultimately control EU legislation (albeit indirectly) through the confidence that they bestow upon their governments.

It is difficult to understand this system of deliberative audit as a field, for several reasons. First, is because each Member State would retain its own controlling power of the central institutions and not be very dependent on any other parliament. In other words, there would be very limited inter-parliamentary interaction. Second, the system of delegated powers is designed to deter the central audit body from taking on a greater legislative and decision-making role. Third, is because the deliberative audit function does not require very strong institutional measures.

As a consequence, the Multilevel Parliamentary Field has little purchase on the audit democracy model. Indeed, on balance, the audit democracy model is far more compatible with a weakly integrated parliamentary *network*. How well then does the audit democracy model capture the present-day EU? The early, pre-1979 (when direct elections were introduced) EP bears clear resemblance to this deliberative audit version, because the EP was composed of representatives from the national parliaments. This ensured direct contacts across levels. Since the EP was not directly elected and consisted of national parliamentarians, this system was more akin to EU-level audit than to EU-level representative democracy.

The present-day EU has however basically moved beyond the audit democracy model: the EP is directly elected and can claim a direct popular mandate, and it is a decision-making body in a host of EU issue-areas - as such it is not different from national parliaments. But the EU also has traits that give the audit democracy model some

empirical credence. One is the EU's poly-centric and thus highly uneven representative character (with the EP having different degrees of control/presence in different functional realms, and national parliaments also exhibiting great structural and operational variation). In some of the issue-areas that have been uploaded to the EU-level, the EP has only scrutiny, not decision-making, power. The same applies (pre-Lisbon treaty) to treaty-making, where the EP's role is merely consultative. There is thus also an important trend towards 'integration without parliamentarisation' - in those domains where decision-making remains dominated by an intergovernmental approach (Curtin 2007). The question is therefore whether this development at all corresponds with what we should expect from an audit-based multilevel parliamentary field, or whether it is instead a mere instance of executive empowerment or predominance, at the behest of representative bodies.

One contemporary development that actually sits quite well with the audit democracy model is the reassertion of national parliamentary control. The provisions on national parliaments and subsidiarity in the Lisbon Treaty (2007) are compatible with the notion of a deliberative audit-based parliamentary system.⁹ They speak to the need for consultation and information. Articles 1-8 of the Protocol on National Parliaments provide specific guidelines for the how and the what, of the Union's duties to inform and keep national parliaments abreast with the Union's legislative proposals. Articles 9-10 are specifically designed to ensure inter-parliamentary cooperation. As a complement to the Protocol on Subsidiarity attached to the Lisbon Treaty, Article 3 in the Protocol on National Parliaments contains specific provisions on subsidiarity. These could be seen to strengthen the *horizontal* patterns of interaction as they permit national parliaments - when operating together - to challenge the Union's actions and range of activities. The provisions can also be construed as means for encouraging deliberative exchanges on the confines of Union action. What is thus set up is a joint monitoring system, which involves parliaments across levels.

⁹ See the Protocols on the Role of National Parliaments in the European Union and on the Application of the Principles of Subsidiarity and Proportionality, OJ C 306/148, 17 December 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0148:0150:EN:PDF>.

To sum up, it is clear that the audit democracy model presupposes such a weak mode of inter-parliamentary interaction as to disqualify it as a Multilevel Parliamentary Field. The audit democracy model operates with a very weak vertical dimension because the model assigns such a limited role to the EP; the horizontal (based on national parliamentary interaction) dimension is also weak because lines of accountability still work mainly from individual country national executives to their respective national parliaments. What we have shown is that the EU has in several important respects *moved beyond* the model of audit democracy, and the EP's development is the clearest example of this. At the same time, we also noted that the EP is *not* a full-fledged representative body on a par with a national parliament. The notion of audit democracy has merit in helping to understand these *deviations*. But the main conclusion is nevertheless that the EU's representative structure is more institutionalised and forms a denser field than this model of audit democracy can accommodate.

The model of EU federal democracy

The second, federal state-based democracy, model posits the Union as a political community based on institutions that are capable of sustaining an identity-building process and a European demos based on common values. The federal democracy model highlights democratic will-formation through the voter-party-legislature chain, which is stabilised through a common identity and culture. Its vision of democracy is premised on an EU with a commitment to direct legitimacy founded on basic rights, representation and procedures for will-formation, including a European-wide discourse. It assumes that the basic structural and substantive constitutional principles of Union law, as well as coercive measures required for efficient and consistent norm enforcement and policy implementation will be institutionalised at both core levels of government (Member State and European).

The federal democracy model thus posits a high degree of institutional *congruence* across levels, through the EP gradually becoming a fully-fledged European Parliament. In other words, this model highlights parliaments across Europe as conventional strong publics: deliberative and decision-making bodies.

For this model to have any real bearing on the EU there will have to be strong forces working towards isomorphism along the *vertical* dimension, that is, to render the EP a fully-fledged parliament and to situate it in the role of senior representative body in the EU federation. Further, for this development to qualify as properly *federal* the isomorphic pressures have to work towards considerable convergence also along *horizontal* lines, i.e. that the national parliaments will become increasingly structurally and operationally similar. The further presumption is that such isomorphic pressures would operate equally along all three main parliamentary functions, namely legislation/budgeting, control/accountability, and deliberative forum.

Isomorphic federalisation pressure emanates from the fact that the EU integration process takes place in a context made up of already established constitutional democracies, that all have a system of representative government which are in terms of fundamentals more similar to each other than they are different. But for this to become a *European* process proper, the values and forms of representative government must be properly 'uploaded' to the European level in a single, integrative model.

A successful federalisation process presupposes (a) that national parliaments willingly rescind power and prerogatives to representative institutions at the European level; (b) that this comes with strong vertical isomorphic pressure from national parliaments to ensure that the institutions at the EU level will have the same democratic credentials as themselves; (c) that national parliaments seek guarantees that the institutions at the EU level do not threaten their fundamental role; and (d) that the parliaments at the EU and national levels agree on a federal division of powers and competences which renders each level supreme within its sphere of competence. The federal model presupposes the construction of a European-wide constituency, and a division of powers and competences between levels that clarifies in what sense and how the citizens are represented by European-level institutions and by member-state institutions, respectively.

Berthold Rittberger (2005) has shown that, slowly but steadily, national governments did exert isomorphic pressure on the EP to model itself on national parliaments throughout the history of the EU.¹⁰ Viewed in this light, in the European setting of forging a representative system on top of established representative systems, isomorphic pressures can draw on well-entrenched norms that are already embraced by the actors involved. The main actors, governments, are themselves institutional carriers of, and must answer to, their own (and other) democratic constituencies. These norm-sets highlight the centrality of parliament as the institutional embodiment of democratic government.

Nevertheless, there are several questions pertaining to how this model may be properly transposed to the contemporary EU. First, is the question of version of federalism: insofar as there is a development in the direction of the federal model, which *version of federalism* – uni-polar¹¹ or bi-polar¹² – does the EU most closely resemble? Institutionally speaking, the EU is much closer to the uni-

¹⁰ This notion of isomorphism he uses to discuss the degree of 'resonance between internalised norms and ideas and a social situation which upsets the *match* (or resonance) between 'a situation and the demands of a position' (Rittberger 2005: 18).

¹¹ The uni-polar, or compact or cooperative model of federalism is based on a functional notion of federalism. It sees the federal compact as embedded in a set of central institutions, which have binding force on the parties to the federal compact, in those issue-areas that are regulated by the compact. The central institutions are based on a combination or mix of two principles of representation: representation by population and representation by territory. The people are represented in the central institutions through directly elected representatives; they are also represented in the central institutions through representatives from each Member State/entity. The closest contemporary variant of this is the German version of federalism (Scharpf 1988, 1994; Jeffery and Savigear 1991).

¹² In the bi-polar model, the parliament or representative assembly at the federal level has as its constituency the entire polity, but where this only pertains to those issue-areas that are under federal jurisdiction. Each parliament at the state or provincial level has the state or province as its constituency, and again only pertaining to those issue-areas that are under state or provincial jurisdiction. Federalism is premised on a clearly delineated division of powers and competences between levels, so that it is possible to discern clear jurisdictional bounds. For its operation, this model is based on institutional symmetry: the institutional structure of the government at the federal level is duplicated at the provincial/state level. This is often thought of as jurisdictional federalism, and the most salient contemporary examples are the United States (not based on parliamentary rule, though), Canada, Australia and India (all parliamentary federations).

polar than it is to the bi-polar version of federalism, but falls well short of both. Consider how the two channels of parliamentary representation are organised and operate. At the EU level, national governments, through the Council formations, have a direct hand in all EU matters. In much legislation (where the co-decision procedure applies), the EP acts as a co-legislator. Thus the two bodies (EP and Council) have to hammer out decisions between them. Within this modified uni-polar structure, national parliaments work through their national governments. At the same time, national parliaments enjoy powers over the full range of tasks that the government subject to their oversight undertakes.

But the vertical dimension of this process differs somewhat from what is the case with state-based federations; the EU stands out here because there is no single centre of authority in the EU. As noted above, the representative system in the EU is programmed along two *incompletely, or at least distinctly, institutionalised* federal-type channels: it is predominantly uni-polar (focused on one level) within the realm of Community action, where issues are hammered out at the EU-level by the EP and the Council. At the same time, the initial Maastricht rationale to establish two intergovernmental 'pillars' was to serve as curtailments or *de-facto horizontal constraints* on further integration, so that the Member States would retain competence within these areas. But what is important to keep in mind is that over time, more and more issues have been 'lifted' up to the EU level. Many of these are now dealt with under the system of uni-polar decision-making associated with the Community method. Yet, a host of critical issues, notably pertaining to security and foreign policy, have become the preserve of an intergovernmental decisional network, which is basically outside of the purview of the EP, but is subject to the Council. Thus, ironically, some of the bipolar logic has been retained but without including the EP and the Commission, which are shut out from decision-making over issues that are increasingly handled at the EU-level through the Council structure. This has given a particular twist to the way in which the vertical and the horizontal dimensions are operating in the EU. One obvious effect is to have made it more important for national parliaments to involve themselves in EU matters. We thus end up with a unique way of constructing a bipolar federal system as far as intergovernmentally

run EU affairs are concerned. The upshot is that the EU is basically run by a uni-polar logic in the Community domain, and an incomplete and very awkward 'bipolar' logic in those competences that are subject to more intergovernmental methods.

Thus, we see that the EU system contains elements of the federal model. But it should also be added that there are several traits of the EU that set it apart from all federal state-based systems. First is the distinct lack of parliamentary congruence in the EU. National governments have direct influence on and/or final say on the entire range of political issues, whether these are defined as European or as national. But this does *not* translate directly into national *parliamentary* control because much of this is situated in the Council where decision-making lacks transparency and individual states may be outvoted. Second, the absence of parliamentary congruence in the EU is further reinforced by the fact that whereas each national parliament has its own government to control, the EP has no proper government to control. In fact, most executive responsibility for EU policies goes back to the national governments. Third, the EU is a modified poly-centric, not a classic mono-centric, system of governance. A system of poly-centric governance is 'an arrangement for making binding decisions over a multiplicity of actors that delegates authority of functional tasks to a set of dispersed and relatively autonomous agencies that are not controlled – *de jure* or *de facto* – by a single collective institution' (Schmitter and Kim 2005: 6). Essentially then there is no single institution, and not even a single level, within the EU that can be seen as the centre wherein sovereignty is embodied. Indeed in many respects the national governments operate as distinct political (sub) centres for their citizens even if they have come to pool and delegate important powers to the European level. Fourth, the EU is marked by an almost unprecedented cultural pluralism and institutional heterogeneity. This lack of institutional symmetry makes it extremely difficult to work out and to operate any division of powers and competences in a manner consistent with federal principles. Fifth, the EU system, as we showed in the discussion of the deliberative audit model, contains procedures and arrangements for linking parliaments across levels that are far more extensive than in any other federal system.

To sum up, then, it is clear that the gradual strengthening of the EP as a decision-making body is informed by a uni-polar version of the federal model, which is quite similar to how the German federal system works. But in the EU, when this process really took off, from the Treaty of Maastricht onwards, important horizontal provisions were put in place to prevent the Union from intervening in what were seen as core national prerogatives. The last decade has seen a significant hollowing out of these horizontal constraints, either through their inclusion under the First Pillar or through the Council taking over the role as national chaperon, as more and more of the issues have been lifted up to European level. The upshot is that the EU's development has traits of both models – audit and federal democracy.

The federal democracy model is not well attuned to the Multilevel Parliamentary Field because the federal model is based on two lines or channels of accountability, each of which refers back to a clearly delineated constituency. The Multilevel Parliamentary Field might however be a useful mechanism to *work towards* a federal system. Precisely because the EU is forged in a system of already established representative-democratic systems, the present-day EU's Multilevel Parliamentary Field offers a means for conveying isomorphic pressure on the EU-level and across widely different national representative systems. The pressures within the field could then help to shape the necessary symmetry among the national parliamentary arrangements that a federal system requires. Once the federal system is properly entrenched, the field is reconfigured into a two-channel arrangement, and this then *replaces* the field.

But such a development presupposes very strong isomorphic pressures, which the present-day EU does not contain. The EU is not a state. It is barred from taking on the hierarchical arrangements and the degree of territorial control that are characteristics of the state. Further, there are significant constraints on the process of transfer of functions to the EU level. The EU therefore falls well short of the model of state-based federal democracy. Hence, we need to consider if non-state based models are more apt to capture the EU.

The regional-cosmopolitan model

The regional-cosmopolitan model envisages democracy beyond the template of the nation state. The model we discern here posits the European Union as the trans- and supranational level of government in Europe, and as one of the regional subsets of a larger *cosmopolitan* order. This implies that the Union will be a post-national *government*, a system whose internal standards are projected onto its external affairs; and further, that it will be a system of government that subjects its actions to higher-ranking principles – to ‘the cosmopolitan law of the people’.

This regional-cosmopolitan model highlights democratic opinion and will-formation through a regional-European representative system that, as a subsystem of a wider cosmopolitan order, operates within a *limited remit* of governmental functions. Its diversity, complex composition, and thinly based allegiance posit public deliberation as playing a greater role than formalised structures of representation, although such are necessary and must be established at all relevant levels of government.

The regional-cosmopolitan model posits that the European integration process transforms parliaments. First, in line with Bohman’s notion of transnational democracy, any given parliament is no longer the main institutional manifestation of a given, sovereign, democratic *demos*, but is rather one among a chain of strong publics who *together* seek to accommodate the interests and concerns of a multitude of interdependent *demos*. These *demos* are nevertheless territorially delimited; they co-exist within a delimited political entity which is able and willing to uphold a set of borders to the outside world. But these borders are far more permeable than what is the case with state-based borders. Second, within this structure, parliaments in the EU operate together in an interactive field to forge legislation and to check executive power. Third, this field is not confined to the parliaments that inhabit the given polity (EU); it links up with parliamentary bodies outside the EU, as well. This is necessary to handle a level of interdependence that not only ties the EU together but also links the EU to the outside world.

Thus, from these three points it should be clear that our regional-cosmopolitan model has affinities with Bohman's transnational democracy version. But our model also differs from Bohman's because we see parliaments as components of systems of *government*, not mere systems of governance, which Bohman portrays these as. In other words, in our view, parliaments are not simply institutionalised publics; they are also able to entrench will formation in legislation and hold the executives to account.

The regional-cosmopolitan democracy model is entirely compatible with the notion of Multilevel Parliamentary Field. Schematically speaking such a model would have the following characteristic features. First, it will be made up of systems of governments, which differ from both states and networked systems of governance. This is entrenched as a field through formal structures of interaction, consultation, and co-operation, with different degrees of density at different levels. Second, at each level of the field we find a distinct functional delimitation. With this we mean that in contrast to the sovereign state which is formally equipped to handle all issues and concerns on its territory; the regional-cosmopolitan model shares with federal systems the trait that no single horizontal entity is permitted to handle all types of issues, but rather has a set of issues over which it wields supreme power, while the rest are dealt with at lower or higher levels. This division stems from how the vertical dimension operates, which is to uphold a division of tasks across at least three core horizontal levels (national, regional-European, and global). In contrast to the audit democracy model, it posits the presence of parliaments as strong publics, and as effective legislators, at all three main levels. The system is set up with a division of tasks between levels, where each level has some functions over which it is supreme. At the same time, there is far more diversity among parliaments than in the federal model. Instead, the regional-cosmopolitan model recognises, on the one hand, differences in the parliamentary structures as an expression of democratic autonomy while underlining, on the other hand, the need for parliaments to be linked together and to operate in relation to each other (horizontally and vertically). Close co-operation across these institutions makes up for and reduces the difficulties that institutional difference and diversity produce.

The regional-cosmopolitan model contains considerably weaker isomorphic pressures than the federal model. One reason is because the model presupposes a stronger civil society and deliberative component as part of action co-ordination than is the case in the other two models (audit democracy and federal democracy). Another reason is because in a regional-cosmopolitan system, all representative bodies will be functionally delimited even if these limits themselves are open to deliberation. Functional delimitation is devised precisely to avoid conflicts, turf-battles etc.

Among the three models presented here, it is the regional-cosmopolitan model where the Multilevel Parliamentary Field seems to be most at home and its distinctive features come out most clearly. What is also clear is that whereas we have in Europe for decades already seen a process of entrenching representative government at the EU-level, this process has thus far *not* been a simple matter of uploading a state-based institutional arrangement to the EU-level. The EU's development has been more uneven and contested; it also contains sufficiently many distinct features to warrant discussing it under this different – non-statal – frame.

The regional-cosmopolitan model is also the model that offers most scope for the dynamic interaction between representatives and represented, reflected in the representative claim. In other words, this model is able to capture the EU's many representative ambiguities some of which we referred to in Part II above. This model also shows that the dynamic interaction of representatives and represented unfolds not simply between levels (which the other polity models suggest), but within a more complex *field*, marked by complex vertical and horizontal patterns of interaction. In this sense the construction of the European constituency warrants special attention: it takes place amidst a wide range of differently constituted national constituencies, which highlights that also the process of reconstituting national constituencies is a complex and multifaceted process.

The cosmopolitan dimension adds to this complexity because it makes the question of constituency *scope* an ever-present critical concern: The construction of the European constituency takes place within a broader global setting, which brings up the issue of bounds:

when and under what circumstances can the constituency be confined to Europe and when is it global? When and under what circumstances can representatives appeal to Europeans as Europeans only? In what sense does Europeanness manifest itself in representative claims across Europe? There is no reason to assume that this will be the same across Europe; thus how this manifests itself within each national constituency is an important question.

Conclusion

This article took as its point of departure how multifaceted the discussion of the EU's democratic deficit is. The fact that the positions in this debate differ greatly on what are the appropriate democratic standards and further that they operated with widely divergent conceptions of what the EU is and should be, show that there is a clear need for an analytical framework that can breach these divisions. We sought to address this by taking as our point of departure what we believe is the most apt characterisation of present-day EU's representative character, that of the Multilevel Parliamentary Field. The Multilevel Parliamentary Field offers a more apt description of the system in place in the EU today than what can otherwise be found in the literature. Most students of representative democracy in the EU operate with a conception of the EU's representative system that mostly approaches the different representative sites in the EU in isolation rather than by highlighting how they interact within a single multilevel polity. We have shown that the EU holds sufficiently many distinct features to force us to rethink this notion. More research is needed to clarify how this field operates across Europe.

In this article our purpose was to clarify what kind of polity the EU is by focussing on the character of its emerging representative structure. We started by arguing that the distinctive character of EU representative democracy is well-captured by the notion of a Multilevel Parliamentary Field. Thus, a proper conception of the EU needs to be compatible with the Multilevel Parliamentary Field. We analysed three different models of European democracy and found that the third model, the regional-cosmopolitan, offers the best reflection of the Multilevel Parliamentary Field. This argues in favour of this non-

statual conception of the EU as appropriate to the character of the EU *qua* polity.

Representative democracy has generally been understood and studied within a state-based frame. To properly capture it within such a complex non-state type entity as the EU represents a major intellectual challenge. The challenge is threefold: First is to envisage a polity that is regional-cosmopolitan in character. What kind of entity will this be – that can sustain a cosmopolitan vocation and yet also serve democracy? We have suggested that it can be a multilevel structure based on authorised jurisdictions. This can also be cast as a system of government but with the important proviso that government need not add up to state (Eriksen and Fossum 2007).

Second is to understand representation within such a system. How does representation work within a parliamentary field? We have drawn on Saward's notion of representative claim because it provides us with an approach to representation that is compatible with the idea of a field. But forging this link between representative claim and field also means that we must rethink representation. This involves a potentially very significant departure from orthodoxy. We need to consider the dynamic relationship between representative and represented, not simply as a dynamic that unfolds within one constituency, but rather as a set of parallel processes that unfold within a multitude of overlapping constituencies.

Third and finally is democracy. Relevant questions pertain to democratic quality and democratic accountability. A field will necessarily foster multiple, overlapping accounts; can such a field preserve accountability or will it undermine it by diffusing it across a multitude of actors?

We have sought to demonstrate that contrary to Bohman and the transnationalists there is no need to abandon representative democracy when discussing EU democracy. At the same time, we have shown that the EU holds so many distinct features that we cannot directly transpose state-based representative arrangements to the EU. We can only establish this through means of a proper analytical framework. Up till now no such framework has existed.

The relevant framework, we have proposed is the Multilevel Parliamentary Field, coupled with the representative claim. This framework comes with its own theoretical and empirical agenda, which requires further elaboration.

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Chapter 4

Applying the RECON models to gender democracy in Europe

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Introduction

Most feminist research on democracy originates in a criticism of liberal democracy as conceptualised and practiced in modern nation-states. At a theoretical level, feminist critics have exposed the abstract individualism of liberal democracy which, being blind to gender differences, has led to women's exclusion from structures of political representation and participation and the perpetuation of gender injustice (Phillips 1993). According to this literature, women's political exclusion – often seen as constituting liberal democracies' gender deficit (Marques-Pereira and Siim 2002: 173) – has come about in two ways. First, because formal democratic processes in liberal

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democracies take abstract individual interests and majority rule as the primary material for political decision-making, minority social groups or those marginalised due to a history of structural disadvantage are rendered invisible. Second, the experiences and interests of dominant groups in society become universalised and established as a norm, resulting in a phenomenon which Young termed 'cultural imperialism'. This results in a situation in which the dominant group(s) project their own experiences, interests and perspectives as representative of humanity, while those of marginalised groups are silenced or at best forced to be articulate in the languages and norm perspectives of the dominant groups (Young 2000: 141-142).

Women's exclusion from democratic structures of representation and participation has generated a considerable amount of empirical research, with gender inequalities in parliamentary representation representing one of the most identifiable areas of scholarship in this field. This work looks at the factors that shape women's access to legislatures, such as electoral systems, party recruitment practices and political culture as well as institutional measures aimed at redressing women's political under-representation (Norris and Lovenduski 1993; Dahlerup and Freidenvall 2005; Tremblay 2008). A second strand of research on gender and political representation examines the relationship between women's representation in parliamentary assemblies (descriptive representation) and gender-sensitive and women-friendly policy outcomes (substantive representation). This strand of research explores the questions of when and how the representation of women's interests occurs, what interests are represented and who represents those interests (Swers 2002; Childs 2006; Sawyer et al 2006). More recently, however, the scholarship on gender and politics has expanded its original focus on women in parliaments to examine the role of state bureaucracies in redressing gender inequalities in society and advancing women movement's goals. Under the rubric of 'state feminism' this research looks at the conditions under which women's policy agencies within government structures facilitate effective linkages between women movements and state responses to women's movement goals (Stetson and Mazur 1995; Outshoorn and Kantola 2007). However, in contrast to research on women's legislative representation, the scholarship on state feminism has seldom problematised the nature of liberal democracy. Indeed, it is

only recently that gender and politics scholars have begun to view the emergence of women's policy agencies as a development in women's political representation (Lovenduski 2005) or, more generally, as part of a wider process of liberal state democratisation (Rai 2002).

The nation-state provides the main focus for the above themes, with some research addressing gender politics in sub-state, federal and devolved democratic arrangements. In contrast, the scholarship on gender politics in the European Union rarely addresses the issue of gender politics and policy in relation to democracy. This research has been dominated by a focus on the implementation and impact of EU gender policy in Member States, though attention also has been paid to the role of supranational actors and institutions in the development of such policy (Hoskyns 1996; Rees 1998; Lewis and Ostner 1991; Rossilli 2000; Verloo 2007). However, this literature contains important gaps.

First, while studies examining the impact of EU membership on gender equality have uncovered factors that act to facilitate and constrain the implementation of policy at the national level, these studies tend to ignore the political processes accompanying the introduction of such policies at the supranational level. Thus, referring to an old Greek tragedy, one author commented that EU equality directives were viewed in this literature as a kind of *dea ex machina* that is, as if they came 'falling out of the sky' rather than being the products of political action at national and European levels by women (Reinalda 1997: 197-8).

Second, the publication in 1996 of Hoskyns' *Integrating Gender* marked the start of a wealth of research investigating the main actors and institutions driving the evolution of EU gender policy. Using a variety of institutional and social movement approaches, these studies have explored how women's trans-national advocacy networks, EU institutions and ideology interact with one another in the development of gender equality policy in the supranational arena. (Mazey 1995, 1998; Rossilli 1997; Pollack and Hafner-Burton 2000, Cichowski 2002; Ellina 2002). However, this research has mainly focused on a selection of transnational actors and EU institutions (particularly the European Commission, the European Court of Justice and the European Women's Lobby) while the role of other EU institutions (e.g., European

Parliament and Council of Ministers) and other transnational organisations ('minority' feminist groups, political parties and labour organisations) have received much less attention.

Third, while studies on gender in the EU have concentrated on both national and the supranational spheres of decision-making, these spheres have so far been unconnected in this research. As a result, we have little understanding of how regional, national and supranational institutions and organisations within the EU interact with one another in the processes leading to the introduction of a new policy on gender equality in the EU and its implementation in Member States. A further consequence of this strict separation of levels is that studies on gender in the EU tend to take for granted that their unit of analysis is the European Union rather than taking it as something to be questioned and further explored. One important exception to this is the recent work by Anna van der Vleuten (2007).

Last, but not least, the literature on gender equality in the EU has been dominated by a technocratic understanding of policy-making. In other words, these studies very rarely conceive the EU as a site of democratic politics but rather as a dedicated space for policy outputs. Indeed, the hidden model of the EU in this work is that of a top-down regulatory regime, rendering unproblematic the policies developed at EU level on gender equality. Within that framework, questions such as: 'what interests are being represented in those processes?'; 'who is included and excluded?'; 'to what extent are those involved in the policy process accountable to European women citizens?' are not addressed.

The RECON project provides a very fruitful theoretical framework for investigating questions of democracy and gender in the European context which, as the above brief review indicates, have remained unexplored in the gender and politics literature. The RECON focus on models of democracy helps us to move away from conceptions of gender democracy which are too focused on the representative dimension – that of women's presence in parliaments and the substantive representation of women's interests in parliamentary and bureaucratic settings. It opens a space where the fundamental democratic questions of accountability, inclusiveness and responsiveness can be explored. Within the RECON models, the concept of

deliberative democracy is particularly useful as it can throw light on questions of gender and democracy in the context of the multi-layered EU polity since – unlike majoritarian versions of democracy – it allows us to investigate multiple decisionmaking contexts. It also facilitates a more holistic analysis of gender politics and democracy than other approaches, as gender equality is treated as one of a range of interests and perspectives competing with others in a democratic decision-making process. There is a strong tendency in the literature on gender and the European Union to focus too much on EU policy outcomes and too little on EU institutional design and the input side of democratic decision-making. This derives from a liberal intergovernmentalist understanding of the European Union that sets aside questions concerning the democratic status of policy outcomes in relation to gender equality (see e.g., Van der Vleuten 2007). RECON's three models for reconstituting democracy in Europe opens up an entire new line of research on gender and democracy in the EU, where the question of what kind of entity the EU is, is problematised rather than assumed.

Defining gender democracy

The core concept that we seek to define and assess in this study is that of gender democracy¹. Democracy itself is a highly contested concept, and evaluations of it tend to emphasise its procedural aspects (Schumpeter 1947: 269; Huntington 1991: 7; Dahl 1971: 5). Procedural definitions of democracy are relatively easy to operationalise, as they examine relatively observable practices such as the right to vote, the extent of competitive politics, the degree of freedom of association, and the fairness of the electoral process. However, procedural assessments of democracy have been criticised for tending towards a 'ticking boxes' exercise. The point is made that the mere presence of certain institutions and practices in a polity does not guarantee its democratic nature. For instance, a political system from which women were conspicuously absent could score highly in terms of democratic performance. In an effort to redress this deficiency, the International IDEA assessment methodology (Beetham et al 2002) emphasises the need to

¹ This section and the following one on constructing gender democracy indicators is derived from Galligan and Clavero 2008b, which provides a more substantive treatment of the issue.

start from a substantial, rather than a procedural, definition of democracy – in other words, a ‘thicker’ definition which characterises democracy in terms of a set of normative principles against which institutional rules and practices should be judged. In this context, democracy is a form of rule based on two criteria: public control over public decision-makers and decision-making, and political equality between citizens in the exercise of that control. In other words, it requires that democratic institutions embody, or serve to realise, the democratic principles of public control and political equality.

While this definition of democracy brings us a step closer to gender democracy, it does not fully capture the gendered aspect and so does not automatically entail that such a democracy will be gender-sensitive. The issue is how the principle of political equality is conceptualised. Indeed, the assumption that this democratic principle can be realised through formal rights of participation and representation which are granted equally across the adult population, irrespective of gender, is a central feminist criticism of liberal democracy. This understanding of political equality presupposes an abstract idea of the individual which, being blind to gender differences, has effectively led to women’s exclusion from democratic structures (Phillips 1991). There is a broad feminist consensus that women’s exclusion from democratic structures of representation and participation constitutes a gender democracy deficit which needs to be redressed. However, there is no similar consensus over the question of what an ‘engendered’ democracy would look like. Thus, while identifying a democratic system where the principle of political equality has been obviously contravened may be a straightforward matter, defining an ideal democratic system in which this principle has been fully realised is a more problematic task.

One route that unpacks this problem is through the related concept of ‘parity’. Phillips (1995: 59) uses the term parity to indicate ‘a rough equality between the proportion of women and men elected’. For her, the institutional requirements to achieve parity take the form of affirmative action strategies, such as gender quotas. A similar, though somewhat ‘thicker’, conception is provided by Vogel-Polsky (2000), who defines parity democracy in terms of power sharing between women and men rather than simply in terms of equal presence.

However, in their respective interpretations of parity democracy, both Phillips and Vogel-Polsky do not address the more subtle issues of inclusion, group recognition and equal respect in political deliberation that are essential to gender democracy. Nancy Fraser emphasises the substantive dimension of decisionmaking, seeing 'participatory parity' as an ideal of justice requiring social arrangements that permit all to participate as peers in social life (1998: 28-29). What is distinctive about Fraser's formulation of parity participation is its normative character, as it establishes a link between democracy and justice. She emphasises the importance of the political, arguing that it constitutes the terrain where struggles over justice claims of redistribution and recognition are carried out. In her view, the political constitutes the arena where questions of who is included and excluded from the circle of those entitled to justice claims are decided, as well as establishing the rules and procedures for resolving contests in relation to those claims (Fraser 2005: 74). Thus, when women are deprived of the possibility of participating as peers with men in the political realm, this represents a distinctive type of injustice which, although related to economic and cultural injustice, cannot be simply reduced to either of them.

However, while the concepts of equality and parity are essential for defining gender democracy, the latter is a broader concept encompassing other elements. Thus, in defining gender democracy it is essential that in addition to the norm of equality, the principle of public control – and associated principles, such as accountability – is not lost. An additional challenge in defining gender democracy is that the definition should both capture the multi-dimensional nature of gender democracy, and be amenable to being evaluated. Thus, a balance must be achieved between a 'thick' definition of gender democracy which risks becoming too abstract to be operational, and a 'thin' definition that will be easy to assess but misses out on the rich meaning of the concept.

Thus, if we are to understand and operationalise gender democracy, the concept must fulfil four basic requisites:

- It should be informed by a substantive conception of democracy while also recognising the importance of the procedural dimension;

- It should take into account issues of inclusion, recognition and equal respect;
- It should give equal weight to the principles of political equality and popular control
- It should be sufficiently grounded to be operational in practice.

In this context, deliberative democracy offers an ideal framework for operationalising gender democracy. According to deliberative democracy theory, what makes a political decision democratically legitimate is not that it has majoritarian support, but rather that it has been critically examined by 'qualified and affected members of the community' through a reason-giving practice. In other words, a legitimate decision is one that can be consented to after withstanding scrutiny by those that are bound by it (Habermas 1998). Yet, for deliberation to be democratic, the requirement of rationality, while essential, is not sufficient, since, in order to conform to the democratic principles of political equality and popular control, deliberation must be public and it must also be inclusive (Young 2000: 21-26). This entails, first, that deliberative practices must be open – conducted publicly and in full view of all affected members of the community. Second, it entails that deliberative practices must include, on equal terms, all affected members of the community. Third, it entails that decisions must be justified to all affected members and are accepted by all in a free and non-coercive debate (Gutmann and Thompson 2004: 3-7; Eriksen and Fossum 2002: 402). Thus, according to deliberative democracy, a political decision is to be considered 'democratic' if it fulfils the principles of inclusion, political equality, publicity and reasonableness.

The concept of deliberative democracy is particularly suited for exploring democratic performance and practice in the multi-layered polity of the European Union. In the first instance, deliberative democracy can break the conceptual link between democracy and the nation-state. Other conceptions of democracy (e.g., aggregative) take the nation-state as a template, equating democracy with its core institutions and procedures and with an idea of sovereignty as territorially-bound and sustained by national identities (Eriksen and Fossum 2000: 6). In contrast, the deliberative model does not tie the

concept of democracy and democratic legitimacy to a particular organisational form (e.g., majoritarian parliamentarianism) or procedure (aggregation of interests through voting), both of which are commonly found in nation-state liberal democracies but are much less in evidence at the supranational level of EU governance. Third, a deliberative conception of democracy distances itself from arguments of liberal intergovernmentalism suggesting that EU legitimacy does not derive from its democratic nature but rather from its efficiency in solving common problems that Member States can no longer deal with on their own (Majone 1998; Moravcsik 1998). Deliberative democratic theorists disagree with the liberal intergovernmentalist proposition, arguing that democracy cannot be defined in terms of output efficiency alone because this is insufficient to call a government democratic: even a benign dictatorship might succeed in aligning policy outputs with citizens preferences (Lord 2007; Eriksen and Fossum 2004: 439).

Although deliberative democracy provides a valuable tool for developing a framework for assessing gender democracy, it remains primarily a theoretical model. Yet, some empirical research has begun to provide answers to questions such as the role played by political institutions in forging democratic deliberation, the contextual factors that are conducive to deliberative politics, and the impact of democratic deliberation on the quality of policy processes and outcomes (Bächtiger and Steiner 2005). The bulk of this research has focused on domestic settings, especially legislatures (Steiner et al 2004), though there are a few studies that focus on other political arenas, such as international governance (Johnstone 2003; Nanz and Steffek 2005) and the European Union (Joerges and Neyer 1997; Magnette 2004; de la Porte and Nanz 2004; Naurin 2007). In general, empirical deliberative democracy treats the main assumptions of this theory as hypotheses to be tested in real world politics. There are few studies that use the normative criteria of deliberative democracy as a yardstick against which the democratic quality of political decision-making in a given system can be assessed (Nanz and Steffek 2005; Stie 2007). Indeed, Neyer (2006: 782) makes the point that 'if deliberation is non-inclusive and if citizens do not have the chance to affect the formulation of a policy, deliberative governance can at best

be deliberation for the people, but can hardly suffice the criterion of being deliberation by the people'.

Deriving gender democracy indicators

In the previous section, the concept of gender democracy was informed by the four normative criteria of deliberative democracy identified by Young: inclusion, political equality, reasonableness and publicity (2000: 23-25). However, in order to use the criteria of deliberative democracy as a yardstick against which assessments of gender democracy in the EU can be made, these need to be operationalised in a set of observable indicators.

The realisation of deliberative democracy ideals requires that a set of minimum institutional conditions are fulfilled. In this respect, Eriksen (2006) draws a distinction between democracy as a legitimisation principle and democracy as an organisational principle, comprising institutional norms and structures. The challenge for empirically assessing the quality of democracy from a deliberative perspective is to link these two principles. This entails that, in deriving a set of indicators of gender democracy in the EU we should identify what institutions and procedures are required to realise those criteria. These will constitute a core of minimum conditions of gender democracy. Nonetheless, in examining whether those minimal conditions are in place in the case of the EU, we need to bear in mind that the normative ideals of deliberative democracy can be realised in practice by different institutional means. For example, in liberal democracies at the nation-state level, the inclusion of all affected voices in decision-making is obtained through free legislative elections whereby citizens periodically elect their representatives. Election procedures may include formal provisions aimed to achieve a gender balance in the composition of legislatures, though this may also be achieved by other informal means. Nonetheless, direct elections to the European Parliament only decide one half of the Union's legislature so that the criterion of inclusion needs to be achieved through other institutional means; e.g., by providing institutionalised access to civil society organisations to deliberative arenas, insofar as these mediate between citizens' interests and decision-making elites (Nanz and Steffek 2005: 369). In an analysis of gender democracy, attention will thus be focused on access provided

to civil society organisations representing women and gender interests in society.

However, compliance with the minimal indicators of deliberative democracy does not give is a measure of the quality of gender democracy, since these represent necessary, but not sufficient conditions. For example, political institutions may grant the right of equal access to civil society organisations representing women's interests in decision-making arenas, though arrangements of this kind does not be necessarily entail that the normative criteria of inclusion is realised in practice. Similarly, electoral laws may include quota provisions aiming at reaching a gender-balance in the composition of parliaments, though in real-life democracies some of these provisions may deliver disappointing results (e.g., women candidates are placed at the bottom of electoral lists). For this reason, our list of indicators of gender democracy makes a distinction between 'minimum indicators' (referring to institutional arrangements) and 'beyond the minimum' indicators (referring to actual deliberative practices).

In this section, then, we operationalise the normative criteria in turn, building in each case a series of indicators that are intended to assess the extent of gender democracy addressing both institutional (procedural) and substantive dimensions. These criteria are developed with a view to universal applicability rather than being exclusively designed for a gendered analysis of EU democratic practice and procedure.

Inclusion

According to Young, the criterion of inclusion dictates that all the people affected by a decision must be included in the process of political deliberation and decision-making. When coupled with norms of political equality, the criterion of inclusion allows for maximum expression of interest, opinions and perspectives relevant to the problems or issues for which a public seeks solutions.

In modern polities, inclusion is commonly achieved through political representation, since the actual presence of all affected by decision-making processes (direct democracy) is unfeasible. Although the concept of political representation traditionally refers to parlia-

mentary representation via elected representatives generally selected by political parties, there are other modes of representation, such as interest representation through civil society groups mediating between society and the political system, and bureaucratic representation through civil servants in the public administration. Despite the centrality of the representative function in modern liberal democracies there are, however, a variety of mechanisms for citizens' participation (such as voting in elections, joining a political party or contributing to a civil society group) which any assessment of democratic inclusion should also take into account.

Feminist democratic theory has emphasised the importance of inclusion as one of the main normative principles that an 'engendered' democracy must fulfil. In operationalising this principle, the empirical literature on gender and politics deploys a wide variety of indicators. Though the most common measurement of inclusion is the proportion of women's representatives in parliament – descriptive representation – in more recent years increasing attention has been directed to the inclusion of women's interests, concerns and perspectives in political deliberation and decision-making – substantive representation (Thomas 1994; Swers 2002; Childs 2006). Another recent trend in the empirical scholarship on gender and democracy is signalled by a departure from an exclusive focus on women's parliamentary representation and a growing interest in other sites of women's political representation, such as women's policy agencies in government bureaucracies (Stetson and Mazur 1995; Outshoorn and Kantola 2007). Apart from research on the inclusion of women and women's interests in political representation processes, there is also a wealth of empirical studies on patterns of women's inclusion and exclusion in processes of political participation. These studies look at a variety of arenas: while some focus on women's presence, role and status in political parties others focus on women's movements and their interaction with the state in policy-making processes. In addition, research on gendered patterns of inclusion and exclusion in political participation also explore gender differences in electoral behaviour such as gender gaps in voter turn-out at elections, and gender gaps in political party engagement (Liebert 1999; Nelsen and Guth 2000; Banducci 2005). The indicators of inclusion are drawn from a consideration of the issues discussed above.

Table 4.1: Indicators of inclusion

Minimal indicators of inclusion

The main decision-makers in deliberative settings are popularly elected or else are directly accountable to an elected body.

There are provisions for attaining a balanced representation of women and men in decision-making arenas.

Civil society organisations representing gender/women's interests have institutionalised access to decision-making arenas.

There are arrangements in place aimed at ensuring that a wide variety of gender interests in civil society have access to deliberation and decision-making arenas.

Additional indicators of inclusion

There is a balanced proportion of women and men in political deliberation and decision-making arenas

There is a balanced proportion of women and men in voter turn-out at elections

There is an extensive range of women's organisations in civil society representing the interests of women's citizens in political deliberation and decision-making arenas.

Political equality

This principle dictates that participants in deliberation and decision-making processes should be included on equal terms – that is, all have equal rights and effective opportunities to express their interests and concerns in a free debate, where no participant is in a position to coerce or threaten others into accepting certain proposals or outcomes.

In liberal representative democracies, the main mechanism of inclusion is the holding of free legislative elections whereby all the adult population (irrespective of gender) have an equal right to periodically elect their representatives. However, one of the main feminist concerns about representative democracy (in both its deliberative and aggregative versions) is that the inclusion of women is a necessary yet not a sufficient condition of gender democracy: because women have been historically oppressed, the realisation of gender democracy in practice calls for special measures to redress asymmetrical gender power relations in order to ensure that they are

provided not only with equal rights, but also with effective opportunities, of political representation and participation.

Redressing these inequalities requires the provision of formal and informal measures for achieving a greater gender balance in the composition of legislatures, such as constitutional electoral quotas, voluntary party quotas, awareness campaigns, training programmes and so on. Another measure for promoting equal participation in political deliberation and decision-making is to adapt political institutions to the needs of women with regards to meeting times, holidays and family responsibilities². In addition, consideration should be given to the suggestion that in a society where the male norm has become universalised, it is extremely difficult for women to articulate their interests and perspectives. According to Mansbridge (1999) in such contexts, women's interests are likely to remain uncrystallised unless they are able to 'retreat' to dedicated deliberative spaces where their interests and perspectives can be articulated. Institutionally, this can be achieved by the creation of deliberative arenas such as parliamentary committees on women's rights or women's policy agencies in government bureaucracies. Fifth, while women's non-governmental organisations have been central actors in advancing gender justice and democracy, their effective role as mediators between women citizens and the state depends on the extent to which these organisations are actively supported through public funds. Public support for women's NGOs enables and empowers those organisations to represent women's interests, concerns and perspectives in decision-making processes in a manner that is comparable in sophistication to powerful middle class and business interests. However, we also need to take into consideration patterns of inclusion and exclusion in this regard. Given the widespread tendency to universalise white middle class women's interests and to efface differences among women (as widely reported and analysed in the feminist literature) we thus need to examine the extent to which the diversity of women's voices are given equal support.

² For example, the Scottish parliament has committed to working family friendly hours and breaking for recess at times that coincide with school holidays.

One of the main problems in measuring political equality from a gender perspective is that prejudice and privilege are difficult to detect in a democracy assessment, as the gender power imbalance may be hidden under a veil of 'reasonableness'. We will return to this point shortly.

Publicity (alternatively transparency and accountability)

The principle of publicity³ dictates that interaction among participants must form a public in which people hold one another accountable. This entails that, when participants are speaking, they are answerable to a plurality of others with a diversity of views, experiences and interests. This principle also requires that participants in a public debate explain their particular experiences, interests, proposals, in ways that others can understand, as well as putting forward reasons for their claims in ways that others recognise could be accepted, even if they disagree with those claims and reasons. In other words, participants 'speak with the reflective idea that third parties might be listening' (Young 2000:25).

In encouraging participants to articulate their positions clearly, offering reasons and justifications for their views, publicity promotes public participation in political deliberation, facilitating public opinion-formation, public scrutiny and accountability. It also encourages participants to replace the language of private interests with the language of public reason.

Empirical studies of democratic deliberation often operationalise publicity in terms of the visibility of the formal processes of decision-making. Visibility is measured in terms of the degree of availability

³ In presenting earlier versions of this paper, the term 'publicity' to describe the concept of the affected groups forming a public, and who were in turn were accountable to a wider public defined by membership or by a more diffuse civil society, was found to be contentious. There was considerable confusion between this understanding of publicity and the term as it is customarily used – to convey a communicative action of some form. To obviate the unnecessary confusion we encountered repeatedly on this issue, we decided to substitute Young's term of publicity with the more conventional democratic theory terms of transparency and accountability. We seek, in elaborating the indicators, to remain as true as is possible to Young's concept of publicity.

Table 4.2: Indicators of political equality

Minimal indicators of political equality

There are structures/procedures/measures for neutralising asymmetrical power relations between women and men, and also among women, in political deliberation and decision-making (gender balance in committee chair positions, dedicated committee for women's rights and equal opportunities etc.)

Civil society organisations representing women's interests are granted equal access to deliberation and decision-making arenas.

Additional indicators of political equality

The concerns and positions of different women's civil society organisations seeking influence in decision-making are given equal weight in political deliberations among representative elites.

Gender interests are discussed in a formally assigned deliberative setting prior to decision-making.

and accessibility of relevant information and documents to all relevant actors and stakeholders at all stages of the policy process. In representative democracies, the requirement of publicity is important because in these political systems, decision-making power is the prerogative of elected representatives rather than the general public. In this context, a measure of publicity is the degree to which different positions are communicated in competitive politics, in a way that is easily understandable, so that the public can get an overview of the choices and alternatives available. However, with the development of new forms of governance, non-elected and 'informal' representatives (government officials and civil society organisations and networks) are acquiring increasing power and influence in political decision-making. In such cases, the principle of publicity requires additional accountability procedures beyond those provided by competitive elections.

The issue of accountability becomes especially pertinent in relation to the representation of women's political interests as this is an area where, arguably, non-elected representatives (such as femocrats in women policy agencies, women's organisations and informal advocacy networks) are acquiring an increasingly influential role in political deliberation and decision-making. The question is how and to what extent these agencies, organisations and informal networks

can substitute for the democratic accountability of decision-makers whose mandate is derived, either directly or indirectly, from the people. There are a variety of mechanisms for rendering women's policy agencies accountable for upholding gender equality commitments such as parliamentary scrutiny and control and consistent monitoring by women's non-governmental organisations and supra-national bodies. The requirement of accountability should also be applied to women's NGOs by rendering information about the objectives, mission, activities and governance structure of the organisation widely available to the public.

Table 4.3: Indicators of publicity
(Alternatively transparency and accountability)

Minimal indicators of publicity

Both institutional actors (including women's organisations) and the public have access to policy proposals on gender-sensitive issues

Political parties articulate their positions on gender equality in electoral programmes

There are open sessions or minutes available after open sessions on gender-sensitive issues

There are mechanisms for rendering decision-makers accountable for upholding equality commitments (gender audits, etc)

Additional indicators of publicity

Politicians and decision-makers are regularly monitored by women's civil society organisations

Women's organisations seeking influence in political decision-making make their aims, objectives, strategies and activities widely available to the public.

Reasonableness (alternatively recognition and respect)

The principle of reasonableness dictates that participants come to a discussion with an open mind. They express a willingness to listen to other participants, treating them and their views with respect. They do not assert their own interests above all others or insist that their views cannot be subject to revision. On the contrary, in the context of disagreement or dissent, they show a disposition to understand other participants' interests and opinions through a process of argumentation (asking questions, providing reasons, etc.) and are ready to change their initial interests if these are shown to be incorrect or

inappropriate (McLaverty and Halpin 2008, 197-214). Although deliberation will not necessarily end in agreement, participants enter the discussion with the aim of reaching consensus; yet with an understanding that these agreements and decisions should be in principle open to challenge.

The deliberative principle of reasonableness is probably the most controversial among feminist scholars, including those who are generally supportive of deliberative democracy. Therefore, these criticisms need to be taken into account when deriving gender-sensitive indicators from this principle. One challenge facing feminist researchers in operationalising reasonableness is that lack of recognition and respect for women's voices may be quite difficult to detect, as prejudice and privilege often have very subtle manifestations that are easily concealed under a veil of rationality. As feminist critics of deliberative democracy have pointed out (Sanders 1997; Fraser 1997; Young 2001) nonverbal communication, or tone of voice, are 'invisible' factors that defeat the principle of equality even in contexts where there is formal compliance with institutional mechanisms and procedures aimed at realising this principle in practice. Formal equal access and opportunities to deliberative settings is not enough; as Sanders notes:

Deliberation requires not only equality in resources and the guarantee of equal opportunity to articulate persuasive arguments but also equality in 'epistemological authority', in the capacity to evoke acknowledgement of one's arguments.

(Sanders 1997: 349)

In other words, women's voices may be easily discredited on seemingly democratic grounds. However, since the indicators of gender democracy need to point to observable phenomena they will fail to capture non-observable features of political deliberation and decision-making which may, in very subtle ways, hamper the democratic principle of political equality. This means that our indicators measuring recognition and respect of women's interests will only detect a violation of the deliberative principle of reasonableness when there are explicit negative statements about women's

groups and their demands, or when their arguments are openly ignored or degraded.

A second challenge for assessing reasonableness is that the indicators must allow for the possibility that when oppressed groups are aware of unequal power relations in a male-dominated politics they may take confrontational attitudes before seeking consensus in the pursuit of 'the public good'. For this purpose, we construct an indicator that taps into the content of justifications that representatives of gender interests provide for their demands in the course of political deliberation. This indicator aims to assess whether appeals are made in terms of narrow group interests, in terms of the public good, or both.

A third challenge is that assessments of reasonableness will heavily depend on how assessors interpret the instances of political deliberation under evaluation. Nonetheless, the subjective nature of this exercise can be partly eased by establishing clear codes and by deploying more than one coder, so that the results of this exercise can be compared between coders, and disagreements discussed. Given that the two specific indicators capturing the quality of reasonableness are those of recognition and respect, we use these to determine the indicators.

Table 4.4: Indicators of reasonableness
(Alternatively recognition and respect)

Minimal indicators of reasonableness

Political institutions and institutional norms facilitate deliberation as the principal mode of interaction among actors, over bargaining and/or aggregation

Additional indicators of reasonableness

Participants show respect for the groups affected by the decision

Representatives of gender/women's interests provide justifications of their demands during deliberative processes

Counterarguments are acknowledged and considered in the course of deliberation.

Application of the RECON models to WP 4

One of the core objectives of work package 4 'Justice, Democracy and Gender', is to ascertain the empirical adequacy of the three models of democracy in Europe spelled out by Eriksen and Fossum (2009) in one particular area of EU policy, gender equality. In order to meet this objective, the study comprises five distinct phases:

The first phase conducted a review of the current state of research on gender justice and democracy in the European Union and also explored the potential of the emerging deliberative democracy literature to support a more substantive investigation into the quality of democracy in Europe from a gender perspective (Galligan and Clavero 2008a).

The second phase focused on the operationalisation of deliberative democratic tenets derived from feminist thought. In this section of the study, a methodological framework for assessing the democratic quality of gender politics and policy in the European Union was developed. It derived a series of observable indicators from three general 'bundles' of principles of deliberative democracy - inclusion and political equality, transparency and accountability, recognition and respect. These normative principles are then empirically developed in a discussion of data collection method and analysis (Galligan and Clavero 2008b). In a complement to this work, Holst (2008) has constructed a normative critique of methodological approaches in assessing gender justice in the EU.

Phase three applied the gender-sensitive indicators of democracy developed in the previous phase to an empirical context, with a view to assessing the democratic quality of decision-making processes on gender equality at the EU supranational level. The analytical assessment was conducted by means of a process-tracing exercise over two selected case-studies: the Goods and Services directive (2004/113) and the Recast equality directive (2006/54). The selection of these two case-studies was guided by the hypothesis that the democratic quality of these legislative processes will vary according to a variety of contextual factors, such as the legislative procedure being followed, the institutions and actors engaged in this procedure

and the degree of polarisation/consensus among these actors over the issues in hand. Our choice of hard policy issues, in the form of Directives, has been dictated by two considerations. One is a desire to produce a robust, defensible, qualitative comparative study using common indicators on issues that are treated at national and supranational level. The other is the commonality of a parliamentary arena as a representative space in which deliberation on these issues must take place. However, we are aware that there is a trade-off between investigating hard policy in relatively formalised settings and soft policy, such as the formulation of National Employment Plans through the open method of co-ordination, where the structure is less rigid, and policy discussions may lean more towards a liberal intergovernmentalist interpretation, or alternatively, take a cosmopolitan turn.

Phase four moves from the supranational to the national layer of EU governance. Using the indicators developed in phase two, it assesses the democratic quality in the processes of transposition of the Goods and Services directive in national settings, focusing on six EU Member States (Austria, Greece, Hungary, Lithuania, Poland and Spain) and one candidate country (Croatia). The purpose of addressing national transposition of this directive is to evaluate gender democracy in a national context, to determine what features of the RECON models dominate, and to ascertain if there is evidence of the influence of multi-level governance in the national setting.

Phase five takes our study of gender and democracy a step further and examines the empirical adequacy of the three models of democracy in Europe on the basis of the results from the assessment of democratic quality previously conducted at both the supranational and national levels of EU governance. In other words: which model of democracy in the EU do the processes examined in this study more closely approximate to? In order to answer this question, we assess the attributes and characteristics delineated in the models (Eriksen and Fossum 2009) in the context of the findings from the studies of gender democracy undertaken in phases three and four above. Given the complex and highly contested nature of EU democratic decision-making, there is more than one way in which gender democracy may be fulfilled, since this will heavily depend on empirical assumptions

about our unit of analysis. Thus, while liberal intergovernmentalism sees Member States as the primary actors in decision-making processes at the EU level (having ultimate control over these decision-making processes), federalists see the EU more akin to a 'state-like' entity, where supranational institutions such as the European Parliament and the European Commission – with legislative and executive functions similar to those of parliaments and governments of nation-states – are acquiring more and more control over decision-making. A third group of scholars, however, argue that the EU should not be conceived as anything resembling a modern nation state, but rather as a non-hierarchical system of multi-level governance where power is increasingly dispersed across different levels rather than being concentrated in the Member States. According to this view, supranational, national and subnational actors and institutions play an important role in decision-making:

The point of departure for [the] [...] [MLG] approach is the existence of overlapping competencies among multiple levels of governments and the interaction of political actors across these levels. Member State executives, while powerful, are only one set among a variety of actors in the European polity. States are not the exclusive link between domestic politics and inter-governmental bargaining in the EU. Instead of the two level game assumptions adopted by state-centrists, MLG theorists posit a set of overarching, multi-level policy networks. The structure of political control is variable, not static, across policy areas.

(Marks et al 1996: 41)

However, these conceptions of the European Union do not tell us anything about how democracy and democratic practice would look like under each of them. The three models of democracy in Europe spelled out by Eriksen and Fossum (2009) aim to reconnect this (highly descriptive) theorising of the EU with the question of democracy.

The institutional requirements and practices which are necessary for rendering decision-making processes on gender equality democratic will vary according to the model of the EU that is being presupposed.

For example, if the EU is viewed as an emerging multinational federal polity, one indicator of inclusion would be that transnational women's advocacy networks participate at all stages of the process. If, on the contrary, the EU is viewed as an intergovernmental organisation, a poor participation of transnational advocacy networks would not necessarily be an indicator of poor democratic practice on matters of gender equality since, under this model, the main locus of the democratic unit is the national, rather than the European, level. Similarly, expectations about the role of the European Parliament in decision-making vis-à-vis national parliaments and national governments represented in the Council will vary according to the model of the EU that it is being assumed during the assessment. Thus, a merely consultative role for the European Parliament in gender equality processes would be an indicator of poor democratic practice under a conception of the EU as a multi-national federal state, but not if we are assuming that the EU behaves as an intergovernmental organisation.

In the following table, the different democratic requirements of gender equality decision-making under each model are spelled out (Table 4.5). Briefly put, model 1 (audit democracy) assumes democratic control of the EU through the democratic institutions of the Member State. Model two (federal multi-national democracy) assumes a constitutional European state based on direct legitimation. Finally, model 3 (cosmopolitan democracy) assumes that democratic control of the EU is shared between supranational and national institutions and actors and, therefore, that the EU can be democratic without being a federal state, even if democratic control is not in the hand of its Member States. The table illustrates the dimension of democratic decision-making highlighted by the gender democracy indicators for each model.

Project integration and cross WP issues

The democratic assessment of EU gender equality decision-making and national implementation processes is being carried out in conjunction with partners at Eötvös Loránd University (Budapest) and at Jagiellonian University (Kracow). Given that these partners are working on WP 5 and WP 8 (besides WP 4) their contribution regarding civil society and identity issues will serve to facilitate the

further integration between these three workpackages. Alongside this work, the theoretical and methodological framework of WP 4 has been very much informed by WP 1 and WP 3. Thus, from the beginning of the project, WP 4 researchers have been following very closely the research conducted by researchers from these work packages. At the same time, these researchers have been providing feedback and comments on WP 4 deliverables. In addition, the work on democratic constitutionalism undertaken as part of WP 2 is informing the model assessment activities of WP 4.

Concluding comments

The RECON models offer a comparative analytical framework in which to tease out the nature of gender justice and democracy in the EU. In addition, the models offer a useful vehicle for bringing depth and nuance to a gender-focused interrogation of democratic decision-making processes. In operationalising these models, we have delved into the literature on gender and democratic participation, and have developed the concept of 'gender democracy' from a range of literatures. In elaborating the concept of gender democracy, we have created a series of indicators applicable to political decision-making processes that evaluate the democratic quality of the process from a gender perspective. These indicators are informed by the principles of deliberative democracy and are grouped into three – inclusion and equality; transparency and accountability; recognition and respect. Applying the criteria associated with these principles to two instances of deliberative law-making – the Goods and Services Directive (2004/113) and the Recast Equal Treatment Directive (2006/54) – will reveal the nature of gender democracy in the EU, and will provide ample evidence for evaluating the presence of one or more of the RECON models in the making of gender policy at EU and national levels.

At this point in time, the study is not complete, and so a full evaluation of the applicability of the models to the processes of gender democracy must await the completion of the national studies. Nonetheless, at this preliminary stage, it is possible to suggest that at the EU level, our study appears to indicate that model 2 – the federal democracy – is emerging as more prominent than the others. It must be emphasised, however, that this tentative evaluation can only refer to the EU-level

study we have undertaken, and is contingent on further findings. Indeed, even within gender policy at EU level, it is likely that different policy issues may exhibit more of the characteristics of one model than another. For instance, the co-decision procedure in the Recast Equal Treatment Directive may offer more potential for cosmopolitan-like decisionmaking than the more tightly-controlled Goods and Services Directive. Nor can we rule out the possibility of elements of multi-level governance emerging in the context of the transposition and implementation of the equality directives.

Table 4.5: Gender Democracy and RECON models

	Audit democracy	Federal democracy	Cosmopolitan democracy
Inclusion and equality	<p>High participation of <u>national</u> representatives of women's interests during decision-making processes at supranational level (e.g., through lobbying own national governments; or through supervisory control of the COM during proposal drafting stage) and implementation in their respective Member States.</p> <p>National women's organisations have access to national deliberations on a directive: 1) when state preferences vis-a-vis a COM proposal are being formed 2) when the national implementation of a directive is being debated</p> <p>The interests and perspectives of national women's advocacy networks are included in these national deliberative agendas</p>	<p>High participation of representatives of women's interests operating at the supranational level during decision-making process.</p> <p>Transnational women's organisations seeking to influence EU decision-making on gender equality have full access to deliberative arenas at EU level</p> <p>The interests and perspectives of women's advocacy networks operating at EU level are included in the deliberative agenda</p>	<p>Strong involvement of inclusive women's advocacy networks -in both decision-making and implementation stages- comprised of a variety of representatives of women's interests operating at different levels of EU governance</p> <p>A wide diversity of women's organisations have access to multiple deliberative sites during both decision-making and implementation stages</p> <p>Horizontal and vertical diversity of deliberative sites (during decision-making and implementation processes) include the interests and perspectives of women's advocacy networks in their agendas</p>
Transparency and accountability	<p>National women's organisations and the public have access to information relevant to decision-making and implementation processes</p> <p>The positions of key actors (national governments; women's policy agencies; political parties; women's organisations; trade unions) are sufficiently explained through a reason-giving practice</p>	<p>Transnational women's organisations and the European public have access to information relevant to decision-making processes</p> <p>The positions of key actors and institutions involved in decision-making processes at</p>	<p>Relevant publics at different levels of governance have access to information on decision-making and implementation processes on gender equality</p> <p>The positions of actors and institutions participating in multiple deliberative sites are sufficiently</p>

	There are sufficient mechanisms for rendering national governments accountable for upholding gender equality commitments at EU level (national parliamentary controls)	supranational level are sufficiently explained through a reason-giving practice	explained through a reason-giving practice
		The EP has an important role in exercising control over the decision-making process, from agenda setting to implementation	There are sufficient accountability mechanisms in place for women's civil society groups operating at different levels of EU governance. The EP as well as national assemblies exercise control over decision-making and implementation processes
Recognition and respect	Participants in deliberations in national arenas show respect for the groups affected by the decision	Participants in deliberation at supranational level show respect for the groups affected by the decision	Range of participants in multiple deliberative arenas show respect for the groups affected by the decision
	Arguments provided by key actors at national level are acknowledged and considered in the course of deliberation	Arguments provided by key actors in decision-making are acknowledged and considered in the course of deliberation	Arguments provided by participating actors in different deliberative arenas at national and supranational levels are acknowledged and considered in the course of deliberation
	Demands from national representatives of women's interests are justified in terms of the public (national) good	Demands from women advocacy coalitions are justified in terms of the public (European) good.	Demands from representatives of women's interests are justified in terms of the universal good, or in terms of universal norms

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Chapter 5

Between norms and practices of the public sphere: Assessing the infrastructures for democracy in Europe

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Introduction

The public sphere is considered the *sine qua non* of democracy. Whereas the liberal conception of a free public sphere claims freedom of expression, openness and public access to information (Habermas et al. 1974: 54; Dahl 1989: 221), the deliberative public sphere embraces the quality of public opinion and will formation (Fraser 1991; Habermas 1996; cf. Gerhards 2002). More specifically, the deliberative democratic conception of the public sphere requires the interplay of institutionalised and non-institutionalised processes of communication: on the one hand public intellectual and mass mediated debates that identify and interpret social problems and, on the other hand, 'parliamentary, institutionalised discussions' aimed at decision-making, under conditions of limited resources and with the requirement of justification (Eriksen 2007). In these normative terms, democracy at the level of the European Union will depend on spheres for connecting both kinds of public communication, inclusive spaces for open communication rooted in civil society and the mass media as well as institutionalised ones for collective will-formation by officials and representatives. Yet, in the practice of the EU, such an overarching public sphere has been found wanting. Rather, what has

been discovered thus far are transnational, segmented publics evolving around policy networks constituted by the common interest in certain issues, problems and solutions' (ibid.). It remains therefore controversial whether the EU can be democratised, as long as it does not conform to the liberal, let alone deliberative democratic requirements of a European wide public sphere (Grimm 1995; Graf Kielmansegg 1996; Trenz and Eder 2004; Eriksen 2007; Fossum and Schlesinger 2007; Fossum and Trenz 2006; 2007).

We take the EU's alleged misfit between democratic norms and practices of political communication as a starting point for probing their performance in practice. This research program entails a conceptual and an empirical part. Conceptually, it enquires different institutional embodiments of democratic principles that have been designed for the EU (the three RECON models) as to which particular infrastructures for political communication they require for democratic opinion and will formation. This results in three ideal types of the public sphere, namely interlinked national public spheres, an encompassing European public sphere and a sphere of multiple and fused publics. Empirically, our research probes whether and to what extent these ideal type public spheres fit European communication practices and explores how and why these vary. Combining normative democratic theory and empirical methods, we apply them to EU treaty reform debates at different public sites and with a focus on different agents. Promoting agents of the Europeanisation of the public sphere include the mass media, public intellectuals, political parties, civil society and parliamentary deliberations.

Ultimately, the research objective to which this chapter seeks to contribute to is to better understand the viability of competing modes of democratic polity building in an enlarged Europe, from the angle of the public sphere. Moreover, by adopting a political-sociological approach to EU polity-making, a novel framework is provided for scrutinising key prerequisites for democracy across state borders. But contrary to authors who underrate EU constitutional reform in relation to other potential agents of a European public sphere (cf. Grimm 1995), we assert that the public justifications and contestations for and against EU reform projects yield fundamental insights (Liebert et al. 2007; Trenz et al. 2008, 2009). For instance, they offer

lenses for assessing the visibility and persuasiveness of competing democratic models, on the one hand, and of the quality of European communication practices, on the other hand. Thus, this endeavour is premised on the expectation that the interplay between legal constitutional projects and extralegal processes of political communication plays a pivotal role in the struggles about a democratically legitimate ordering of Europe. This approach complements normative conceptual accounts of European democratic constitutionalism with empirical diagnoses of the socio-political structures they are embedded in. Both are conceived as equally constitutive and dynamic elements of the emerging European polity.

The chapter proceeds in three steps, aimed at mapping the ground of this research endeavour. To ensure that the normative debate is properly steeped into the reality of European experience, it provides a research design and methodology. Both aim at assessing the European public sphere in terms of its concrete instances, as well as of the normative implications that these practices yield. We start with elaborating three conceptions of the public sphere, each related to the building of a European polity (or constitutional or treaty reform politics) along the RECON models. Then, in view of applying these patterns to empirical research, we propose a framework based on a template of indicators for different patterns of European political communication and comparative political discourse analysis for assessing the emerging European public sphere. Finally, we illustrate this research program by preliminary findings from various European political and institutional fields, in particular national mass media debates of the EU's constitutional politics; but also including national public intellectual debates on Europe; national parliamentary debates on the Lisbon Reform Treaty ratification; European parliamentary campaigns. We conclude that in the light of our preliminary findings, it can be confirmed that the communicative presuppositions for European federal democracy, that is an encompassing European public sphere, remain weak. Instead, we argue that empirical patterns and dynamics of European political communication indicate new modes of a democratic constitutional politics in Europe to be emerging.

Elaborating the RECON models: Three conceptions of the public sphere in European polity building

Research on the European public sphere is normatively driven by concerns about the democratic deficits of European integration: the so-called 'EU – citizen gap' grounded on a communication deficit. After the EU's Laeken summit in 2000, the project of developing a Constitution for Europe has become ever more contested, with increasing competition between alternative models of democracy in Europe (Eriksen 2007; Eriksen and Fossum 2007, 2009; Fossum 2008; Fossum and Menéndez 2005). Unarguably, the EU sought to promote its legitimacy by fostering public accountability, openness and participation, in other words: a democratic public sphere (European Commission 2006). In general terms, a 'democratic public sphere' is expected to live up to three normative standards: First, decisions of the polity must be 'deliberated within the public sphere that allows all points of view to be considered, justified and decided in relation to all other, free of inequalities, power and resources' (Lord 2008: 12); second, justifications given in the public sphere must be based on claims of universal validity (see Habermas 1989); finally, it must empower mass public audiences to turn into social constituencies for legitimating collective decision-making.¹

In this context, the question of which institutional and constitutional order of the EU has the best fit with these democratic principles has become centre stage. Research on the public sphere in Europe – either conceived at the national, supranational or transnational level – is deeply entrenched with this normative debate about the reconstitution of democracy in Europe (Trenz and Eder 2004). The RECON models depict three modes of entrenching democratic principles and procedures in alternative institutional configurations of the EU polity. These institutional configurations are being explored elsewhere in more detail². Here, our aim is limited to thinking through their requirements from the normative perspective of what kind of public

¹ In this context, calls for democratic accountability and transparency of the Commission and Council and, to a lesser degree, for improving public communication by the European Parliament have attracted research interests (Morgan 1999; Liebert 2007b).

² See, in particular, contributions by RECON work packages 2 and 3, in this volume.

sphere it would take to make what kind of democratic constitutionalism in the EU work. Each model of democratic order has specific implications regarding the opportunities and constraints of the public sphere. These implications are at the heart of this section. The following describes through the lenses of the three institutional configurations of EU democracy alternative patterns and dynamics of an unfolding sphere of democratic opinion and will formation.

The RECON framework establishes three ideal type conceptions of public sphere underlying the respective RECON polity models (Eriksen and Fossum 2007):

- 1) A public sphere confined to the nation state;
- 2) An encompassing European public sphere;
- 3) A constellation of multiple, overlapping national, European and cosmopolitan discourses.

Comparing these three conceptions from a democratic angle, they exhibit different trade-offs. With regard to the inclusiveness of communication, the second transcends the boundaries of national communities and the third even extends beyond the Union to the world's citizens. Yet, while inclusiveness and, thus, the diversity of voices increases, the universal validity of reasons given for justification towards the general public is likely to shrink. And, finally, whether these mass public audiences will turn into nationally defined, pan-European or even transnational regional-cosmopolitan social constituencies depends on how democratic principles are injected into the established institutional order.

In the following, these three conceptions of the democratic public sphere at the national, supranational and transnational level will be described more fully, including how they link with the RECON polity models.

The nationally confined public spheres in a European state order

The European state order is a kind of constitutional settlement in the form of an international treaty by which member governments delegate legal and bureaucratic competences to the EU, thus progressively constituting the EU's economic order by 'delegating democracy' (RECON model 1). In terms of polity models, the intergovernmental mode of constitutionalisation favours the maintenance of a nation-state order. Moreover, in substantive terms, this order benefits coordinated problem solving through delegating democratic powers to judicial and bureaucratic bodies at the EU or global level. Despite the unanimity principle, the 'masters of the treaties', that is the Member States, restrict their own powers by delegating competences to supranational bodies if they need to solve collective action problems. Theoretically, this institutional configuration provides safeguards for national representative democracy. It allows governments to stay in control of the European integration process and citizens to make use of domestic democratic infrastructures. These include checks and balances to the exercise of power through elected parliamentary representatives through which the people have a decisive say in the democratic processes.

In this framework of the European nation state order, the conception of the public sphere is naturally biased in favour of the *national* public sphere. From this perspective, the nation state is seen as its paradigmatic container that relies on a common language, territory and authority. Here, political communication is restricted to distinctive spaces of meaning and discursive exchange. Nation- and public sphere building are seen as co-evolutionary through the differentiation of a well functioning system of mass communication (Deutsch 1953; Gellner 1991; Anderson 1991). Authors may also stick to the classical Habermasian notion of the public sphere as a critical space of intermediation and communication that is open to the participation of everybody, in which issues of common concern are discovered, discussed and proceeded and in which a specific communicative power is created that holds government accountable (Habermas 1996; Neyer 2003; Eriksen 2005; Hüller 2005). For constitutional lawyers like Preuss (2004), the public sphere is a

constitutive feature of political community, the 'incarnation of the *res publica*' (p. 49) that binds the public good to collective will formation. For sociologists like Eder (2004: 66, 2007), the public sphere unfolds as a discursive universe that becomes institutionalised in the process of nation-building. Media and communication analysts like Kevin (2003), Norris (2000) and Díez Medrano (2003) pragmatically equate the public sphere simply with the (national) media system.

The conceptualisation of the public sphere in a European nation state order differs markedly from that of a European federal system. In the latter, the key to the public sphere is the issue how to conceptualise it after what we presume to know about the national public sphere, thus, not expecting that it should or would significantly depart from those preconceptions.

The encompassing European public sphere in a federal order

The federal conception of a democratic European order rests on a 'reasoned view of norms' applied to a unitary and state-like federal entity that seeks to keep at bay internal diversity. In terms of polity design, supranational constitutional politics envisages a European democratic federal state. Accordingly, RECON model 2 entails a federal constitutional settlement as the *finalité* which the teleological, consensus based dynamics of constitutional politics is aimed to bring about. This model is premised on a teleological vision of history whereby the experience of constituting a democratic state would be replicated at supranational level. According to this notion, the legitimacy of the EU will rest on supranational democratic procedures in the framework of a federal democratic constitutional design. Moreover, the development of a universal position based on a shared set of cultural and social conditions serves to avoid or bypass conflict. A shared normative framework enables representatives of the governed to make sure, across different contexts, that governments will respond to the wishes of the former.

The European public sphere that provides the communicative infrastructures for this federal democratic European order is modelled after the national public sphere. However, the majority of scholars would discard the possibility of an encompassing European public

sphere built along the conception of the national public sphere (Gerhards 1993, 2000; Schlesinger 1994, 2003). Most importantly, its major precondition – a pan-European media system – is supposedly difficult, if not impossible. Furthermore, given the diversity of languages, media cultures and traditions, European audiences are expected to remain segmented along national lines. Finally, it is argued that political communication in Europe will continue to be channelled through national civil society organisations, parties and elected representatives. As a result, the practices of news production with regard to the EU are likely to remain segmented. European actors and European issues will be discussed, if at all, in domestic and not in European debates (Preston and Horgan 2006: 37). A minimalist definition of the European public sphere on which most might be able to agree denotes an open communicative space that is linked to the approval and criticism of evolving forms of European governance. This kind of European public sphere produces visible communications about the performance of European political actors and institutions. It is a *political* public sphere in so far as it refers to the normative expectations, attitudes and opinions expressed in the sphere of politics (Eder 2004; Trenz 2002, 2005). This conceptualisation of the 'European public sphere light' has shifted the research agenda to the *Europeanisation* of public and media communication. Here, the national public sphere and European communication are coupled either through the infiltration of European actors and issues in national public spheres (vertical Europeanisation; Koopmans and Erbe 2004). If Europeanisation proceeds through intensified exchanges between different national public spheres (horizontal Europeanisation), these will move towards the third ideal type of a sphere of multiple overlapping discourses.

Multiple spheres of overlapping discourses in a cosmopolitan European Union

Following RECON model 3, the conception of a cosmopolitan order for the European Union is concerned with the question of how the reflexive potential of a post-national democratic setting can be institutionally backed up and constitutionally settled. But the issue of how to build a post-national Union with an explicitly cosmopolitan imprint is not turned into a matter of 'grand constitutional design'. Unlike RECON model 2, teleological assumptions regarding the

direction and *finalité* of European constitutional politics in terms of a 'definite settlement' are avoided. Instead, the notion of a cosmopolitan order instils flexible principles and procedures for accommodating conflict and structuring debates that emerge from encounters between different cultures and discourses. For that purpose, the notions of 'cosmopolitan law' and 'cosmopolitan principles' are introduced as a minimum normative framework for democratic practice. Thus, agreements on the forms, allocation and division of legal and bureaucratic authority take the shape of procedural and flexible devices, making sure that they remain reversible and subject to political will formation. The procedural openness characteristic of RECON model 3 correlates to its underlying, genuinely contentious processes. It precludes any fixed constitutional settlement through elite consensus and post-national allegiances among the citizens of Europe. The contentious politics of democratic constitutionalisation is likely to accompany the open-ended journey on which the EU has embarked and will continue as long as its *finalité* will remain object of popular contestations.

The corresponding paradigm of constitutional politics goes against the 'big bang' approach to European constitution-making espoused by the 'supranational constitution-making narrative.' It espouses a critical and reflexive democratic constitutional politics built on a logic of dialogue (Tully 1995, 2007; Shaw 2000, 2003; Wiener 2003; Wiener and Della Sala 1997; Jentges et al. 2007; Liebert et al. 2006). Borrowing from the Canadian context, Jo Shaw has introduced the notion of 'post-national constitutionalism' into the European Union (2000, 2003). Following Tully, post-national constitutionalism is defined as an 'intercultural dialogue' in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity (Tully 1995: 30). The possibilities for a definite constitutional settlement are secondary. What counts, instead, is a 'democratic minimum' in the sense of principles ensuring open debate that make people reflect about common problems and solutions (Bohman 2007). Dialogical constitutional politics is the medium through which citizens will constitute themselves as members of a multi- and transnational polity.

If this model conceive a cosmopolitan regional order to emerge from open-ended processes of democratic constitutionalisation, a European public sphere in terms of multiple dialogical spheres of overlapping discourses are supposedly key to these processes. Such a discursive, difference and contention based conception of the European public sphere draws on work by political scientists who are concerned with issues of mutual recognition of differences and discursive constructions of identity. Landfried has suggested a conception of 'interwoven public spheres' that discover 'topics of shared relevance through the positive experience of difference' (2004: 125). For Risse (2004: 149), the public sphere is first of all a discursive community that allows for the recognition of actors as legitimate participants in political discourse and constructs its collective identity as a political community. But while the supranational constitution-making mode is premised on public sites for affirming shared values and a collective identity for accommodating political conflict within supranational institutions, the mode of democratic constitutionalisation envisages a normative order of the European Union to emerge as an 'essentially contested project' (Bankowski and Christodoulidis 1998). By deploying inclusive and responsive dialogue, this conception of multiple European spheres re-enforces non-teleological processes and procedures that are open to contestation and aimed at accommodating diversity of views, interests and identities.

The kind of reflexivity unfolding in constitutional debates will be expressed in ongoing, yet relatively unstable and diversified opinion formation processes. They entail the compromising and establishing of interim solutions that remain reversible, and will not preclude new conflict and future debates. The discursive – and that includes contentious – mode of democratic politics is based on this open-ended notion of EU constitutional settlement. It does not require a written constitution but can live with flexible procedural arrangements. Amplified by the mass media or other agents, the sphere of multiple overlapping transnational publics can be expected to help people have a say in the politics of the EU. Thus, it will benefit its democratic legitimacy, too.

The next section develops these three conceptions of a European public sphere further for empirical research. We propose a

framework and indicators for empirically assessing the patterns and dynamics of European communication practices in a variety of established or emerging spaces. Subsequently it will be illustrated how this operationalisation scheme works in empirical research.

Assessing European communication patterns and dynamics in practice: Empirical framework

We suggest an empirical framework that can be applied to analysing the communication practices involved in EU politics in different domestic and European institutional and non-institutional arenas, e.g. parliaments, public intellectual forums, civil society, political parties and the mass media, where communication about EU politics typically unfolds. This framework rests, first, on a process approach to communication dynamics; furthermore it provides a template of code families for each of the three ideal typical models of institutional configurations of the democratic principles in the European order that can be used for empirically assessing the practices of political communication. Thus, in addition to a descriptive classification of the communicative patterns and a diagnosis of the process dynamics involved in the Europeanisation of domestic communication, our framework allows for normatively evaluating their implications from the angle of democratic constitutional politics. In other words, we draw on three different conceptions of a European public sphere to assess whether and to what extent patterns and dynamics of communicative practices fit the presuppositions of the RECON polity models.

The explanatory and normative framework mapped out in this section is structured in three parts: First, we outline a process-tracing approach to European communication; then we introduce the core of our analytical-explanatory framework, three templates for assessing patterns of 'European communicative practices'; and finally, we describe our methodological tools – political discourse analysis. In the final and concluding section, we will illustrate this framework by some expectations and evidence from European communication practices.

A process approach to European communication inputs, intermediaries and public resonance

A process-tracing approach to EU politics aims at capturing the effects of public discourse and communication on the making of a democratically legitimate EU. By assessing the performance of the evolving public spheres in Europe this approach allows a reconstruction of how public communication is generated, mediated and received. The potential generators, intermediaries and receivers of public communication about the EU are the object of analysis here. This approach is grounded in a process conception of the public sphere that distinguishes between the inputs, throughputs and outputs of public communication (Gerhards and Neidhardt 1991). Accordingly, these three interrelated processes account for the performance of the public sphere and their consequences for political legitimacy:

- a) Institutional and political actors' generating communicative inputs (i.e. political communication that is meant to generate public legitimacy);
- b) Intermediary processes that select, amplify and 'frame' communicative throughputs (i.e. mass media communication);
- c) Public resonance in terms of civil society mobilisation, audience reception and socialisation (i.e. public opinion formation and collective identities).

For the purposes of mapping and assessing the public communicative performances in these interrelated fields empirically, the WP 5 research program differentiates between three research clusters, each approaching the process of contending the public legitimacy of the EU from a different, specifically chosen sub-angle:

Communicative inputs

In this cluster, WP 5 assesses instances of contentious constitutional politics within different institutional arenas. This includes the generation of public voices by political actors with the aim of reaching electorates and mass publics. Traditionally, this refers to ongoing partisan conflicts and debates, which are believed to remain nationally confined but, on particular occasions such as referenda or European Parliamentary elections, might embrace more overarching

European debates and alliances. Relevant communicative inputs are further provided by civil society actors, social movements and public intellectuals, who address not only bounded electorates but rather broader, frequently transnational audiences. The contestation of the legitimacy of the EU is further confined by particular arenas which allow political actors to stage their performances and to *represent* their claims in front of a larger audience. The most prominent place of this kind is the Parliamentary arena, where elected representatives constitute so-called *strong publics* which become engaged in a process of public will formation that is institutionally connected to political decision-making. To take account of all these interrelated processes by which the public voice is introduced into EU constitutional politics, the following sub-studies are envisaged as part of the RECON WP 5 framework:

- a) National mass media coverage of Lisbon Reform Treaty negotiations (Liebert and Trenz 2008a; Liebert et al. 2008);
- b) National parliamentary ratifications of the Lisbon Treaty (Maatsch forthcoming);
- c) Party campaigns for European Parliamentary elections (Packham forthcoming);
- d) Organised civil society in the politics of EU treaty reform (Liebert and Trenz 2009; Liebert 2009; Trenz et al. 2009);
- e) Public intellectual narratives about the EU (Lacroix and Nicolaïdis forthcoming).

Communicative throughputs and intermediation.

In this cluster, WP 5 examines the processes by which EU constitutional politics are given or gain public salience. This includes an analysis of the role of the mass media as the general arena in which inputs and information provided by political actors and institutions are transformed into public communication that is visible (and accessible) to the broader audience and to the citizens in general. The question is how active or passive a role the mass media have played in re-presenting EU constitutional politics to the general public. More specifically, this raises the question whether and how mass media have engaged with the democratic dimensions of EU constitutionalisation, supporting either the path of constitutional low politics,

justifying the high politics of supranational constitution-making, or enhancing a contentious approach to European integration with its concomitant ambivalent repercussions for the constitutional endeavour. Research in this subfield has been more or less completed. In several interrelated research projects we measured the scope and performance of constitutional media debates, seen here as an indicator of the democratic quality of the process (Liebert 2007b; Trenz et al. 2008; Liebert et al. 2008). Translating the RECON model assumptions into empirical indicators (see Table 5.1), the democratic quality of media debates on the EU constitutional project was measured in terms of visibility (coverage intensity), language (different framings of same topics), substance (argumentative strategies deployed and the extent of deliberation, and hence of reason giving) and pluralism (inclusion of diversity of voices). More specifically, WP 5 research within the RECON frameworks involved the following sub-studies:

- a) The amplification of constitutional debates through the general mass media in the Member States (Liebert et al. 2008; Vettters et al. 2009; Liebert 2007a; Evas 2007; Maatsch 2007; Packham 2007; Rakusanova 2007; Wyrozumska 2007; Gattig 2008);
- b) The critical performance of journalists: News Framing and Commenting (Trenz et al. 2007, 2009);
- c) The potential for participatory journalism through online media (Trenz 2009);
- d) The performance of organised civil society as a mediator and representative (Liebert and Trenz 2009; Liebert 2009; Trenz et al. 2009).

Communicative outputs

In this cluster, WP 5 contrasts performances in terms of communicative intermediation in EU constitutional politics with public feedback in terms of citizens' attitudes and opinions. The potential effects of EU constitutional politics on public preference formation are made visible by election results and opinion polls which are regularly published by Eurobarometer. WP 5 makes systematic use of

Table 5.1: Patterns of public communication in different modes of EU politics

	Intergovernmental politics of constitutional treaty reform	Supranational politics of constitution-making	Democratic politics of regional cosmopolitan constitutionalisation
Visibility and coverage cycle	Nationally limited public spheres top down Europeanisation <i>* coverage cycle of EU low, with peaks for national events in EU politics</i>	Encompassing European public sphere (institutionalised and open to general publics) <i>* coverage cycle of EU with peaks for official EU topics/events</i>	Multiple sphere of overlapping publics <i>* coverage cycle of EU variable, with peaks also for non-national EU-politics</i>
Actor type and origin	Exclusively national origin and EU institutions (ECJ, IGC, Council) <i>* dominance of national origin and national state/government/court elites</i>	Inclusive multilevel origin: National and EU actors (leaders, parties) <i>* similar share of EU elites vis-à-vis national actors</i>	Inclusive and diverse political, societal origin: civil society, citizens <i>* similar share of national and non-national, government and NGO actors</i>
Logic of interaction	Logic of intergovernmental bargaining and compromise, structured by European law <i>* depoliticised international relations centred on national representatives, experts, courts</i>	Logic of parliamentary politics between majority and consensus rule; alternating governments <i>* majority-opposition interactions encompassing EU and national party elites</i>	Logic of participatory politics, structured by IHR, deliberation <i>* transnational discursive interactions and public deliberations encompassing different social and political voices</i>
Salient topics/issues of constitutional politics - policies - institutions - processes	'Treaty Reform' nation state sovereignty 'Union of states' national ratification referenda national elections Economic costs and benefits of EU enlargement <i>* low salience due to low politicisation of international organisation</i>	'Treaty establishing a Constitution for Europe' 'Federal Europe' Pan-European referendums European elections EU absorption capacity for enlargement <i>* medium salience due to EU polity routinisation and institutionalisation</i>	Ongoing EU reforms Deliberative Convention Citizens' initiatives International Human Rights and democratic practices in candidate countries <i>* high salience linked to open and inclusive EU politics</i>
Argumentative strategies and justifications	Efficiency, functionality, national interests, national identities <i>* justification codes</i>	Collective European interests, shared memories and future; value community <i>* justification codes</i>	contested interests, values and norms <i>* justification codes</i>

this primary data to corroborate hypotheses on how the mediating effects of constitutional debates help generate public legitimacy (Gattig 2008). Audience research can be also approached more indirectly by observing the socialisation of particular social groups within specific EU contexts and their attitudinal change in response to Europeanisation. One such change would be the possible emergence of transnational *sectoral publics* which develop strongly Europeanised attitudes and identities as a consequence of their being committed to the same political causes (for instance, civil society activists) or as a consequence of their being exposed to similar socialisation experiences (for instance, migrant workers). WP 5 is relying here on co-operation with WP 8 in which the emergence of such new collective identities is more systematically analysed. This encompasses the following sub-projects:

- a) Mass public opinion (Gattig and Liebert 2007; Gattig and Blings 2008; Pawlak 2009);
- b) Students' European identities (Liebert and Sackmann forthcoming);
- c) Identity change in temporary migrant workers (Góra and Mach 2009);
- d) Europeanisation and attitudinal change in national civil society organisations (Trenz et al. 2009).

Aimed at a 'reconstructive interpretation' of these different dimensions of the dynamics of European constitution-making at the level of public discourses, the empirical framework which this section lays out can be applied – and link – sites of European public communication as different as national parliamentary debates, mass media discourses, party campaigns in European elections, as well as public intellectual debates on Europe. The second component of the empirical framework is the template for empirically assessing different patterns of communication that emerge from these different communication spaces.

Three templates for empirically assessing public communication in EU politics

Here, we do not aim at superimposing or projecting any of the three models of democracy or of the modes of constitutional politics in the EU into the public sphere. Nor are we only interested in establishing descriptively which of the three models is given preference in public discourse. More importantly, we are interested in how the structures of public discourses reflect these different modes of constitutional politics and models of democracy. In other words, we aim at understanding the ways how the corresponding languages of these democratic and constitutional models enter public discourses and whether political communication translates them into an idiom that is more familiar to mass publics.

Intergovernmental politics of quasi-constitutional treaty reforms

Five indicators establish how this logic is reflected in constitutional media debates: National preferences about treaty reforms are negotiated in rather closed arenas without much media attention. The expression and mobilisation of public concerns outside these arenas is weak. Communicative inputs are provided mainly by national governments qua legitimate representatives of national interests, or by experts. EU institutions play a minor technical role as there is no need for legitimacy beyond the representative procedures of national democracy. Justificatory discourse mainly emphasises national interests, efficiency and functional problem solving.

Supranational politics of constitution-making

According to this logic, limited diversity is the precondition for accommodating conflict in EU constitution-making. In this case, mass media communication would have to limit popular contention and partisan conflict about European integration, and give voice primarily to representatives of the governed. In other words, mobilisation by affected groups and civil society would hardly be visible in the media. This would give rise to patterns of perception that vary little across national arenas. Politicisation would be channelled by political parties; the mass media would mention recurrent debates about the EU that are stimulated by supranational actions and events. Justificatory discourses would concentrate on highlighting the European

collective good, and the promotion of shared values and collective identities.

Democratic politics of regional cosmopolitan constitutionalisation

According to the logic of inclusive, open-ended transnational dialogical politics of constitutionalisation, overlapping public spheres for mass media communication are required, with public debates amplified through mainstream mass media. Overlapping media debates would respond to growing demands for information about EU constitutional politics from national publics. These debates then facilitate cross-border interactions and communicative exchanges involving a wide range of actors, and the participation of both state and civil society actors at different levels of governance. A growing level of understanding among citizens would be evident from general support for the goals of European integration and the contents of constitution-making. Constitutional ratification referenda would not be reduced to a one-off opportunity for popular mobilisation. Rather, they would be the starting point for contentious public debates that trigger further public interest, increase demands for information and communication. Justificatory discourses would focus on contested sectoral and territorial interests and identities.

The following table presents three templates of empirical indicators for assessing the communication patterns involved in three different modes of EU constitutional politics. The aim of these templates is to operationalise the three conceptions of the public sphere developed above, , by proposing sets of 'code families' along five dimensions of political communication. For applying these templates to the study of communication practices, it is necessary to use comparative political discourse analysis.

For applying the RECON based templates of different conceptions of the public sphere in empirical research, they can be used for descriptive, normative or prescriptive purposes:

a) For assessing the communication infrastructures of each of the three polity models empirically, assessment means *operationalisation* for the purposes of communicative process-tracing. Here the sets of empirical indicators are used for determining to what extent the

communicative assumptions made by the three models have materialised in practice. The aim is then to *explain* in terms of patterns and dynamics of communication practices why, for instance, the EU's constitutional processes may fail or succeed. Here, causal knowledge about the communicative presuppositions of the different polity models may serve not only to explain but also to design more effective devices for European political communication.

b) If instead we want to apply the RECON models in terms of normative templates to public communication practices, *empirical operationalisation* will be replaced by normative *standardisation*. In this perspective, we break the models down and interpret them in terms of normative standards for a democratic public sphere. If the purpose of the RECON models is normative assessment, we apply normative *standards* for identifying the presuppositions for a legitimate democratic order in the EU. Referring to a deeper level of the communicative infrastructure for democracy in Europe, these normative standards relate to the cognitive attitudinal predispositions that determine why citizens, elites and mediators *comply* with one mode of doing EU politics or model of the EU polity and *reject* the others. For the purposes of a normative assessment, public discourse analysis can be used as a systematic compliance test to establish degrees of correspondence between the normative validity of the polity models (or politics modes) and discursive practices. The norms are used for testing 'compliance' in the different institutional, constitutional and policy fields of communicative practices that are covered by the various RECON WPs. By translating each of these models into standards for normative assessment, the RECON models are used to make the normativity of EU constitution-making explicit. These standards are applied systematically to reconstruct the selective patterns by which the mass media amplify constitutional debates. The aim of this reconstructive interpretation of media discourses is to determine which of the different options for reconstituting democracy in Europe is supported by media discourses. What is at test is thus not the explanatory strength of a theory but the applicability of normative principles and their relevance in structuring public discourse on the EU.

c) Regarding the normative application of the RECON models, we can also aim at *designing* discursive strategies for tackling subjective norms and beliefs. While the analytical use of the RECON models helps identify the communicative behavioural practices, their normative application helps grasp cognitive presuppositions underlying communication. Both are equally important dimensions of the communicative infrastructures for democracy in Europe that shape the processes of public opinion and determine political will formation across the substantial fields of activities performed by the EU.

To complete this methodological framework, in the next step we will present its third and last element: comparative political discourse analysis.

Methodology: Atlas.ti-based discourse analysis

The two elements of the empirical framework that have been developed thus far – the process approach to communication, and the template for patterns of communication in EU politics – need to be complemented by a third element aimed at constructing comparative data sets: Atlas.ti software based comparative political discourse analysis³. This tool is necessary for the empirical mapping, reconstruction, explanation and evaluation of the patterns and dynamics involved in the communicative infrastructures of EU constitutional politics. The current section provides a summary overview of the empirical methodology we have employed for generating empirical data in this WP 5, among others, in the field of mass mediated constitutional ratification debates in a total of fourteen old, new and candidate countries (2005-7).

WP 5 has developed a common methodology that can be used to assess empirically the communicative infrastructures for democracy in Europe. These infrastructures include communicative inputs, intermediary communications as well as communicative outputs with a bearing on the public legitimacy of the EU. This methodology seeks

³ For a discussion of claims analysis and comparative political discourse analysis, see Liebert and Trenz 2008a; for a developed exposition of the methodology of 'comparative political discourse analysis' (CompDA), on which this chapter draws, see Liebert et al. 2009.

to cope with the challenges of connecting different arenas where European political debates originate and to account for how these debates amplify and resonate with mass communication and public opinion. The common methodology applied to these different fields of communication is comparative political discourse analysis (ComPDA), based on an Atlas.ti supported coding scheme.⁴ The application of this instrument combines three key components: a deductive, an inductive and a comparative strategy.

Following the deductive approach, we construct 'ex-ante' a coding instrument that 'translates' the normatively derived conceptions of the European public sphere into 'empirical indicators' (or 'codes') capable of capturing the terms used by public discourse; this coding-scheme is applied to a sample of relevant published texts and allows to assess the salience of any of the three competing models of democracy in the public spheres (either segmented, mass public or strong).

Adopting the inductive strategy of 'open coding', we go beyond reconstructing the salience of the three models, and develop suggestions for further refining the RECON models of democracy by:

- Identifying the variety of 'frames' and their positive/negative connotations in respect to each of the three models;
- Developing hypotheses for explaining the three models in terms of the discursive justifications (or motivations) given for or against them;
- Assessing the legitimacy of the three models in terms of who supports or opposes them.

Our comparative strategy allows us to identify cross-national variations as well as divergences between segmented, mass public and strong publics, allowing for recommendations regarding the viability of the models, alternative framing strategies and interaction dynamics between different kinds of public spheres.

The next section will illustrate the application of this methodological framework for assessing norms and practices of European political

⁴ See Maatsch and Gattig 2008.

communication, in the field of mass mediated debates on constitutional treaty ratification.

Theoretical expectations and empirical findings: Mass media debates on constitutional ratification (2005-7)

To what extent do we find empirical evidence for an unfolding European public sphere that would indicate the correlate of an intergovernmental European constitutional politics of delegative national democratic states, that is nationally confined public spheres? Or, alternatively, does it show traces of a comprehensive European public sphere that we conceive as being linked to the supranational politics for a EU federal polity? Or, finally, does it speak to the conception of a multiple European sphere of intersecting discourses, that we have conceived as a defining feature of a post-national democratic European politics with cosmopolitan elements?

Theoretical expectations

This paper has developed an analytical as well as normative democratic framework and described the empirical methodology for exploring the evolving communicative practices in the developments of the European order. From the theoretical debate, a number of propositions can be formulated about the viability of the three competing models of democratic order in terms of the evolving infrastructures for a European public sphere. From a social science perspective, these propositions are competing claims that can be tested against each other in the light of the performance of Europe's communicative infrastructures.

From a political sciences perspective, the operationalisation and application of (RECON-inspired) logics of European constitutionalism for assessing mass media debates in the Member States potentially makes a contribution to three distinct research aims:

- a) To the comparative assessment of the democratic quality of how the EU constitutional reform process has been reported by the media;
- b) To the analysis of underlying structures to explain the unequal distribution of access among different types of political agents and their variety of views;

- c) To assess the impact the media have on the subjective normative predispositions that shape processes of reconstituting democracy in Europe.

To develop this line of analysis, we will keep these three facets distinct from one another, and will focus here largely on the first and second questions.

Three alternative expectations – or research hypotheses – can be formulated: First, if public spheres continue to be fragmented along national boundaries while European integration becomes more politicised, this will promote the re-nationalisation of democracy in Europe. Second, to the extent to which Europeanisation gives rise to a pan-European public sphere, this will strengthen the communicative infrastructures favourable for legitimising a supranational European polity. And, third, depending on whether and how processes of transnational communication will open up nationally closed public spheres and foster transnational dialogue, potential for cosmopolitan types of discursive democratic legitimacy can be expected to emerge in Europe.

To what extent to our empirical findings speak to these propositions?

Empirical findings

This question can be answered largely negatively as regards the communicative presuppositions of RECON model 2, as the comparative data from the WP 5 media survey demonstrate (Liebert and Trenz 2008a; Liebert et al. 2008). The patterns of media discourses mainly follow model 1 in terms of a) restricted salience of constitutional issues, b) the dominance of national government actors and intergovernmental institutions, c) the overall relatively low, but varying levels of interdiscursivity.

On the other hand, our comparative mass media findings also provide evidence of overlapping transnational public spheres (corresponding to RECON model 3), in terms of: (a) cross-border exchanges for debating issues of EU level policies and institutions; (b) cross-nationally shared concerns with collective European problems and interests, albeit judged by different normative lenses; (c) linkages

between European and global problem perceptions; and (d) references to issues of democratising European governance and preferences for reconstituting democracy beyond the nation state, albeit not necessarily at the supranational level.

Summarising these empirical findings on mass public post-ratification crisis debates (June 2005–June 2007) in fourteen countries⁵, we advance five propositions:

- 1) We find a clear dominance of national governments, political parties and intergovernmental institutions as the main communicators on EU constitutional reform politics, and as the ‘voice of Europe’ in the media.
- 2) We find considerable degrees of mutual cross-national observation, a modest level of interdiscursivity between national media spheres, and low degrees of vertical intermediation between supranational and national arenas.
- 3) We find spaces for the unfolding of justificatory discourses to be restricted, but justificatory logics where they do occur do not exclusively refer to the defence of national interests and market logics but also to quite a considerable degree to common European values and objectives.
- 4) We find national mass media only moderately concerned with democratic norms and rights, and, if they are, mainly in relation to the ratification process (issue of referendum), and not in reference to any specific polity model.
- 5) We find that a ‘re-nationalisation effect’ becomes manifest over the 2005 – 2007 period . It is evident in a) the growing dominance of national actors, b) increasing national self-references in mass mediated constitutional debates in relation to dominant topics (e.g. ‘Christianity’ as one of the top five topics in relation to the Treaty establishing a Constitution for Europe (TCE) in Poland), or of shared ‘hot topics’ permeating

⁵ These countries (i.e where media debates on Constitutional Treaty Ratification during the period 2005 – 2007 were comparatively studied) include Bulgaria, the Czech Republic, Denmark, Estonia, France, Germany, Holland, Italy, Poland, Spain, Sweden, the UK, and Turkey; for details on methodology and empirical findings, see Liebert et al. 2008.

national debates, namely 'unemployment' (with the noticeable exception of UK and Denmark). Further evidence of this trend can be found in c) declining support for a constitutional settlement of the EU (as measured through the claims-making project; Trenz et al. 2009).

WP 5 thus delivers important data for empirically testing and debating the viability of the RECON polity models. We emphasise that the question of empirical viability should be kept separate from the question of the normative consistency of the models. Our empirical 'compliance tests' pursue a critical intention but cannot deliver ultimate support or undermine the polity models nor give a judgement about their normative validity.

Summary and conclusion

In the first step, we developed three conceptions of the European public sphere from the RECON models. In the second step, we proposed a process-tracing approach to EU political communication, a template of empirical indicators for assessing the practices of political communication involved in European (constitutional or treaty reform) politics, and the comparative political discourse analysis. This framework builds on certain assumptions regarding the epistemic status of the RECON models, for instance (ideally) that each of them models the outcomes from an alternative mode of *constitutional politics* and privileges certain communicative presuppositions over others. More in particular, we suggest to use these indicators for assessing the modes of intergovernmental quasi-constitutionalisation, supranational constitution-making, and democratic constitutionalisation, contending that each of them rests on specific presuppositions regarding patterns and dynamics of communication practices.

Taking the contentious nature of the ongoing process of reconstituting the EU into account, our findings support the argument that the nature of European constitutional treaty development and reform cannot be framed any more as an un-political, technocratic, functional process (Majone 1998; Bartolini 2006). Instead, these findings confirm a 'post-functional' framework of legally underdetermined political choices and contentious politics (Weiler 1999; Hooghe and Marks

2009). If one accepts this claim, the issue is whether and in which sense – from a post-functionalist democratic perspective on European integration – the EU is capable of developing a democratically legitimate constitution, and what its prerequisites are. We argue that the normative persuasiveness as well as practical viability of the third ‘transnational dialogic’ mode of European (constitutional or treaty reform) politics depends on the availability of practices of discursively negotiating the input as well as output based democratic legitimacy of the EU multilevel polity. This third way beyond the traditional alternatives of a confederal vs. federal European order will depend on the infrastructures for strengthening and consolidating such practices of transnational discursive interaction. These pertain to the transnationalisation of national mass media systems, to cross-national party-parliamentary forums, to European citizens platforms as well as to transnational civil society communicative networks.

More specifically, in the post Maastricht, and especially post-enlargement context of European integration, the logics of (1) EU quasi-constitutional development (through successive intergovernmental treaty reforms) as well as (2) the logic of supranational constitution-making by representative consensus-building (Constitutional Convention) both appear constrained by the increasing dissensus among critical segments of national as well as transnational publics. By contrast, if one reframes the role of critical publics not as predicaments of supranational integration but as ‘catalysts’ of European transnational public debate from below, we can expect (3) the mode of ‘transnational dialogue’ to offer the greatest potential. This claim rests on the discourse theoretical requirements for the democratic legitimacy of the EU polity, since this dialogical mode would benefit the quality of real civil society through public communication in the EU most.

In view of the impact of the global crises on these processes – and despite the uncertainties and lack of knowledge from which experts, policy-makers and citizens alike suffer, our theoretical approach, framework and methodology allows us to envisage three alternative scenarios and submit them to further empirical testing.

First, vis-à-vis global pressures, the EU's asymmetric, economically integrated and socially and politically fragmented constitutional order constrains EU leaders too much to bring about the necessary regulatory changes for correcting national, European and global market failures. As a consequence, the EU will suffer delegitimation, the EMU will falter, as will, arguably, European integration in other fields, too.

Alternatively, under the new global challenges and threats to European citizens life conditions, if EU leaders succeed in jointly stepping up federal constitutional provisions for upgrading supra-national market regulation, but fail to encourage the extra-legal infrastructures for democratic legitimacy, namely a pan-European public sphere, this will deepen the divide between political economic integration and nationally fragmented social policies, and increase the EU's legitimacy deficit.

Finally, if the EU's constitutional development is supported by a transnational civil society and a multiple sphere of interwoven publics capable of ensuring public information, communication as well as the control of socio-economic multilevel policy-making, these evolving infrastructures will strengthen the deliberative and participatory elements of democracy in the EU.

Yet, in an integrated project like RECON, it is beyond the scope of any single project group and will ultimately fall back upon WP 1 to draw further conclusions from such findings regarding the prospects for democracy in Europe.

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Chapter 6

Integration without democracy? Three conceptions of European security policy in transformation

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Introduction

European foreign and security policy is being transformed. From being an issue area exclusively under the control of the Member States, there is now an increasing diversity of actors and institutions involved in the making of foreign and security policy in Europe, which do not fit with an intergovernmental conception. This raises potentially important democratic challenges. But in order to properly assess the state of democracy in this policy field, it is necessary first to define the nature of the EU polity. It is only when we know what kind of polity we are facing that we can be clear about what kind of democratic requirements might be necessary and suitable. The transformations in European foreign and security policy could of course mean that the policy field is more open to input from actors outside of the executive, and thereby more transparent. If this were the case, foreign and security policy might to some extent be 'democratised', as the executives would have to stand accountable to other actors and through more transparent processes than what is

* This chapter has previously been published in a slightly different version, see Sjursen 2007.

often customary in a domestic political setting. However, it could also mean that the institutional 'soup' has become so complex that it is even more difficult for the citizens and their representatives to get a clear picture of what is going on than in the nation state context. It could, in other words, strengthen the tendency towards decision-making behind closed doors and in small, exclusive settings. Drawing on the core models of the Recon project, this chapter explores three different ways in which European foreign and security policy may be conceptualised. Subsequently, the relevance of these conceptions are discussed with reference to the existing literature.

Eriksen and Fossum (2007) suggest three ways in which a putative democratic deficit in Europe can be rectified. Each of these possibilities is linked to a more general conception of the EU qua polity, and responds to the basic democratic requirements of congruence and accountability in different ways. Firstly, democracy may be reconstituted at the national level, as delegated democracy with a concomitant reframing of the EU as a functional regulatory regime. Secondly, they suggest, democracy may be reconstituted through establishing the EU as a multi-national state based on a common identity (ies) and solidaristic allegiance strong enough to undertake collective action. Thirdly, democracy may be reconstituted through the development of a post-national Union with an explicit cosmopolitan imprint. These are ideal types, where the core concern has been to develop conceptions that, from a normative/democratic perspective are consistent. It follows that what we find empirically will not have a perfect fit with any of the models. Nevertheless, they are useful tools to help organise and make sense of empirical knowledge, and point to explicit standards against which the EU's democratic qualities may be assessed.¹

Relevance for our understanding of the EU's foreign and security policy

Ever since the first attempts in the early 1970s at establishing foreign policy cooperation in the European Community (EC), through the so-called European Political Cooperation (EPC), there has been a, sometimes implicit, sometimes explicit, search for conceptual tools

¹ The focus here is on the second pillar of the EU, that is, the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP).

that might allow us to capture its implications. In the early days, much of the debate was between those who simply considered the idea of a common European foreign policy as inconceivable, and those who saw this as the beginning of an altogether new kind of international relations. It was often a rather sterile debate focusing on whether EC foreign policy 'existed' or not. While realists considered states to be the only conceivable foreign policy actors, others, often with a more empirical inclination, sought to map and describe EPC and thereby documented 'real' changes in the way foreign policy was made in Europe. Amongst the first explicit efforts to conceptualise European foreign policy that grew out of this literature was Gunnar Sjöstedt's book (1977) on the EU's actorness in foreign policy. Further, Dave Allen and Michael Smith (1990) wrote about the EU's international *presence*, while Christopher Hill (1990) discussed whether the EU should be thought of as a civilian power, superpower or flop.

Today there is a change. The voices of dissent, or rather, the argument that the EU does not have an impact internationally, or that there is no such thing as a European Foreign Policy (EFP), has been increasingly difficult to sustain. The EU is the world's largest trading power as well as a major donor of humanitarian assistance and development aid. Further, its gradual building of capabilities in security and defence makes it an important actor in areas of tension, as we can observe for example with regard to the Middle East. In spite of the scepticism, the European Union has forced itself upon the international agenda. It seems that we are facing a field where empirics are running ahead of the theories. As a result, rather than questioning the 'reality' of the EU as a foreign policy actor, the existence of the EU as a relevant force at the international level is taken for granted and the debate focuses much more explicitly on how to conceive of and account for this development.

A precise and coherent conception is however still lacking. What is particularly lacking is a conceptualisation of the foreign policy actor. Most attempts at conceptualising EFP focus on the content of the EU's foreign policy initiatives, rather than on the polity as such. This is particularly problematic if we want to address the question of democratic accountability of foreign and security policy, and if we consider concerns about democracy to be an integral part of any discussion about future developments in foreign and security policy

in Europe. It is also surprising given that much effort has in recent years been put into arguments regarding the so-called 'normative' power of the EU in the international system.²

One way out of this dilemma is to consider that the conceptual toolbox that we should still rely upon is the 'traditional' one where sovereignty is the constitutive principle of international relations and where foreign policy is intrinsically linked to the idea of a state. This is a position that, in fact, would be shared by IR Realists and a number of democratic theorists, albeit perhaps for different reasons. As for the Realists, the state is the core constitutive unit of the international system and it is unlikely that this will change. Consequently, if we want to understand international politics, this is where we should start (Bull 1991: 295-6). Realists would probably be less concerned with the question of democratic accountability, which would be at the core of certain democratic theorists' attachment to the concept of the state as *incontournable*. From their perspective, the argument would be that it is impossible to separate a conception of law from that of a state, as hierarchy is required in order to ensure respect for the law and uphold citizens' rights. From a more empirical research position, the advantage of taking such a standpoint is that it also provides us with a fairly clear conception of a polity that may be applied to the EU as a form of 'measuring stick'. With the two exceptions of Christopher Hill (1993a, b) and Teija Tiilikainen (2001) surprisingly few have, however, sought to explicitly compare the EU's foreign policy to that of a state's.³ In fact, the tendency seems to be to argue, sometimes even from a normative perspective, that such comparisons are not the way to go.

In the conceptions presented by Eriksen and Fossum (2007), which form the basis for the discussion in this chapter, the concept of polity (democracy) is disconnected from that of the state in the last of the models. A core challenge is then to establish a coherent conception of the foreign policy of such a polity. What might a non state foreign policy look like – and does it entail abandoning all traditional conceptions of what foreign, security and defence policy 'actually' is?

² For a critical assessment of this literature, see Sjursen 2006a, b.

³ Incidentally, they come to very different conclusions.

I now turn to each of the three conceptions of the European polity, discussing first what the foreign and security policy dimension might look like and second, briefly, the empirical fit of the conception.

Audit democracy

In the first model the EU is conceived as a *functional regime*. Its purpose would be to address problems that the Member States cannot (or can more efficiently) resolve when acting independently. Examples would be cross border issues such as crime and terrorism, environmental problems, economic competition or migration. In order to handle such issues, the Member States would establish politically independent institutions such as specialist agencies and delegate policy-making powers to independent regulatory commissions. In this model the presumption would be that '[...] only the nation state can foster the type of trust and solidarity that is required to sustain a democratic polity' (Eriksen and Fossum 2007: 12). In order to preserve national sovereignty and ensure that Member States would be able to hold the EU institutions accountable, a set of institutions in which Member States would have the right to veto would be established at the EU level. Further, Member States would be assisted in their exercise of democratic control of collective endeavours through a representative body that would be able to supervise and control the Union's actions (hence the concept of audit democracy), but that would not be able to authorise law making.

What would foreign and security policy be like in this model? First of all, it seems quite clear that whatever would be done at the EU level, it would be quite limited in scope, as it would be entirely *subject to the Member States' approval*. This would be a European order in which one would have national European foreign, security and defence policies, with only concrete tasks delegated to the European level. To the extent that there would be institutions at the EU level dealing with foreign and security issues, these would be intergovernmental. Member States would communicate through the traditional means of diplomacy, with national diplomatic missions in Brussels. It follows logically that there would be no permanent European 'voice' in the international system, no 'Europe' to telephone, although the Member States of the EU might choose to speak collectively on certain issues or in a particular setting. As for the diplomatic missions, these might

conceivably be located in the same geographic area, as is for example the case with the national delegations to NATO; however, diplomats would have their daily workplace in their national delegation in Brussels, and not in any other permanent institutional formations (even if intergovernmental). The mandate for national delegations would be formulated by the home ministries and changes would be subject to decisions in the capital.

One would not necessarily expect restrictions on the types of issues that could be discussed amongst the Member States. As long as the principle of consensus would be rule regardless of the issue area under discussion, there is no reason to assume that security and defence would be excluded. There would be no political, economic or military instruments directly available to the EU as a collective actor. One could however expect collective, ad hoc, civilian, economic or military initiatives, when so decided by consensus amongst the Member States. One could also imagine such initiatives to be taken by a smaller group of Member States, if all would not like to take part. Still, however, such initiatives would also have to be run by the rule of consensus.

But what, then, might one expect to see delegated to the EU level? What would be the European dimension to foreign and security policy in this model? Is it possible to imagine that any dimensions, aspects or tasks that are relevant to the field of foreign and security policy could be delegated to the EU, without affecting the ability of Member States to maintain control? One area where one might imagine delegation is that of defence procurement. Here Member States might see an economic advantage in joining forces in the development of armaments. Overseeing such tasks might be delegated to a special agency. Further, joint training operations as well as education of military staff might very well be conducted in cooperation without jeopardising the sovereign control of each government over its troops. Finally, as already noted, it should be possible to expect some ad hoc joint military activities, along the same principles as those followed in military alliances. That is, troops would be raised by the nation states, and it would be entirely up to them to decide for each specific task whether or not they would be willing to contribute to a common operation.

What kind of perspective on international relations might underpin joint initiatives in this conception of European Foreign and Security Policy? There is little in the model prescribing a particular type of foreign policy or a particular type of military initiatives. As the main criterion for acting would be that there is agreement amongst the Member States, one might expect policy to be based on self-interests, but it could equally well be inspired by a collective conviction of what is 'right' or 'good'. However, as the model is premised on the idea of the nation state as the only entity that can foster the type of trust and solidarity necessary to sustain a democratic polity, one would expect to see a foreign policy that considers sovereignty to be the constituent principle of international relations. This does entail clear restrictions in terms of how far European initiatives could go in a normative direction and seek to establish common rules and regulations at the global level, if one is to expect consistency between the internal standards of the polity and the principles and values that are promoted externally, multilateralism would be the limit. The scope for strengthening human rights legislation, for example, at the global level would be restricted, as this is a concept that challenges that of external sovereignty. The main indicators for this model are summarised in the first column of Table 6.1.

Beyond delegation?

What is the empirical fit of this model? Looking at the main principles guiding the institutional setup, the initial conclusion would be that this model fits very well with what we have in the field of foreign and security policy. Foreign and security policy is confined to a separate pillar within the EU, and decisions are made through consensus. Each Member State has the right to veto any proposed decision. As for the supranational institutions – the European Parliament, the Commission and the European Court of Justice (ECJ) – their roles are fairly limited. The European Parliament is only consulted on the main aspects and basic choices made in the field of foreign and security policy and kept informed of how those policies evolve. As for the European Commission, it has slightly more influence, as the Treaties stress that it is fully associated with the CFSP. Representatives of the Commission take part in a number of intergovernmental groupings within the CFSP framework. The more we move toward the 'hard' end of defence, however, the lesser the influence of the Commission. As for the ECJ, as the EP, it plays only a limited role in the CFSP.

A further factor that suggests a fit with the expectations of this model is that there is some delegation of concrete tasks. In fact, in 2004, a European Defence Agency (EDA) was established, 'to support the Member States and the Council in their effort to improve European defence capabilities in the field of crisis management and to sustain the European Security and Defence Policy as it stands now and develops in the future'.⁴ The Agency became operational in 2005. The governance structure of this agency fits well with the first model. The EDA is under the direction and authority of the Council, which issues guidelines to and receives reports from the High Representative as Head of the Agency (Meyer 2006). Detailed control and guidance, however, is the job of the Steering Board, which is composed of the Defence Ministers of the 26 participating Member States (all EU Member States, except Denmark) and a representative from the European Commission. In addition to ministerial meetings at least twice a year, the Steering Board also meets at the level of national armaments directors, national research directors, national capability planners and policy directors. Its main 'shareholders' are the Member States participating in the Agency; key stakeholders include the Council and the Commission as well as third parties such as OCCUR (fro. Organisation Conjoint de Cooperation en Matière d'Armement) and NATO (European Defence Agency Information). In addition, an intergovernmental Regime on Defence Procurement was launched on 1 July 2006. This is a voluntary, non-binding intergovernmental regime aimed at encouraging application of competition in this segment of Defence procurement, on a reciprocal basis between those subscribing to the regime. At the moment there are no provisions for joint training of military staff. However, there are, of course a number of joint military and civilian operations conducted under the aegis of the EU - with personnel provided by the Member States (Howorth 2007).

However, this is not all that there is to the EU's foreign and security policy. As becomes evident in the institutional map provided in Figure 6.1, this is an extremely complex system. Two things may be noted straight away. Firstly, it is often very difficult to distinguish the authority of the Commission and that of the Council/Member States.

⁴ See the background information on the EDA at the website of the EU: <<http://www.eda.europa.eu/genericitem.aspx?area=Background&id=122>>.

Formally, matters pertaining to foreign political, as well as security and defence issues are the responsibility of the Council and subject to the rule of consensus. Other issues that arise at the global level (trade, agriculture, environmental issues, etc) are subject to the Community method. However, it is a well-known fact that it is very often difficult for the Union to decide whether an issue falls under the first or the second pillar. Economic sanctions are the classic example. This involves the EU's trade policy, so relates also to the first pillar, however, it is an important instrument of foreign and security policy – hence it relates to the second pillar. From early on in the history of European foreign policy cooperation, this has led to double headed missions and ad hoc solutions in which the Commission and the Council are both involved at different levels. The second thing that may be noted immediately is the increasing density of permanent intergovernmental institutions in Brussels. Some of these appear to have emerged in the context of the nomination and gradual strengthening of the role of the High Representative for the CFSP, as a number of the Council bodies work under his direction. However, it is not the case with all the institutions. The Political and Security Committee (PSC), which is also crucial to the definition of the EU's foreign and security policy seems to have fortified its position as a result of different logics.

An important question that arises as a result of this institutional mushrooming is to what extent it is still possible for the Member States to retain the kind of sovereign control over foreign and security policy that is expected in the audit democracy model. It would seem that the Member States themselves have sensed the 'risks' involved in establishing permanent institutional structures in Brussels, even when these are intergovernmental and staffed with Member State representatives. For a number of years, the establishment even of an EPC Secretariat in Brussels was resisted, although there were clear practical arguments in favour of such an arrangement (Nuttall 2000). The reason for this resistance must be seen as linked to concerns about a loss of sovereignty, which in turn raises questions about democratic accountability, although it is doubtful that the latter was a core concern for national executives. Likewise, the almost instinctive reluctance of many Member States to any perceived incurrence of supranationalism into this field is also visible in the distinction that remained for so long between the common trade policy and EPC.

Until the early 1980s, certain Member States refused to accept that EPC should be able to invoke the instruments available through the common trade policy to support its diplomatic statements. This only changed after the Polish crisis in 1981 (Sjursen 2003).

A further element that goes counter the expectations of the audit democracy model is that a lot of effort has in recent years been put into developing a coherent vision of a European Foreign and Security Policy. The most explicit expression of this ambition is probably the European Security Strategy (ESS 2003) that outlines the core elements and principles of the EU's security policy. The establishment of such a document does not fit the idea of Member States only delegating specific tasks to the Union level in order to be better placed to develop their own national foreign and security policies. Rather, it points towards the aspiration of developing a coherent and distinctive European voice in international affairs.

In the same vein, a closer look at the identification of tasks for the EDA reveals that it is not established to support the security and defence policy of the Member States, as one would expect in the audit democracy model. Rather, the aim is systematically referred to as supporting and strengthening *European* defence policy. Amongst its tasks are those of working '[...] for a more comprehensive and systematic approach to defining and meeting the capability needs of the *European* Security and Defence Policy (ESDP).' Further, it should support '[...] collaborative use of national defence R&T funds, in the context of a *European* Defence R&T Strategy which identifies priorities' (my emphasis) (European Defence Agency 2009). Again, this suggests a coherent and distinct European voice, rather than simply a pooling of resources to strengthen national defence policies as a core concern.

This preliminary discussion suggest that if Europe is to reconstitute democracy in accordance with the principles of audit democracy, it would have to roll-back integration even in this policy area, which is generally assumed to be subject to only limited (if at all) supra-nationality. The institutional structures are more complex than what an intergovernmental model implies, and this raises questions regarding the possibility of holding the executive accountable.

Further, the aims of common initiatives appear to go much further than what a mere delegation of tasks would require.

What then, about the model that conceives of democracy as reconstituted at the EU level?

Federal multinational democracy

In this model, the EU is conceived as a multinational federal European state. Rather than being premised on a sense of common destiny of the kind one traditionally considers to be at work in the framework of a nation state, the idea here is that of a multinational federal state, where nation building processes at Member State and regional levels would have to be accommodated within the overall federal structure. The common identity basis would then be premised on a '[...] commitment to direct legitimacy founded on basic rights, representation and procedures for opinion and will-formation, including a European-wide discourse' (Eriksen and Fossum 2007).

In this conception of the EU, there would be a single foreign, security and defence policy at the federal level. More concretely this would entail that core criteria of statehood, such as: a permanent population (in other words the establishment of a European citizenship); a defined territory (or the idea of a common territory); effective government (that is, a system of political institutions capable of making decisions and putting them into practice through a system of law) and the capacity to enter into legal relations with other actors at the international stage would have to be fulfilled. One would expect the EU to establish a single foreign and defence ministry and that decisions in such matters would be made in accordance with the decision-making procedures of a federal state, resting on a coherent conception of a European foreign and security policy. The EU would raise military forces and they would be answerable to the Union and not the Member States. Further, their core purpose would be that of guaranteeing the inviolability of the EU's territory.

Although the EU would be a state, it would, as noted, be a *multinational* federal state, which would accommodate nation building processes both at regional and 'national' levels. The expectation in this model is that the EU would have a sufficient

identitarian basis to act collectively and be representative of a common interest at the global level. This could be constituted through a so-called constitutional patriotism where 'political agency [is] conceived as animated by a set of universalist norms, but enriched and strengthened by particular experiences and concerns' (Müller 2006: 2). It would mean that, contrary to what is usually assumed to be the case in European nation-states, there would have to be a stronger reliance on democratic procedures and on an open public debate in order to ensure the legitimacy basis of the foreign and security policy. It would not, most likely, be sufficient to assume the kind of automatic 'rallying around the flag' that seems to be the expectation in states that rest on the idea of a 'thick' collective identity. Further, there would be two parliamentary chambers – where one would emerge from the national level and represent the previous Member States' concerns in foreign and security policy.

There would be no practical limitation to the kind of 'power' that a federal EU might want to project in global politics, as it would dispose of military, as well as economic and political, instruments. However, this is not to say that the EU would necessarily conduct a foreign policy in line with what we think of as Great Power politics, where the particular interests of the EU itself would constitute the only guideline for policy and would be asserted in a manner consistent with the material power of the Union. One could equally well expect a more multilateral focus and a focus on international law. This would be in line with arguments presented for example by John McCormick (2007), as well as Jürgen Habermas and Jacques Derrida (2003). The idea here is that a European state is needed at the global level not so much in order to pursue 'European' interests in a power-political game, but to promote a 'European' perspective on international affairs, in contrast, for example, to the perspective of the United States. As in the case of model one, however, policy would be underpinned by the idea of external sovereignty as the core constitutive principle in the international system, thus setting clear limits on the human rights dimension to the foreign policy. One could even imagine that this would be the prime mover for the establishment of such a multinational federal entity. The core elements of this conception of a European foreign policy are summarised in column two of Table 6.1.

Is this a completely far-fetched model of EFP? As already noted, the institutional set-up of the CFSP/ESDP is far more complex than what one would expect according to the audit democracy model. Does this signify a *de facto* move towards supranationalism in line with model two?

Elements of statehood?

Increasingly, findings suggest that the institutional nexus of policy-making and the many actors involved in the field of foreign and security policy depart from a simple intergovernmental organising model. It is not only that the Commission's activities affect traditional foreign policy issues and it is often difficult to distinguish between its domain and that of the Member States. More importantly, several authors point to the increasingly autonomous role of the Council and the Council Secretariat in making and shaping European foreign policy. Deirdre Curtin (2007) argues that, especially in the newer policy fields such as the CFSP, the Council has assumed executive functions much in the same way as the Commission does in other policy areas. And in spite of governmental inputs in these policy-areas, what is becoming apparent in her view is the autonomous nature of the Council and its bodies. The performers of this growing Council structure are Council General Secretariat bureaucrats as well as national bureaucrats participating in Council committees. Their important role in assisting the Presidency in agenda-setting and in actual negotiations is, according to Curtin, often overlooked. Duke and Vanhoonacker (2006) also find, in a study of the Brussels-based administrative aspects of the CFSP (defined as Coreper II, the Political and Security Committee (PSC) and the Director Generals in the Commission and the Council Secretariat), that the 'administrative level plays a crucial role in the agenda and decision-shaping processes of CFSP'. And further that '[...] the administrative role goes well beyond that of making sure that the machinery works smoothly, to include important if often unnoticed roles in agenda-shaping, decision-shaping and implementation.' (ibid.: 18). Their overall conclusion is that this, in combination with the increasingly political function of the High Representative and the Policy Unit, has entailed considerable modifications of intergovernmentalism in foreign policy.

Ben Tonra (2003) points to the same phenomenon when he argues that the CFSP structure reflects a move from intergovernmentalism towards a Brussels-based bureaucratic working method. This is so even though the locus of control lies with the Council and the Council Secretariat and consequently leads to a policy process that is distinctive from the so-called Community method. Other researchers also point to such a process of Brusselsisation i.e. a shift in the locus of national decision-making to Brussels-based institutional structures of foreign policy (Allen 1998; Howorth 2001).

It has been argued for a long time that the existence of clearly distinguishable national preferences within European foreign policy has become less obvious. In fact, despite the well-known solo initiatives of some of the EU's Member States in situations of crisis, it is increasingly difficult for Member States to escape expectations of consistency between national foreign policy and the foreign policy positions of the EU. The accumulation of previous stances on foreign policy issues providing a common framework for action and decision, and the fact that the obligation to consult all other parties has (according to observers such as Nuttall 2000) become the standard in the CFSP - even though it is obviously not consistently respected suggest a move beyond a pure intergovernmental process. But what is more recent is all the observations pointing to the fact that it is increasingly difficult for national foreign ministries to control all aspects of national foreign policy-making. The frequency of meetings amongst national representatives in the various institutional settings organised under the Council and located in Brussels may have contributed to such processes of Brusselsisation, which suggest a *de facto* move in the direction of supranationalism. Further, the time spent on the preparation of these meetings as well as their duration may contribute (Tonra 2003; Pijpers 1996). These kinds of observations further strengthen the idea that we are beyond a classic intergovernmental model. They do also imply that we have in front of us a system of political institutions capable of making decisions. However, this system is dissimilar to that of the federal model in the sense that it is difficult to trace the decision-making hierarchy and to see where and within which institution lies the authority to specific decisions. As I will return to later, this has implications for the question of democratic accountability as outlined

in the second model. Do the recent provisions of the Lisbon Treaty make a difference to this?

Although the post of Foreign Minister was taken out with the Lisbon Treaty, all the functions that this foreign minister was supposed to fulfil, have been agreed upon. This means that when (if) the Lisbon Treaty comes into force, the High Representative, whose responsibility it is according to art. 9e to '[...] conduct the Union's CFSP' will also be the Vice President of the Commission. It is of course too early to tell what the implications of this innovation will be. However, one hypothesis is that, even though he/she will have a mandate from the Council she will spend most of his/her time in the Commission and only intermittently meet with the national Foreign Ministers. From an organisational perspective this would imply that his/her prime reference and identity will be linked to the Commission rather than the Member States. In turn this would suggest that the tendency referred to above of a loosening of the grip of Member States on the EU's foreign policy is likely to be further strengthened.

However, it is other elements in the Lisbon Treaty than those of the institutional structures that most clearly modify the intergovernmental perspective hint towards the shaping of a state-like entity. First of all, with regard to the issue of external sovereignty, it is important that the EU according to the Lisbon Treaty will obtain legal personality. This means that it may sign treaties and engage in direct diplomatic relations with other actors. Some would argue that the EU has already done this (Tiilikainen 2001), as the EU has for example entered into an agreement with the now defunct West European Union (WEU) as well as with NATO through the Berlin agreement. However, with the Lisbon Treaty the EU's status in international affairs should no longer be disputed. Further, with regard to the EU's conception of its territory, the Treaties say that the Union's foreign and security policy shall 'safeguard its values, fundamental interests, security, independence and integrity'. Clearly, the commitment to the integrity of the Union does not go as far as promising to protect the inviolability of the borders of the Union, as a national security and defence policy would. However, to commit to the 'integrity' of the Union, a clause that was introduced in the Treaty of Amsterdam, as well as to its security, certainly goes a long way in this direction. According to Tiilikainen (2001) there was also a debate in Amsterdam

as to whether the inviolability of the EU's external borders should be added to the list of goals of the EU's foreign and security policy.

Finally, with regard to foreign policy instruments, the Lisbon Treaty agrees to establish a European External Action Service (EEAS), which is 'to work in cooperation with the diplomatic services of the Member States and comprise officials from relevant departments of the General Secretariat of the Council and of the Commission, and staff from national diplomatic services'. This is not, then, a European diplomatic service, however, its establishment does seem to be modelled on the very idea of the diplomatic services of states. Further, although it is called a European External Action Service, it might actually look and act very much like a European diplomatic corps.

As noted, in spite of the increasing autonomy of the Brussels-based CFSP institutional network, it is quite clear that this does not amount to the establishment of single and coherent foreign and defence ministries, which have the final word in decisions in foreign, security and defence matters. However, several of the recent institutional developments, such as the strengthening of the role of the High Representative and the development of an External Action Service, appear to be inspired by a state-like foreign policy model. Further, although it does not fulfil the core criteria of statehood, such as having the power of coercion, the EU does possess some elements of what is considered intrinsic to external sovereignty, such as legal personality. So, although the picture is mixed, model two appears to have a closer empirical fit than model one.

However, the federal model also has certain democratic requirements. Here, the EU's foreign and security policy does not fare well. Although more research is required regarding the implication of institutional developments in CFSP/ESDP for openness, transparency and accountability in European foreign and security policy, it does seem that the increased integration and efficiency in this policy-field has come at a certain cost to democratic accountability (Bono 2006; Thym 2006; Crum 2006; Barbé and Herranz 2005; Koenig-Archibugi 2002).

Curtin (2007) considers, in line with her findings of an increasingly autonomous role for the Council, that executive dominance is

exacerbated in foreign and security policy. She describes (foreign) policy making in the Council as taking place in largely non-public conclaves and argues that the Council is set apart from debates on public deliberation in the EU decision-making process and that it is not engaging with non-bureaucratic actors in a deliberative fashion prior to decision-taking. Wolfgang Wagner (2007) also points to the risks of executive dominance. He argues that the Europeanisation of defence policy weakens the Parliamentary control of defence policy, particularly in those Member States in which the national Parliament has been a powerful participant in these policy fields. Integration of military structures, and role specialisation in particular, make an individual Member State's opt out from joint military missions difficult. As a consequence, only little room is left for (national) Parliamentary deliberation. Thus, the democratic deficit, which clearly is already an issue in some countries in the field of foreign policy, has been exacerbated due to the limited role of the European Parliament. In fact he argues '[...] the EP can hardly compensate for the weakening of parliamentary control at the national level' (Wagner 2007: 9).

On the other hand, some argue that certain developments towards a strengthening of democratic control at the European level have in fact taken place, which is why more research on this issue is required. Kietz et al. (2005) show that over time, the European Parliament has gained considerably more competencies in foreign policy than what was foreseen in the Treaties. This is so, in their view, both in terms of the EP's supervisory and budgetary powers. The strengthening of the EP's power was introduced through an Interinstitutional Agreement (IIA) from 1997, which extends the EP's information and consultation rights, confirms its budgetary powers and introduces concrete budgetary procedures in the field of foreign policy (ibid.: 187). This 1997 interinstitutional agreement was amended by a Joint Declaration of the Parliament, the Council and the Commission in 2002, which provided amongst other things for a regular political dialogue on the CFSP between the Council and the EP. What is more, Kietz et.al. predict future amendments to this IIA, which would further strengthen the EP's role (ibid.: 187).

Overall, what emerges is an ambition of establishing the EU as a political power in its own right in the international system. The EU does possess some of the core features of statehood, and even that the

state model may be at the back of policy-makers minds when they discuss further integration in this field. However, there is no exact fit with this model. This is particularly so when it comes to the question of democratic accountability, where almost all mechanisms appear to be located at the level of the nation states. It would seem that foreign and security policy functions are simply uploaded to the EU level, without strengthening democratic control. The risk is that what we will observe in future then is a multi-level process of self-reinforcing executive dominance. Yet, it could very well be that this 'political power' should be conceived of in a different way from that of a state-like power. This would point us in the direction of the third model of a regional cosmopolitan order.

A regional-democratic polity

According to this conception the EU would be a regional cosmopolitan order, in which government would be separated from the state. It would be a non-state democratic polity with explicit government functions. In such a polity, the concept of government would rest on the moral authority of the procedures established for decision-making and law making (Eriksen and Fossum 2007: 29). Compliance, in other words, would be ensured as a consequence of decisions following such authorised procedures, and not as a result of coercion (or the threat of coercion). It should be noted that the EU would be cosmopolitan in the sense that its actions would be subjected to the constraints of higher ranking law; however, it would not be aspiring to become a world organisation. Instead it would be committed to the fostering of similar regional cosmopolitan orders in the rest of the world. So what is envisaged is a polity 'with a pyramidal conception of congruence and accountability, i.e. where the global level contains certain fundamental legal guarantees, the EU handles a limited range of functions over which it has final authority.' (ibid.: 30)

What would foreign, security and defence policy look like in such a non-state multilevel, civil society based polity?

An important assumption is the idea that there is a link between the role of the polity in transforming political community within the region and how it would relate to/situate itself in relations to the rest of the world. This is so as the internal standards of the polity – the

principles of human rights, democracy and rule of law – would be the ones that would also be projected externally. Nonetheless there would be a border to Europe – but this border would be justified in functional terms – allowing for other regions also to form. This gives a clear indication as to the kind of perspective on international relations that would form the basis for the polity's foreign and security policy. The main point would be a search for a 'domestication' of power politics through law. In other words a search for the international order to move from an exclusive emphasis on the rights of sovereign states within a multilateral order to the rights of individuals in a cosmopolitan order. One would expect a foreign policy underpinned by the idea that the principles of human rights need to become positive legal rights that could be enforced at the global level. It is indeed difficult to avoid both that the most powerful only use a 'moral' foreign policy for their own interest and to avoid that even when they don't they are still suspected of doing so unless human rights, in practice, are universal principles applied to all (Eriksen 2003). In a cosmopolitan system, all international relations would have to be subordinated to a common judicial order that would transform the parameters of power politics and redefine the concept of sovereignty. It is this emphasis on the 'taming' of power politics – on a transformation of the international system from a Westphalian state order to a global cosmopolitan order that constitutes the core, or critical, difference between this third model and the first and second one.

As noted, the whole sense on internal and external would be transformed, and not only foreign policy but also domestic politics would have a different meaning than in a traditional perspective. One could imagine that issues such as energy, environment and perhaps even social redistribution would not only be 'European' issues, but also issues that would be discussed and decided upon at the global level. The need for territorial defence would in principle disappear and one would instead see a kind of security policy that would focus on ensuring the respect for cosmopolitan principles, in line with collective decisions made at the global level. But what, in more concrete terms, would be the distinctive institutional features of a regional cosmopolitan polity? Proponents of a cosmopolitan perspective are surprisingly vague on this (Held 2003, 1995; Archibugi 2002; Beck 2003; Rumford 2005). In the Eriksen and Fossum (2007) concep-

tion of a regional-democratic polity some explicit choices have been made. Most important perhaps is the emphasis on government rather than governance – pointing to an ability to make binding decisions to which the executive is held accountable. So, there would be a clear and identifiable executive dealing with global issues at the EU level. This executive would be accountable both to the regional and to the global levels, as the EU would be bound by global cosmopolitan law. As noted, this also means that the tasks for which this executive would have responsibility would be different from those of a traditional foreign or defence ministries. What seems to follow from the Eriksen and Fossum conception, however, is that there would be a rather ‘thin’ global order, with a focus on respect for human rights and global security. Hence, these would be the core tasks of the EU executive’s ‘foreign’ policy – together with that of representing the Union in relations with other regions as well as in global institutions. As for accountability at the regional level, it would be ensured through a regional parliament combined with a transnational public debate. A summary of this model is found in the third column of Table 6.1.

Cosmopolitan Europe?

How, then, does this fit with what we know about the EU? Obviously, we are not in a global cosmopolitan context. This means that when examining the external policies pursued by the EU we must consider instead the extent to which the EU is a promoter of such an order at the global level. First, however, what about the institutional structures?

As noted in the discussion of the second model, there is an ongoing process of transferring decision-making to a more diffuse European administrative/executive level, which, although formally working along the principles of intergovernmentalism, in practice appears to have a more autonomous role. Here, the Political and Security Committee, the Policy Unit working for the High Representative and some of the DGs in the General Secretariat of the Council are key. Most research does, however, point to a rather closed decision-making process in these fora rather than a process that is geared towards ensuring an open public debate, as one would expect in a regional cosmopolitan polity.

Arguably, the institutional structures may present some normative constraints on the dealings of the executives. As there is no hierarchical structure with the ability to coerce Member States in the EU's foreign policy we may consider the EU's foreign policy as being made somewhere in between the assumed anarchy of the international system at large and the hierarchy of a nation-state decision making system. This leads to mechanisms such as the coordination reflex between Member States, requiring that they take no final position on foreign policy matters before consulting with the other Member States, which may be conducive to a kind of closed deliberation. This requirement of consultation, in which national positions would have to be justified in a manner that makes it acceptable to all, might not only, as Mitzen (2006) suggests, cause Member States to moderate their interest claims, but also to seek a certain consistency between their claims and the underlying constitutive principles of the EU. An example may be the process of writing the EU's Security Strategy, where some of the more belligerent formulations regarding intervention disappeared from the first draft during the process of consultation with Member States. Although this does not amount to democratic accountability, it might provide for a foreign policy with a deliberative imprint in the sense that it subjects actors to intersubjective scrutiny and leads to the requirement that policy be consistent with the entrenched norms of the Union. Further, as Eriksen (2006) underlines, there is a fairly strong focus on rights, through the EU Charter, which ensures a protection of citizens' rights across Europe. However, it remains that we are far from observing the kind of democratic accountability envisaged in the regional cosmopolitan model. Also the lines of accountability towards national and European Parliament are unclear, and attempts at establishing transnational parliamentarism do not appear to have brought much improvement in terms of democratic accountability (Marschall 2007).

Most importantly, however, it is difficult to find evidence in the existing literature with regard to whether or not this emerging structure would be more similar to model three than to model two. Clearly, this may in part be due to a failure to sufficiently specify the model in this chapter. However, we should not disregard the possibility that, as already hinted at, when it comes to the core organisational features of the third model, these are not that different from that of the second model of a democratic constitutional state.

Such a suggestion is strengthened by the fact that, as noted, the 'cosmopolitan' literature provides little concrete information on this matter. This might suggest that we should think of the third, cosmopolitan model as a guiding principle for policy rather than a polity model.⁵ However, before concluding on this point, more research is required.

What, then, about the EU's perspective on international relations? As noted, this is what would constitute the critical difference between the third model and the two others. According to the EU's Security Strategy (ESS 2003), its international objectives are to develop a stronger international society, well-functioning international institutions and a rule-based international order. Membership in key international institutions is to be encouraged and regional organisations are considered important in the effort to strengthen global governance. The cornerstone of a law-based international order is, according to the ESS, the United Nations (UN). Its role must be strengthened; it must be equipped to fulfil its responsibilities and to act effectively. Furthermore, protection of human rights has been included as a particularly important goal in the European Union's external policy.⁶ This has, amongst other things, led to a human rights clause becoming standard content of all trade agreements established with third countries since 1992 (Menéndez 2004). The emphasis on human rights is consistent with a regional cosmopolitan entity. Clearly, such an emphasis could be seen simply as 'cheap talk', or even as an effort to impose specifically European conceptions on other parts of the world. However, the EU is willing to bind itself to the same standards through legal measures. Hence, it has for example actively supported the establishment of the International Criminal Court (ICC), which might hold the EU as well as other actors accountable. Making the Charter legally binding would further reinforce this tendency by ensuring that the EU is legally committed to consistency between its own policies and those promoted abroad. Furthermore, the EU consistently refers to the principles of the UN and makes it clear that its peace keeping and conflict prevention

⁵ Many thanks to Daniel Gaus for pointing this out to me.

⁶ See in particular *Human rights in third countries: Summaries of legislation*, <<http://europa.eu.int/scadplus/leg/en/lvb/r10100.htm>>, but also the *European Security Strategy* (ESS 2003).

missions should be 'in accordance with the principles of the United Nations' (Article I-41.1).

So, the EU binds itself to principles that are consistent with what we might expect in a regional cosmopolitan entity. With regard to practical policy there is also evidence support such an interpretation. The EU's campaign for the abolition of the death penalty launched in 1998, is an example of its human rights policy leading to results: it has contributed to the abolishment or reduction of capital punishment in Cyprus and Poland, Albania, Ukraine, Azerbaijan, Turkmenistan (Manners 2002: 249-250). It is also a case which demonstrates that its human rights policy has been pursued at a certain cost and thus most likely is not merely 'cheap talk': as it has meant taking a stand in opposition to its closest ally the United States. Finally, to the extent that enlargement may be considered a form of foreign policy, Gamze Avci (2006) argues that the EU's conditionality has been a crucial factor in triggering democratic reforms in Turkey. And clearly, respect for democratic principles and human rights have been a condition for membership in the EU since its early inception (Verney 2006).

However, some of the external policies of the EU may be interpreted in different ways and signal a certain ambiguity that might lead us to question this close 'fit' with the foreign policy of a regional cosmopolitan entity⁷. For example, a core characteristic of the EU's foreign policy is the emphasis on regional cooperation. Federica Bicchì (2006) argues that the EU's promotion of regionalism in the Mediterranean must be characterised as an attempt by the EU to promote its own model abroad without much consideration for the context in which it is to be introduced. Thus she writes that '[...] the EU does not promote (neutral) norms, but promotes Europe' (ibid.: 220). She concludes that this does not necessarily echo the promotion of norms that are universally embraced. Similarly, Börzel and Risse's survey of the EU's policy on democracy promotion suggest a certain value-bias in the sense that the EU has developed a specific model of democracy promotion that it seeks to export without much consideration for the target state. Hence they argue that 'In fact, the EU follows quite clearly a specific cultural script.' (Börzel and Risse: 2004: 2). Thus, although the promotion of regionalism could, in light of the emphasis

⁷ For this interpretation see Hyde-Price 2006.

on cosmopolitan regionalism, fit quite well with the third model, it is given a different meaning by these authors.

An alternative interpretation of the EU's promotion of regionalism is however, presented in a publication by the Foreign Policy Centre (Barth Eide 2004). Here the promotion of regionalism is seen as part of a global trend in which the EU contributes to fundamental processes of transformation in the international system in the direction of a power shift from states to regional organisations and individuals. Regionalisation is seen as part of an effort to ensure global security and respect for human rights. This would be more consistent with a regional cosmopolitan foreign policy. Finally, Lerch and Schweltnus (2006) stress that the EU not only works to promote human rights, but that it aspires to change the valid rules of international law in order to accommodate a stronger human rights protection than what is found in international law today. As the EU is confronted with the challenge to present coherent arguments that go beyond the legal status quo she has found that it '[...] EU leaves room for different human rights conceptions while pushing a debate and a gradual process towards a new international consensus on the interpretation of the right to life' (ibid.: 241). In this respect she points to a contrast with the United States for example, which considers the issue of the death penalty to be a 'value' question of criminal justice.

Concluding remarks

In this chapter I have depicted three models of European foreign and security policy, based on three broader conceptions of European democratic order. I have also made a very preliminary assessment of the empirical relevance of each of these models, drawing on the existing literature. Three observations can be made on the basis of this analysis. First, and perhaps most surprisingly, it would seem that thinking of EU foreign policy as 'state-like' is not as far fetched as one would perhaps expect. In fact, contrary to most of the literature on European foreign policy, which stresses the uselessness of a state model, it would seem that elements of this model are present. Hence, the EU is at least as close to a conception of the foreign policy of a federal state as it is that of the 'foreign' policy of a cosmopolitan-like polity, which appears to be a conception much more favoured in the EFP literature at the moment. This is not due to the EU's recent

strengthening of capabilities in the field of defence, but rather to it acquiring most of the legal attributes of a sovereign state. One might add to this the fact that we are seeing the early beginnings of a discussion of 'final' borders for the EU, which further reinforces the impression of a state-like entity. (The question of borders has not been raised in this chapter though.) These empirical findings are, however, preliminary and must be further investigated and verified (or rejected).

A second observation that emerges from this analysis pertains to the models in themselves and most particularly to the third, regional cosmopolitan model. Although it has become increasingly popular to call for a cosmopolitan Europe or to refer to a cosmopolitan perspective when analysing the EU, it is difficult to find much detail on the specific characteristics of a cosmopolitan *polity* in this literature. The attempt made in this chapter to specify the distinct organisational features of a cosmopolitan polity suggests that it would in fact in very many ways be similar to that of a constitutional state. This is so both with regard to the role of executive authorities and to a hierarchical legal structure that would uphold citizens' rights. This might then suggest that rather than allowing for a distinct concept of polity, a cosmopolitan perspective would constitute guiding principles for policy that could match different types of polities. The difficulty with this conclusion though is that it does not allow us to resolve the tension between human rights and the principle of external sovereignty, which is one of the core reasons why a global cosmopolitan law is required in the first place. Hence, it may very well be that the problem is simply that the potential organisational features of a cosmopolitan polity have not been fully and satisfactorily explored in this chapter.

My third and final remark is that from the perspective of European democracy, foreign and security policy is not doing very well. It would seem that executive functions are indeed uploaded to the EU level, but that this is not matched by changes in the forms and levels of accountability, which are still linked to the nation-state. We must ask to what extent such a development is sustainable? If the EU were to equip itself with a 'thick' identity of the kind that we usually assume underpins the foreign and security policies of European nation states, the answer would be in the positive. This is so, as this

would allow for a more traditional legitimacy basis for foreign and security policy where, as noted in the introduction, democratic procedures would be less important in order to establish support for policy. However, there is little evidence to support the idea that such an identity is emerging or may be built. This would mean that the EU, if it continues down the path of deeper integration of the executive dimension of European foreign and security policy must expect increased contestation. In an entity such as the EU, which accommodates a variety of identities, thick and thin, it is hard to imagine that one can establish legitimacy for a policy through other things than democratic procedures. It would be through such established procedures that it would be possible to develop and sustain a common foreign policy for Europe, either in a cosmopolitan or a state-like variant.

Table 6.1: Indicators for three models of democracy

Dimensions of a democratic polity	Audit democracy	Federal multinational democracy	Regional-European democracy*
Legal sovereignty/ legal personality	No EU capacity for treaty making, recognition of other states, diplomatic relations	Treaty making, recognition of other states, diplomatic relations the prerogative of the union level	Right to sign legal agreements, representation of the EU at global level
Conception of territory	No single European territory	Guarantee of the inviolability of the EU territory	Commitment to the integrity of core principles of cosmopolitan law
Executive institutions	1 state 1 vote Specialist agencies No administrative capacity at EU level	A single foreign ministry A single defence ministry	Executive at EU level accountable to regional and global levels
Capabilities Economic Political Military	Ad-hoc military operations subject to collective agreement No EU diplomatic representation	Military forces raised at EU level (core task: the territorial defence of the Union) Diplomatic representation at EU level Common trade policy	EU and national military forces (core task: the enforcement of cosmopolitan law)
Resource allocation	No budgetary powers at EU level	A single European foreign policy budget and defence budget	Shared budgetary powers between EU and national levels
Forms of democracy	Audit democracy at Union level Representative democracy at Member State level	Representative democracy at EU level (two chambers)	Representative democracy at EU level combined with transnational public debate(s)
Perspective on international relations	Westphalian state system	Westphalian state system	Global cosmopolitan order
Mode of legitimization	Protection of national interests and values	Protection of European interests and values	Upholding cosmopolitan principles
Identity	No European identity	Collective European identity founded on constitutional patriotism	Post-national identity based on universal norms, fundamental rights and democratic procedures

* Embedded in a cosmopolitan order with limited legal competences at global level (security, human rights protection, crimes against humanity).

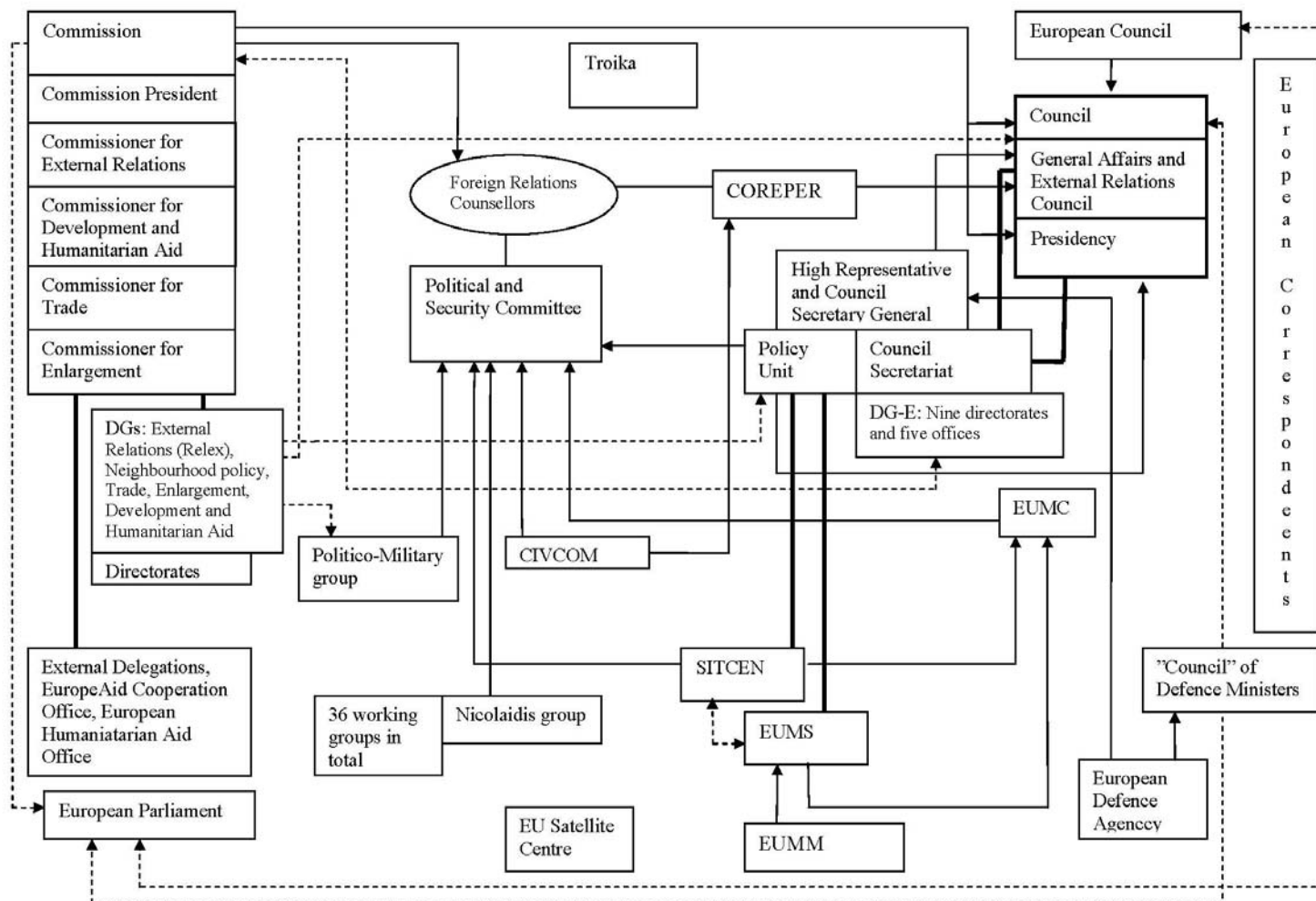


Figure 6.1 The EU's Foreign and Security Policy – Institutional map

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Chapter 7

Reconfiguring the complex socio-economic constitution of the Union

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Introduction

This chapter offers a brief description of research undertaken by work package 7 ‘The political economy of the European Union’ of the RECON project, and is structured in four parts. The first section contains an overall description of the research theme, and the specific methodological choices required by the specificities of the socio-economic constitution. The next section describes the way in which the three RECON models are applied to WP 7; in particular, attention is paid to three specific analytical dimensions, and indicators are spelt out by reference to each RECON model. The following section considers three specific research questions of WP 7, while the final section summarises some of the first findings resulting from the first two years of research under RECON.

Democracy and the political economy of the European Union

As even the occasional browser of this report would have already learnt, RECON is a research project aimed at elucidating the ways

and means through which democratic government¹ could be 'reconstituted' in Europe. This requires the combination of the description, reconstruction and normative assessment of the institutional set up, the decision-making processes and the common action norms (mainly legal ones) that frame and define the European political order.

There is nothing more political than the modern economy, and thus it is only natural that one of the work packages of RECON is devoted to *The Political Economy of the European Union*. This term makes quite naturally reference to the activities of production and distribution of goods and services, considering not only their 'autonomous' economic logic and relevance, but also their political dimension (as both influential upon politics and as the object of steering through politics) and legal implications (in particular, attention is paid to the legal norms that constitute and regulate economic activities, the substance of which is partially determined by the socio-economic structure). We thus consider European fiscal, tax, labour and social policies, not only as subjects of specialised knowledge, but as key building blocks of the European political and social constitution. In particular, we study the socio-economic constitution of the European Union with a view to determine the extent to which it limits or facilitates the democratic reconstitution of the European Union; we also put forward concrete reform proposals to increase the democratic legitimacy of the European political order.

¹ In this chapter, the term 'democratic government' is intentionally used in lieu of 'democratic governance'. A full explanation of this choice is not appropriate here for reasons of space, but suffice to say that I assume that there cannot be proper democratic legitimacy without democratic government, and that, consequently, 'governance' mechanisms, the legitimacy of which stems from a different source than the identity between the authors of and the subjects to common actions norms, are 'parasitic' on an encompassing institutional and decision-making framework which can redeem its claim to democratic legitimacy. Governance mechanisms can be very necessary to exploit in democratic terms specialised knowledge and to render efficient the democratic division of social labour, but they are not and cannot be self-sufficient in democratic terms. When they are transformed into the 'new grammar of law', a new form of authoritarianism emerges. It must also be said that the term 'democratic government' is understood in encompassing terms, comprising not only the legally formalised institutions and decision-making processes, but also the role played by general publics in democratic will-formation. However, the term is not conflated with the idea of democratic social order, which refers to democracy as a form of life. On this, see Bobbio 1984; Allot 2002; Möllers 2006; Somek 2008; Menéndez 2010 forthcoming.

WP 7 aims at a crowded research area. Full libraries have been written on the political economy of the Member States and of the European integration project. In particular, European integration was propelled by economic integration. The creation of a common market implied redrawing the economic boundaries of Member States (more on this in the next section). Vis-à-vis third Member States, it was clear from the beginning that the Communities aspired to become a single economic unit. In their mutual relationship, the common market programme implied redefining boundaries, by means of making them porous to the economic products and actors of all other Member States, while the single market was expected to simply bulldoze all internal economic borders. Such transformations could not but have major direct and indirect effects on the European socio-economic configuration. Not only did embryonic supranational policies emerge in many different economic and social subfields, but national policies also became increasingly Europeanised, in the descriptive sense of being highly influenced not only and not mainly by supranational design, but also by the design (or lack of design) of all other national policies. As a consequence, the literature on the fiscal, tax, social and labour policies of the Union is broad and wide-ranging. Especially prominent is the legal literature on the four economic freedoms, the politico-scientific literature on supranational and Europeanised national social policies, and the politico-economic analysis of economic and monetary integration.

Still, RECON aims at filling a major gap in the literature of the political economy of the EU, namely that of a systemic and normatively conscious description and assessment of the socio-economic constitution of the Union. The very fragmentary and progressive dynamics of European integration has fed the latent tendency in socio-economic research, and in research in general, to specialisation. For that matter, literature on the political economy of the European Union tends to be narrowly specialised, resulting in a double disconnection. There is an uncoupling from other subfields dealing with other aspects of the socio-economic structure of the European political order. For example, the Europeanisation of national tax systems is considered as an autonomous problem, and barely no attention is paid to the structural changes brought about by the new interpretation of free movement of capital after the entry into

force of the 1988 Directive² and the resulting case law of the European Court of Justice. Still, such changes have severely undermined the effectiveness of the power to tax in the hands of states, and may have affected the shape of tax law more deeply than any direct legislative reform. Economic borders maintained through capital controls were fundamental in ensuring knowledge of income flows to national exchequers; now that such a basis is basically gone, tax evasion is more likely to go undetected. And then there is the second disconnection from the overall discussion on the legitimacy of power in the EU. In national public debates (clearly after the Second World War), it was assumed that the whole set of socio-economic policies did not constitute an autonomous subset of social problems, but were part and parcel of the overall political structure of the polity. However, such an assumption is rare in European socio-economic debates.³ And still, the interconnection is also present at the supranational level. Just consider that the amount of revenue levied through taxation determines the policy choices available when fixing the range of public goods to be delivered and funded at the European level, or to be defined at the European level and funded at the national level. This is so because a higher or lower capacity to implement tax decisions determines the level of funding for public programs (debt is only a short term alternative, as some Member States are bound to rediscover pretty soon after the frenzy of expenditure which started in the autumn of 2008). This requires a simultaneous emphasis on the specificities of the constitutional norms governing each sector being studied, and on the analysis of the mutual interactions of such constitutional frameworks.

The key point made in the previous paragraph is, simply stated, that research under RECON is premised on the double reconnection of socio-economic questions. This results in three basic methodological choices (concerning empirical research, the focus on constitutional elements, the ambition to integrate findings in an interdisciplinary framework), which may be proper to spell out briefly in the following paragraph.

² Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178, of 08/07/1988, pp. 5-18.

³ Such disconnection is reinforced by the very design of the European constitution, as we will see later in the paper.

First, research in WP 7 is based on concrete and detailed empirical research, which motivates and explains the choice of a research team where different researchers focus on specific sub-projects. The interdisciplinary character of the research project (to which I return *infra*) entails that there are different understandings of what constitutes a proper object of empirical study and what methods are proper to undertake empirical research; lawyers focus on statutes and judicial rulings, and on the surrounding policy discourses, with a view to analyse how they reflect different elements of different models of the socio-economic European model; economists focus on raw statistical data; political scientists combine an analysis of raw data and interviews. But besides these disciplinary divergences lays the common purpose of transcending mere 'formal' analyses of the socio-economic configuration of the European Union in favour of substantively grounded and informed ones. Thus, for example, the analysis of the law governing the four economic freedoms, non-contractual liability of Member States for breaches of Community law, or personal income tax is based on a detailed analysis and reconstruction of each and every relevant judgment of the European Court of Justice which is attentive to the actual substantive and distributive implications of the rulings.

Second, research in WP 7 aims at clarifying the fundamental guiding principles of the socio-economic constitution of the European Union, or what is the same, the underlying ideological understanding of what is European socio-economic integration about, the institutional configuration and decision-making processes, and the means of social integration proper of the European socio-economic configuration. Focus on the constitutional dimension implies that the consideration of minute details is undertaken without losing sight of the 'larger' picture, increasing the chances that empirical research will be relevant to all members of WP 7 and of the research project in general.

Third, research in WP 7 takes seriously the political, legal and economic dimensions of the socio-economic configuration of the emerging European political community, and especially the mutual interconnections between these dimensions. Indeed, reconnecting socio-economic issues depends on taking seriously all disciplinary perspectives. In particular, the work package inscribes itself in the

long-standing tradition of 'political economy',⁴ in the double sense of focusing on the interplay between political decision-making, legal norms and economic activities; and in the sense of aiming at elucidating, exposing and criticizing the actual principles which constitute and govern the socio-economic structure of the European Union.⁵

Before concluding this section, it must be added that in line with the characterisation of the 'democratic deficit' question in RECON, WP 7 is designed on the assumption that the framework of the European socio-economic structure is amenable to democratic decision-making. This amounts to saying that the concrete configuration of the socio-economic structure of the European Union is not fully predetermined by forces beyond the reach of existing or potential political will. However, the refusal of 'determinism' does not entail the endorsement of a blind economic *voluntarism*. The democratic malleability of the socio-economic constitution is clearly compatible with the acceptance of the premise that the present shape of the socio-

⁴ The phrase 'political economy' is an ancient one, dating back to the seventeenth century, which has been used to design, censure and uphold rather different contents and approaches. Its core meaning refers to the description of the production and distribution of goods and services in a given society which highlights the role played the political, cultural and legal structures of that society. The original body of literature which was associated to the term has been the source of many of the ambivalences of the term. Smith or Ricardo were keen on describing the specific mechanisms which explained how a relatively unregulated and untamed economic structure could bring about generalised social welfare. However, they were not only very interested in the interrelation between philosophy, politics, law and economics, but actually contradicted the viability of a 'pure' approach to economics. Still, the alleged 'possessive individualism' that pervaded their thinking explains why Marx used the term as describing the 'system of bourgeois economy', and thus presented his work as a critique of political economy (and among other reasons, because 'liberal' political economy was too formalistic). On the terms of the debate and on the neo-classical shift of paradigm, it is entertaining to read Galbraith 1987. Not so dissimilar debates have developed more recently concerning the study of international relations, and the property and convenience of tying together political and economic analysis. The very development of International Political Economy as a field is the direct outcome and consequence. On IPE, see Cohen 2008. The relatively recent triumph of econometricians, or what is the same, the full 'purification' of economic analysis, through exclusive reliance on a set of -allegedly non-ideological- axioms and mathematical and statistical calculus to go along marks a contrast between the 'contextual' analysis of the economic reality and the 'autonomous' and 'pure' consideration which cuts across debates.

⁵ We thus follow an approach not dissimilar to Parkinson et al. 2000.

economic structure and the general social and political dynamics already unfolding determine the scope within which political choice is indeed possible, and the level of government at which decision-making can be both efficient and legitimate. Politics matters, democratic legitimacy matters, because there is room for meaningful and transformative choice based on arguments about what is just and correct to do. But the status quo, and the ways in which it has been reached, set limits to the choice of means of reform and to the actual outcomes which can be achieved through reform.

Application of the RECON models to WP 7

The research framework of WP 7 consists of the specification of the three RECON strategies to the socio-economic configuration of the European Union by means of considering how each model proposes the rearrangement of the relationship between the three key socio-economic institutions (markets, welfare systems and states) so as to increase the democratic legitimacy of the European Union; three analytical dimensions (and several subdimensions) together with the companion indicators corresponding to each RECON socio-economic model. This renders the three RECON models analytically powerful and normatively salient when reconstructing and assessing the socio-economic structure of the European Union.

It may be pertinent to say as a preliminary side remark that the research framework assumes the justifiability of market (should one say capitalistic?) arrangements (or what is the same, the troika of private property rights on a sizeable part of the available economic resources, free exchange of such rights through contracts, and the availability of the legal vessel of the corporation as a means of both gathering capital and limiting the personal liability of shareholders). Quite obviously, this does not entail legitimising any market or capitalistic socio-economic configuration. It only implies accepting that market structures, given certain properties of the institutional configuration and/or of the actual distribution of resources, may be justified, or at the very least, provide the most plausible normative baseline by reference to which to consider the democratic legitimacy of the socio-economic configuration of the European Union.

Defining the three RECON model configurations in the politico-economic field

The specification of the three RECON models to the socio-economic field is undertaken by means of considering how each RECON model would require rearranging the relationships between the three key socio-economic institutions so as to ensure a higher democratic legitimacy to the European Union as a whole, such key socio-economic institutions being *markets* – through which economic resources are produced and allocated, as well as the ensuing economic risks; *welfare systems* – through which socio-economic entitlements to public resources are assigned, and socio-economic risks are thus placed in common; and public institutions or in short states – the institutional structure and collective decision-making processes which mediate the relationship between markets and welfare systems.

This results in a direct *translation* of each RECON conception to the socio-economic field, and the distinction of some variants relevant to WP 7.⁶

Renationalising the legitimacy basis of the socio-economic structure

The renationalising strategy claims that a democratically legitimate European Union would be one where a supranational community of economic risks (the single European market) is established and its legitimacy is anchored to national institutions and decision-making processes, which retain an exclusive competence to define the national welfare systems.

The combination of a supranational community of economic risks and a collection of national welfare systems is conceivable under two different sets of assumptions, which correspond to the two variants that we distinguish within the first RECON model when applied to the socio-economic configuration of the European Union.

⁶ This distinction is not intended to put into question the triadic model of the general project, but only serves the purpose of fine-tuning the analytical capacities of the general conceptions to the specificities of the politico-economic field.

First, it could be assumed that the legitimacy of the supranational regulatory framework of the single market as the European community of risks could be established by defining the supranational institutional setup and decision-making processes in such a way as to ensure the aggregative nature of the European general will, or what is the same, that no European market-making norm could be contrary to the democratic will forged through the relevant national decision-making processes. Additionally, mechanisms of audit democracy at the supranational level could further guarantee that the actual implementation of the common supranational norms does not result in undermining the division of competences on which the European socio-economic settlement is based, and particularly the almost exclusive reserve of power to national institutions and decision-making processes on what concerns the regulation of welfare structures. The implicit assumption being that there is a clear structural difference between the legitimacy requirements of the norms regulating markets and welfare systems, as the background value consensus between Member States at both the constitutional and legislative levels is markedly different concerning each institution (all Member States share a basic commitment to a market structure based on the five fundamental economic freedoms – the four plus undistorted free competition – while there are wide differences in the values enshrined in the national welfare systems, and even more in the ways in which such values are institutionally operationalised). To the extent that supranational politics remains intergovernmental politics, it can be assumed that there would not be major challenges to the coherent steering of the relationship between a supranational community of economic risks and a set of national welfare systems, given that national institutions and decision-making processes remain capable of influencing the shape of both.

Second, it could be assumed that the legitimacy of the supranational regulatory framework of the single market as the European community of risks is to be anchored to the *cognitive* superiority of the (non-political) institutions and decision-making processes assigned with the competence to define it. This implies a clear-cut distinction between the *regulatory* nature of market-making and the *political* nature of market-correcting norms. The transfer of *regulatory* powers concerning the definition and operation of markets to supranational institutions is not problematic from a democratic perspective, due to the very non-political nature of these compe-

tences. Indeed, the litmus-test of the legitimacy of regulatory institutions and decision-making process is not the extent to which it reflects the *general will* (as proper of democratic government), but the *best judgment* (as a superior governance mechanism). The latter depends on the institutional ability to collect and apply specialised technical knowledge to the institutional definition and operation of markets. The advocates of a regulatory characterisation of the European Union tend to claim that only at the national level we find the proper institutional setup, decision-making processes and substantive means of social integration required for guaranteeing the democratic legitimacy of welfare arrangements. The proper national political steering of welfare institutions render easier, not more difficult, by the creation of supranational regulatory institutions, to the extent that the latter are capable of providing a better regulation of markets. Consequently, the democratic legitimacy basis of the European socio-economic configuration is to be anchored to the (nationally established) democratic legitimacy of welfare systems.

Federalising the legitimacy basis of the socio-economic structure

The federalising strategy claims that the Europeanisation of markets as communities of economic risk should proceed hand in hand with both the Europeanisation of welfare systems and of state structures for highly interrelated normative and functional reasons. Firstly, even if it is possible to draw a clear analytical line between markets and welfare systems, between market-making and market-correcting norms, both sets of norms are so intertwined that it is at best fuzzy in functional terms, and irrelevant from a normative perspective. Secondly, a supranational market distributing economic risks and opportunities among European citizens cannot be neither normatively justified nor functionally stabilised (among other reasons, precisely because of its lack of normative legitimacy) unless there is an overlap between the community of economic risks, the scope of insurance arrangements and the community of citizens. There is thus a need for forging a common general European will governing the definition of both communities of economic risk and of communities of insurance.

The federalising strategy is compatible with two structurally similar but substantively antithetic conceptions. Firstly, the federalising strategy is supported by those who claim that the legitimacy of the

socio-economic structure requires a wide range of insurance arrangements because the legitimacy of markets cannot be ensured without major countervailing provisions of public goods and services and the redistribution of economic resources (the market is not the source of its own legitimacy but can only be legitimate if embedded in strong welfare institutions). Given that redistributive tasks correcting market allocations need to be partly discharged at the higher level of government to ensure the equality of all members of the political community, then federalising should result in the sharing of such powers among different levels of government (including the supranational one), and shielding the transfer of structural powers to non-political decision-making processes.

Secondly, the federalising strategy is also supported by those who argue that the legitimacy of the basic socio-economic institutions depends on the proper limitation of political power by a robust acknowledgment of the right to private autonomy. Given that such affirmation can only be effective at the supranational level, there is a strong case for affirming negative supranational constitutional principles limiting the power of national public institutions. Federalising results in the limitation of national discretion to limit the right to private property an embodiment of the right to private autonomy.

Towards a post-national and cosmopolitan basis of the legitimacy basis of the socio-economic configuration

The cosmopolitan strategy claims that the Europeanisation of economic risks and of insurance arrangements can proceed without the need of fully Europeanising the decision-making processes, or what is the same, that the progressive supranational opening of national communities of economic risk and of insurance can be launched and governed without having to resort to processes of formation of a general European democratic will that necessarily results in the creation of a multinational federation. Opening national economies and national welfare states without fusing them can be done by means of defining a general European will alternative to the mere aggregation of general wills or the full-blown articulation of an autonomous European general will unmediated by national political processes. This 'alternative' general will results from process aimed at making mutually compatible national general wills (by means of ensuring that they are attuned to certain substantive principles, such as the principle of non-discrimination on the basis of nationality, refl-

Table 7.1: Application of RECON conceptions to the political economy of the European Union

RECON general strategy	Political economy specific strategy	Variant A	Variant B
Renationalisation of democratic decision-making	Europeanisation of the community of economic risks (single market)	<i>Indirect Democratic Legitimacy Variant:</i> Supranational institutional structure and decision-making processes as transmission belts of national democratic legitimacy; competences basically limited to market making; plus audit democracy mechanisms that further guarantee the terms of the European socio-economic settlement	<i>Governance Variant:</i> Clear-cut Division of Competences (market-making vs. market-correcting) and establishment of governance procedures capable of collecting and applying technical knowledge to the first set of tasks, plus supranational audit democracy mechanisms ensuring that governance institutions remain agents in accordance with their mandates
Federalising strategy	Europeanisation of markets, welfare systems and states	<i>Supranational Constitutional Distributive Justice:</i> Establishing supranational insurance arrangements capable of ensuring the legitimacy of supranational markets	<i>Supranational Constitutionalism:</i> Establishing constitutional limits to political power at the supranational level, and structurally empowering non-political decision-making processes
Cosmopolitan strategy	Europeanisation of bits and pieces of markets and welfare systems governed by the aggregation of reflexive national political processes or by smart multi-level governance arrangements		

ecting the existence of relevant interests beyond those articulated through national political processes; or by creating procedural devices through which they can be reflexive of interests expressed in other national political arenas) or by means of creating new, non-hierarchical collective decision-making processes (such as supranational governance arrangements which have the integrative capabilities required without impinging upon the pluralistic character of a cosmopolitan European Union).

The three analytical dimensions

Three dimensions should be considered: ideology of European socio-economic integration (which, in WP 7, necessarily refers to the 'single market'); institutional configuration, including institutional embedding; type and range of decision-making procedures; type and range of policy instruments; and the final dimension of social stabilising factors that integrate the socio-economic structure

Ideology of European socio-economic integration

It is well-known that the key means through which European integration has proceeded has indeed been economic integration. In particular, the three founding Treaties of the European Communities set as their purpose the creation of common markets through the establishment of a set institutional structures, of decision-making procedures, and of supranational public policies, with a view to realise the four fundamental economic liberties (plus free and undistorted competition) *and* the set of objectives described in Articles 2 and 3 TEC. Not by chance the shorthand by which the European institutional framework was known until relatively recently was the 'common market'; and not by chance most legal and political analysis has tended to concentrate on the economic aspects of the process of integration.

Still, there are rather contrasting conceptions of what is the actual purpose of socio-economic integration. It seems to us that the ideology of European socio-economic integration is characterised by reference to two sub-dimensions: firstly, whether and to what extent socio-economic integration concerns the removal of all national economic borders (which moves in the continuum from a fully integrated and open socio-economic structure, which would not even have external borders vis-à-vis third countries); secondly, whether and to what extent the economic system is to be regarded as an

autonomous social system, or as part of the general social and political order (which moves in the continuum from a self-regulating economic system to a fully embedded economic system, with a middle step consisting in the need of establishing a fixed regulatory framework within which market forces should be left to operate autonomously).

Table 7.2: The ideology of socio-economic integration

	Reconfiguring national socio- economic borders	Partial deletion of national socio- economic borders	No national socio- economic borders
Autonomous economic system			Neoliberal single market
Regulated economic system		Regulatory common market	
Embedded socio-economic system	Liberal common market	Cosmopolitan socio- economic structure	Supranational social <i>Rechtsstaat</i>

The relationship between the economic system and the overall socio-economic configuration of society

The characterisation of the economic system as *an autonomous social system* assumes that the founding Treaties of the Communities did enshrine a transcendental definition of the 'single market', the validity of which is a precondition of democratic legitimacy, and not the reverse (indeed, the normative force of the five economic freedoms would not derive from their being enshrined in the Treaties; the opposite would indeed be more plausible, namely, that the legitimacy of the Treaties stems from the fact that they actually enshrine the four fundamental economic freedoms). The 'self-contained' conception of the common market indeed amounts to an updated version of Lockean constitutionalism, with the five economic freedoms playing the role assigned to the right to private property in the original version of the theory. Thus, the five economic freedoms would be the necessary guarantees of private autonomy, and consequently, of the sheltering of individuals from any kind of coercion or force other than the one deriving from the limited character of economic resources and the actual cost of life plans. As a consequence, this conception firstly overstates the role as yardsticks of European constitutionality of economic liberties, together with

civic fundamental rights, while rendering relative the fundamental status of both political rights and especially of socio-economic, welfare rights (which should be subject to a very close scrutiny when reviewing their European constitutionality); secondly, it presents fundamental economic freedoms as transcendental values, whose actual definition should not be subordinated to national constitutional standards, but be directly derived from an ideal conception of an undistorted market; Treaty provisions should be constructed by reference thus to a normative ideal of an autonomous single market, not by reference to positive constitutional standards (not even the literal tenor of the Treaty provisions). And finally, it is associated with 'negative' integration, that is, with the active review of 'European constitutionality' of national (and also supranational) norms that set limits to economic liberties.

The 'embedded' conception of economic integration presupposes that the economic sphere is but a part of the overall social order; very critically, its legitimacy cannot be established by exclusive reference to its substantive traits, but depends on the legitimacy of the political order (thus the idea of 'embeddedness'). Hence, setting economic integration as the key means of European integration necessarily implies a program of transformation which goes beyond economic regulations, and necessarily covers those aspects of social and political regulation which are part and parcel of the legitimacy framework of the economic order as a whole. Consequently, economic integration aiming at the creation of an embedded internal European market rings a chord with liberal, social-democratic political theories. As a consequence, this conception stresses the equal constitutional standing of civic, political and socio-economic (welfare rights), and affirms that the proper weighing and balancing of rights when in conflict is first and foremostly to aim at the full realisation of equal political freedom. The conception also presents fundamental economic freedoms as values to be shaped and determined by reference to the overall canon of constitutionality, and whose constitutional weight depends on the extent to which they operationalise specific civic, political and socio-economic fundamental rights (otherwise, their constitutional weight being less than that assigned to fundamental rights *proper*). In addition, the conception emphasises the key role played by 'positive integration' in the actual realisation of the constitutional principles which frame the operation of the economic system. Finally, it highlights the key importance of

temporary and exceptional measures to shelter the fabric of the socio-economic order from dangerous stress in the phases of adaptation.

The 'regulatory' conception of economic integration affirms the relative autonomy of the economic system. It is relative because it presupposes the existence of a set of rules creating the basic institutional structure of the economic system (such as private property rights, contracts or companies) which the economic system itself cannot produce by itself (thus not being self-regulating); however, it affirms that once the regulatory framework is in place, it should not be altered or transformed, but at most interstitially fine-tuned, and that such a task should be trusted to *independent regulatory agencies*, whose institutional structure guarantees that regulation aims at the realisation of goals within an adequate time span, sheltered from the vagaries of representative politics.

European economic integration and national economic borders

The socio-economic powers, characteristically exercised by modern nation-states (regulation, taxation, redistribution, macro-economic management), presuppose a close correlation between state capabilities and the creation and maintenance of economic borders, or what is the same, of limits to the flow of goods, services, capital and persons across borders. Economic borders play an essential role in providing public authorities with the cognitive basis and the coercive capacities necessary to ensure the effectiveness of the political and legal steering of the socio-economic structure. Borders may be drawn, maintained and policed by means of limiting cross-border economic activity, or alternatively, by creating the means for public institutions to have full knowledge of the economic implications of such activities (and thus of the economic ability to pay related to cross-border economic activities). The affirmation of economic integration as the main means of European integration left rather open the question of what effect and impact integration was supposed to have on national economic borders, with two outstanding and contrasting extreme options.

European integration could require the elimination of national economic borders, and thus lead to the creation of a complete internal market, which would result, either through positive integration or through regulatory and tax competition, in the emergence of a single European socio-economic configuration. If that was the case, all

national norms which place an obstacle on the movement of goods, services, capital or persons across borders should be immediately regarded as *prima facie* contrary to European constitutional law, and only be justified if they can be proven to further a supranational goal (not if they aim at the realisation at the national scale of a national constitutional principle).

Alternatively, it could be argued that European integration would only call for the reconfiguration of national economic borders, so as to ensure that all citizens of Member States of the European Union receive equal treatment in each and every Member State. This would result in the putting in common of all national economic systems, without the immediate emergence of a single economic system in the Union. If that was the case, European integration would render suspect two sets of national norms. First, those who aim exclusively at keeping non-national economic actors, products or factors of production away from the national economic system, or what is the same, the standard protectionist mechanisms of customs duties and quantitative restrictions. Second, those who, while aiming at a meaningful policy objective other than keeping non-nationals out, exclude the application of the legal regime applicable to nationals to non-nationals, or in other words, that discriminate against citizens of another Member States on account of their nationality.

Between these two options, one could find the characterisation of European integration as aiming at piece-meal integration, resulting in different degrees and types of integration depending on whether we are considering goods, services, capital or persons (or different types of goods, services, capitals and persons) or even which territories or time periods we are referring to. This results in a panoply of legal and economic regimes to be governed through ad hoc institutional structures and defined through differentiated legal regimes.

Combining the two axes

These results in a grid with nine potential conceptions of the ideology of European integration, five of which are easily identifiable to the different conceptions of the European socio-economic configuration described in the previous section.

The intergovernmental model favours a 'Liberal Common Market' defined by the reconfiguration of national economic borders (which

Table 7.3: The four institutional analytical subdimensions

Allocation and exercise of powers	<p>How are competences allocated (international agreement, constitution, ad hoc negotiation)?</p> <p>Who does what on socio-economic matters (who defines markets, who defines welfare systems)?</p> <p>What justifies the exercise of powers through supranational decision-making processes? (Making good for lost state capabilities, insulating decision-making from political decision-making –in the name of efficiency and stability, or in the name of private autonomy-, full realisation of socio-economic principles at the right level of government, ensuring the universalisability of socio-economic decisions)</p>
Institutional setup	<p>What kind of supranational institutional framework (universal, agent –political or regulatory-, facilitator)?</p> <p>Which actors are involved (institutional, non-institutional, non-EU actors)?</p> <p>Which is the preeminent supranational institution on socio-economic matters (Council, Commission, European Parliament, European Court of Justice)?</p> <p>Which are the principles governing relationships between institutional actors across and within levels of government (comity, loyalty, specialisation, competition, partnership)?</p>
Decision-making processes	<p>What is the purpose of deciding at the supranational level (proper transmission of legitimacy, either directly or indirectly; cognitive superiority of supranational regulators and experts, substantive superiority of supranational constitutional standards, reconciling collective interests at different levels of government)?</p> <p>Who decides on the different constitutional levels of decision-making (constitutional, statutory, implementation, adjudication)?</p> <p>Who decides what on different stages of the decision-making process (initiative, policy-shaping, formal decision-making, monitoring of implementation, feedback)?</p>
Policy instruments	<p>Types of Supranational Common Action Norms (hard law, soft law, international agreements)</p> <p>Degree of Institutional Robustness of the supranational socio-economic normative framework (low, medium, high)</p>

need to be preserved to make sense of the national exclusive power over welfare systems) with the characterisation of the resulting European economic system as one embedded in national welfare systems. The governance model favours a 'Regulatory Common Market', premised on the reconfiguration of national economic borders (which cannot be eliminated without putting in peril the legitimising ground provided by national political decision-making over welfare systems) with the characterisation of the European economic system as a partially autonomous one (with the regulatory task being entrusted to supranational administrative structures). The social-democratic federal model supports the construction of a European *Social Rechtsstaat*, characterised by the complete removal of national economic borders and the full embedding of emerging single supranational market in the supranational socio-economic configuration. The neo-liberal federal model supports the complete removal of national economic borders and the characterisation of the supranational economic order as an autonomous and self-stabilising and regulating one. Finally, the cosmopolitan model supports a partial and variable deletion of economic borders, leading to the embedding of the peculiar resulting supranational economic system (see Table 7.3).

Two final comments. First, the complex character of the European political order renders it possible to claim that 'economic integration' at the national level must be structured around the embedding of market institutions, while at the supranational level the only option is to establish a 'self-contained' market. One line of defence of such a position could be that the 'embedding' of the market calls for a decision-making process capable of producing democratic legitimacy which would be simply not available at the supranational level. It still remains to be seen whether the inner logic of a supranational self-contained market not will render it impossible to sustain the 'embedded' market at the national level. Second, the fact that research is being conducted by reference to specific sub-policy fields entails that it is relevant to consider discourses concerning the ideology of each policy field, as either being autonomous or being aimed at wider socio-economic or political goals.

Institutional configuration

The second analytical dimension corresponds to the institutional configuration of the European Union, and comprises (a) the allocation and exercise of powers over the socio-economic structure of the

Union (how they are allocated, to which institutions and/or decision-making process, and what grounds justify the assignment of competences to supranational institutions and decision-making processes); (b) the supranational institutional setup on socio-economic matters (its nature, the actors involved, the actors which are given preeminence in decision-making processes, and the principles governing relationships between institutions within and especially across different levels of government); (c) the structure of supranational decision-making processes (including the purpose of setting up supranational decision-making processes, and the actual configuration of decision-making processes along normative levels – constitutional, legal and statutory – and along stages of the process – initiative, policy shaping, formal decision-making, monitoring of implementation, feedback); (d) the policy instruments which carry supranational decisions on socio-economic matters (including the type of common action norm: hard law, soft law, international agreements) and the degree of institutional robustness of the supranational socio-economic normative framework (low, medium, high).

Allocation and exercise of powers over the socio-economic structure of the European Union

The *intergovernmental model* is characterised by the assignment of a limited set of intergovernmentally negotiated competences over the European economic system to supranational institutions. This is grounded on the assumption that supranational action is only justified as a means of overcoming the erosion of the effectiveness of national capabilities. It is translated into constitutional language through the affirmation of residual national powers and the primacy of national constitutional norms over conflicting Community norms.

The *regulatory governance model* is defined by the assignment of constitutionally limited and specified powers over the European economic system to supranational regulatory institutions. This corresponds to the assumption that the proper discharge of such regulatory tasks requires delegation to agents insulated from the vagaries of the political process, and that a supranational delegation is best placed to ensure that regulators are capable of gathering and applying the best 'technocratic' knowledge. This implies a primacy of supranational regulatory norms, based on its 'specialised' character, which also implies that such primacy has a narrow and limited breadth and scope.

The *constitutional federal model* presumes the need of assigning universal competences over the socio-economic structure of the Union to supranational institutions and decision-making processes, as defined and specified in supranational (and democratic) constitutional law. This is necessary to create regulatory, redistributive and macro-management capacities at the supranational level so that supranational markets can be regulated and corrected. This translates into a democratic discipline of powers, which favours solving competence conflicts by reference to the principle of proportionality, and which assigns residual primacy to Community norms when conflicting with any national norm whatsoever.

The *neoliberal federal model* assumes a clear-cut division of positive and negative competences over the socio-economic structure. The legitimacy of the supranational level deriving from the constitutional entrenchment of private autonomy and fundamental economic freedoms, the main socio-economic powers assigned to it are of a negative character, aimed at ensuring the discipline of the exercise of public power across all levels of government. The supranational constitutional discipline of power over the European socio-economic configuration is essentially negative on what concerns public power, and this results in the opening up of large spaces where 'societal subsidiarity' is realised (implying a 'devolution' of socio-economic power to non-public decision-making processes, for example those governed by the money medium).

The *cosmopolitan post-national model* is based on a flexible and variable allocation of competences on socio-economic matters. The justification of action at the supranational level being grounded on the need of increasing the chances of universalisable socio-economic regimes, the wide range of interests and actors renders unavoidable a definition of competences according to a rather variable geometry.

Institutional setup

The *intergovernmental model* is premised on the characterisation of the institutional setup of the European Union as a complex political agent of Member States. Supranational decision-making involves exclusively institutional actors ('intergovernmental'), which are expected to show comity towards each other, and engage into cooperative relations. The key institution in the supranational institutional setup

is the Council, as carrier of the democratically legitimated expressions of the national interest.

The regulatory governance model assumes that the institutional setup of the European Union is a complex supranational regulatory agency that aims at discharging the tasks it has been assigned by its principals. Supranational decision-making should involve not only institutional actors, but also all relevant stakeholders; relationships between institutions across levels should be based on the principal/agent model, with a clear-cut division of tasks and allocation of responsibilities. The key supranational institutional actor are the Commission, which plays a role similar to that of a supranational agency on what concerns the single internal market, and the specialised regulatory agencies, with the European Central Bank as the most outstanding one.

The constitutional federal model characterises the institutional setup of the European Union as a full-blown multinational federation with 'universal' competences on socio-economic matters. Supranational decision-making should involve mainly and paramountly institutional actors (which should remain open to be influenced by larger communicative processes in civil society), which should interact according to the principle of constitutional loyalty, thus assuming that they should cater for the supranational public interest, and not only for a narrow national or regional public interest. The key supranational institution is the European Parliament, as capable of forging directly democratically legitimated common action norms.

The neoliberal federal model portrays the institutional setup of the European Union as part of the limited and limiting government of a federation of states with limited governments. Supranational decision-making should be as far as possible devolved to non-public institutions and actors ('social' subsidiarity), who should be legally empowered to trigger reviews of the constitutionality of all forms of legislative action. Public institutions should engage into a competitive market of public regulation. The key supranational institution under this characterisation of the EU is the European Court of Justice, as both ultimate interpreter of negative constitutional principles, and as addressee of individual claims concerning the constitutionality of specific legal norms.

The cosmopolitan post-national model defines the institutional setup of the European Union as a system of multilevel governance. Such a system should be led by institutional actors, but be open to the participation of all kind of actors, including non-Community ones. Relationships between participants should be based on the principle of ad hoc partnerships. The flexible and dynamic character of the institutional setup does not render possible to determine the key or determinant institution.

Decision-making processes

The sub-dimension of decision-making processes should deal with three aspects of the European institutional configuration, namely a) the identification of the overarching principle governing supranational decision-making; b) the configuration of decision-making along normative lines (how is constitutional, legal and regulatory power actually exercised on those matters within the powers of supranational institutions); c) the configuration of decision-making along stage lines (how is the power of initiative, of policy shaping, of formal decision-making, of monitoring and of regulatory feedback actually exercised). The actual characterisation of this sub-dimension is to be postponed until representative empirical research is available from different partners.⁷

Policy instruments

The intergovernmental model is based on the combination of a Treaty based framework with secondary Community hard law instruments (regulations and directives) concerning the European economic structure, as a means of mutual ensuring against default. To the extent that supranational decisions affect welfare systems, the intergovernmental model comes hand in hand with a preference for directives, or even for non-binding legal instruments, such as recommendations. This entails a variable degree of institutional robustness: high on economic matters (hard law supported by the compulsory jurisdiction of the European Court of Justice) and low on welfare matters (with hard law mediated by national decision-making processes and a limited role for the European Court of Justice given the exclusive competences of Member States).

⁷ An analysis of the allocation supranational tax decision-making processes can be found in Menéndez 2008.

The *regulatory governance model* is based on the combination of a Treaty based framework through which the constitutional mandates of supranational institutions is established and of hard, but merely regulatory law, produced by supranational institutions in their regulatory role; it may be open to the use of soft law mechanisms on what concerns welfare systems. This implies a high degree of institutional robustness on market-making, and no institutionalisation of supranational decisions on welfare systems.

The *constitutional federal model* is based on the combination of a federal constitution and hard law instruments through which supranational socio-economic powers are exercised. This implies a high degree of institutional robustness all across the socio-economic board.

The *neoliberal federal model* is based on the combination of a federal constitution which severely limits the scope of statutes and statutory regulations affecting the shape and structure of the supranational economic structure. Instead, the legal instrument of choice to specify the constitutional framework is the ad hoc, case-based judicial ruling. This implies a high but negative institutional robustness all across the socio-economic board.

The *post-national cosmopolitan model* does clearly lean towards the use of soft-law mechanisms through which alternative formulations of a supranational collective will can be established, and which keep open a variable set of actors and a variable geometry of objective and subjective binding character. This results in a low degree of institutional robustness.

European socio-economic integration and the stability of the socio-economic order

The third analytical dimension concerns the means of socio-economic integration in the European Union. Smooth conflict-solving and coordination of collective action on what concerns the production, allocation and distribution of economic resources is especially problematic given the immediate connection of the socio-economic configuration of any political community to the *who gets what, when and how* question (to paraphrase behavioural political science); the obvious and immediate relevance of substantive resources when considering the socio-economic structure places under major stress any social integrative mechanism. The importance of this dimension

is extremely high for democratic institutions, given that they rely on a massive degree on spontaneous compliance and self-application of socio-economic legal norms on the side of citizens.⁸ In the case of the European Union, socio-economic integration is especially problematic, given the mismatch between the huge regulatory powers of the Union and the very limited amount of resources at the direct disposal of supranational institutions, which result in an extremely limited capacity to transfer economic resources directly to citizens.

There are two relevant sub-dimensions to be considered here, namely (1) which is the main mechanism of social integration; it is possible to distinguish self-interest, thick communitarian ideal and welfare programs of redistribution of economic resources as alternatives; and (2) which is the unit of social integration, the two main options being states or individuals; this entails different yardsticks with the help of which to measure socio-economic obligations.

The *intergovernmental model* will favour mechanisms of social integration with Member States as units of European socio-economic integration; this entails that both the collection of supranational revenue, and its expenditure, will be calculated by reference to indicators of national, not individual wealth. Given that all Member States are social *Rechtsstaats* with levels of taxation and public expenditure at the high end of the OECD (with a couple of exceptions among the new Member States), the intergovernmental model tends to be premised on the need of ensuring social integration through formal equality before the legal order and welfare programs of redistribution of economic resources.

⁸ Socio-economic institutions in democratic systems are all designed assuming that citizens will massively comply in a spontaneous manner with the obligations specified by the legal framework. That is not necessarily the case in non-democratic political systems. The modern income tax and modern means-tested welfare benefits can only subsist when citizens are willing to offer an honest assessment of their economic means. On the correlation between democracy and the income tax, see Seligman 1911. At the same time, it has been observed once and again that the fact that most citizens are willing to comply with their tax obligations without being forced to do so explains why democracies can impose not only higher tax burdens but also why the criteria for allocation of taxes can be more complex and sophisticated. On this, see North 1990, especially chapter 6. This explains the factual convergence between the tax systems of democratic states. See Steinmo 1993.

Table 7.4: Socio-economic integration

	Spontaneous integration through vested self-interest	Appeal to a communitarian identity	Welfare programs which cover basic socio-economic risks and ensure a certain equality of economic resources
Individual socio-economic integration	Neoliberal Federal Model (may accept welfare expenditure in the form of flat minimum income)	Constitutional Federal Model	
Socio-economic integration among states			Intergovernmental Model (taxes and expenditures calculated by reference to national, not individual wealth)
No socio-economic integration at the european level			Governance Model

Note: It is unclear how the cosmopolitan and post-national model will structure European socio-economic integration

The *regulatory governance model* affirms that there is no other European socio-economic integration but that resulting from the aggregation of all national mechanisms of socio-economic integration. Assuming, as the intergovernmental model, that all Member States are social *Rechtsstaats* where welfare benefits are key mechanism of social integration, democratic legitimacy requires that national democratic processes remain exclusively competent to determine the breadth and scope of such welfare programs.

The *constitutional federal model* is prone to consider the individual as the main if not exclusive unit of European socio-economic integration (along with programs focusing on the individual, there could well be programs focusing on regions or even states), and to sustain that welfare and redistributive programs should be the key mechanism of European socio-economic integration, ensuring the (partial or complete) putting in common of certain economic risks, and a minimum degree of access to economic resources to all citizens. However, the constitutional federal model could also stress the need of developing some form of communitarian identity, supportive of the willingness to sacrifice personal economic gains for the sake of other members of the community, with which one shares a common identity.

The *neoliberal federal model* defends the individual as the main unit of European socio-economic integration, and defends that, beyond the eventual guarantee of a minimum income, socio-economic integration is best ensured by a constitutional and legal framework which ensures equal opportunities to all members of the political community. This provides benefits to all citizens, which in their own self-interest should be prone to support the reproduction of that society.

The *cosmopolitan model* will support a variable range of units of European socio-economic integration; it will be supportive of a variable set of welfare programs, characterised by defining entitlement in inclusive terms (extending even to non-European citizens) and in context-sensitive ways, which render the level of benefits dependent on the concrete terms according to which the program is defined in personal and spatial terms.

The federal structure of the European political order introduces a higher degree of complexity, given that it is possible to claim either

that all subsystems are stabilised by the same form or by different types of collective identity. In particular, it is frequently argued that while the national tax subsystems are stabilised by a civic or a communitarian collective identity, which goes hand in hand with contemplating robust tasks for such subsystems, the supranational tax subsystem is exclusively stabilised by an interest-based identity.

Three specific research questions

In addition to the general 'overarching' themes stemming from the general design of RECON, WP 7 aims at contributing to answering three 'specific' cross-cutting research questions, concerning (1) the nature of the so-called 'social deficit of the European Union; (2) the democratic implications of the division of socio-economic competences between the European Union, its Member States and the European regions; (3) the preconditions for effective and lasting democratisation of the institutional setup and decision-making process in the socio-economic sphere.

First, WP 7 aims at *elucidating the actual nature of the so-called 'social deficit'*, a vague notion which refers to the deficiencies in the constitution of the European socio-economic order which hamper the democratic legitimacy of the European Union. While there is almost perfect consensus on the existence of a 'social deficit' of the European Union, the remedies proposed to overcome it are so disparate that they betray the lack of a clear diagnosis of the problem. By means of reconstructing and assessing the actual institutional set up and decision-making processes through which socio-economic decisions are taken, the work package will establish which of the two definitions of the 'social deficit' is more adequate, or the extent to which each one captures a part of the actual legitimacy equation of the European Union. These two theses are (1) whether there is a substantive 'social deficit' of the European Union, the source of which will be the specific principles governing the socio-economic constitution of the Union, which would require the actual change (whether democratic or not) of the said principles (by, for example, reducing the weight assigned to economic freedoms when in conflict with wider collective goods or policies); or (2) whether the 'social deficit' is but a concrete manifestation of the wider democratic legitimacy problems of the European Union, and in particular, results from the lack of consistency in the institutional setup and decision-

making processes governing market-making and market-correcting decisions (in which case, the correction of the 'social deficit' of the European Union is but one concrete aspect of the general democratic legitimacy problems of the Union). *In other terms, the reconstruction and assessment of the institutional set up and the decision-making process of the Union can clarify to what extent the 'social deficit' is a matter of the substance of constitutional norms governing the European socio-economic structure, or of the procedure through which such norms are decided upon; and what is the relationship between the two.* This key question is, as we will see, related to the first analytical dimension described below (ideology of socio-economic integration).

Second, WP 7 will consider whether the democratic legitimacy of the national level of government only can derive from the assignment of exclusive competence over a number of competences, said to be essential to preserve both the 'constitutional identity' of each Member State, and the 'vibrancy' and 'relevance' of national decision-making processes; or whether it is closely dependent on the overall legitimacy of the European political order. The partial reconstruction of the actors and processes through which some socio-economic decisions are taken, which was undertaken in CIDEL⁹, revealed a degree of Europeanisation of powers far beyond what is assumed by such theories, and which requires the *thorough reconsideration of the democratic implications of divisions of powers among levels of government* without unsupported assumptions about which of those are critical for the maintenance of democratic politics at all levels of government. In particular, *the work package will aim at determining what degrees and levels of Europeanisation of the institutional set-up and the decision-making process of each policy field are sufficient and required to reconstitute European democracy, thus being compatible with the overall democratic legitimacy of the Union at all its levels of government.* Furthermore, WP 7 aims at examining what the interrelationships across policy fields are. In particular, are there specific configurations which are incompatible with the democratic legitimacy of the Union as a whole? Can democratic legitimacy be achieved if a very different institutional set up and decision-making processes are applied to the constitution of socio-economic relationships (market-making) and to the rectification

⁹ CIDEL – Citizenship and Democratic Legitimacy in the EU – a 3-years (2003-2005) joint research project with ten partners in six European countries, funded by the European Commission's Fifth Framework Programme for Research.

of distributional outcomes in order to realise specific social goals (of social justice, to ensure a certain pattern of distribution of economic resources)? Related to this, WP 7 aims at determining whether the way in which the socio-economic configuration of the European Union is conceived has an influence upon the way in which public institutions are characterised, and thus, on the very principles which govern public action, and consequently, affect the legitimacy equation of the European political order. In particular, research will test the democratic effects of alternatively public action informed by the *principle of mutual cooperation between institutions and mutual complementary relationship between policies* and public action informed by the *principle of regulatory competition and selection of policies by reference to their autonomous financial viability*. These two closely related questions will be answered by considering the elements falling under the second analytical dimension of the research project (the institutional structure of the European socio-economic configuration).

Third, WP 7 aims at determining *whether European integration can be stable in the absence of major institutional and decision-making reforms, given that the persistence of democratic shortcomings of the Union might end up of undermining the stability of the European political order*. This question, however, must be complemented with the reverse one, namely, *whether major constitutional reforms of the European political order can be undertaken in the absence of stabilising procedures and outcomes which establish the necessary preconditions for the social acceptance of such transformations*. In particular, focus on taxation, labour and social policies will lead to the critical consideration of the stabilising role played by mutual interest, civic commitment and pre-political membership, and the extent to which such stabilising factors can be mobilised in favour of European constitutional reform.

First findings

In this last section I summarise the preliminary findings resulting from the first twenty four months of research in RECON León, the main partner in WP 7.

As originally planned, the RECON team in León has focused its research on the analysis, reconstruction and assessment of the case law of the European Court of Justice in the overlapping policy areas of free movement of persons, free movement of capital, personal

income taxation and non-contractual liability of Member States on account of their breaches of Community law.¹⁰ This has been done with a view to determine which of the three RECON models of the European Union (if any) fits better with the conception of the Union underpinning the case law of the Court, and what effects the construction of positive law by the Court has had on the democratic legitimacy of the Union from the standpoint of each of the three RECON models.

A first set of preliminary findings corresponds to the structural implications of the case law of the Court. In our view, the systematic reconstruction of the different subfields we consider proves that the case law has had four main implications. It has contributed to (a) the Europeanisation of national policies; (b) the fostering of a power shift from representative to judicial decision-makers (which, in the particular circumstances of the Communities, has contributed to the empowerment of very concrete private actors, essentially those who can afford to be repeated players of the judicial game); (c) the subjection to the 'market' logic of 'profit' policy areas which were

¹⁰ The choice of policy areas was intended to increase the salience of the research within WP 7 and the research project in general. As already partially discussed in the second section of this chapter, personal income taxation is a fundamental part of the socio-economic constitution of any modern polity, to the extent that not only the institutional setup and the decision-making processes on taxes tend to play a role model on the overall design of the state system, but also tax systems play a key role in socio-economic integration as the main measuring rod and operationalisation of obligations towards all other member of a given society, and as main providers of the sinews of the state, and thus, the source of the provision of public goods and services. But the formal design and paramountly the material implementation of tax systems is highly dependent on the cognitive and coercive means at the disposal of states. The way in which free movement of capital is constructed is highly determinant of the shape of 'possibilities' within which tax systems have to be designed, at the same time that tax considerations may set limits to the understanding of what are the rights of European citizens as holders of capital. In a less spectacular manner, the construction of the principle of free movement of persons plays a similar role; in addition, it explains to a large extent the 'expenditure' pressure which leads to reforms of tax systems. Finally, non-contractual liability of Member States provides a further test to the findings on personal income taxation. The limits to the non-contractual liability of states which go beyond those proper of the principle when applied to private parties operationalise the same principle of equality in bearing the costs of the existence of public institutions which underpins the allocation of taxes. The very fact that 'liability' has a commutative basis in private law, however, renders more visible the risks implicit in the shift of the case law of the Court.

fully or partially 'decommodified'; and (d) the redistribution of economic resources from the *least well off* to the *better off*; such distributive effects are essentially hidden because of the lack of visibility of the socio-economic cleavages beyond national economic borders (the 'national' logic hiding the 'class' logic).

a) The case law of the Court of Justice has 'Europeanised' an ever growing set of national policies by the means of subjecting national laws on the field to a review of European constitutionality by reference to the Community fundamental economic freedoms. The peculiarity of a Court-operated Europeanisation is that while national legislators are severely constrained by economic freedoms, understood as subjective rights on which physical and very especially legal persons can base actions against Member States, no positive political steering can be exerted at the supranational level to compensate new limits to unilateral national decision-making. In substantive terms, it does not matter whether 'negative' Europeanisation results from the lack of positive competence of the Union, or from the subjection of an eventual decision to the 'old' Community method in which there is a need of unanimous support in the Council of Ministers. In both cases, the outcome is 'negative' Europeanisation, which necessarily entails less scope for political decision-making and more for judicial steering. Negative Europeanisation fosters the devolution of decision-making to non-public actors, with influence being measured by reference to economic and intellectual resources. This is a process that can be observed regarding personal income taxation, the definition of non-contributory welfare benefits, and the definition of standards of non-contractual liability of the state. Perhaps the clearest example is constituted by the move of subjection of national corporate income taxes to the review of European constitutionality by reference to economic freedoms after the judgment in *Avoir Fiscal*.¹¹ This 'negative Europeanisation' has resulted in the loss of effective political power to shape the corporate tax code on the side of states, and later, on the convergence of corporate taxes under the pressure of companies and even of private parties setting accounting standards.

b) 'Negative Europeanisation' is not only a judge-led Europeanisation, but it is also a form of Europeanisation which increases the power of all judges. The emboldening of constitutional principles as

¹¹ Case 270/83, [1986] ECR 273.

negative standards of constitutional review *without* the corresponding constitutional reforms that will render possible and feasible the adoption of countervailing political decisions at the European level implies an appropriation of constitutional power by judges, and the transfer of actual decision-making powers from representative state institutions to 'markets'. This is something that can be very clearly observed by reference to the transformation of free movement of capital from ancillary freedom to the ultimate foundation of the socio-economic Constitution of the Union. The increase in the breadth and scope of the freedom to move capital was the result of new 'interdictions' of national legislative action, which implied the emboldening of the powers of (negative) constitutional review in the hands of European judges (be them the ECJ or national courts acting as enforcers of the yardstick of European constitutionality), and the further accrual of actual faculties to owners of capital, backed up by judicial action.¹²

c) The rethorics of the 'civic' transformation of Community law and of the 'decommodification' of the right-holder of Community rights comes hand in hand with a structural commodification of some key public institutions and the 'economisation' of standards of constitutional review. This paradoxical outcome is the result of a series of causes, which include the structural bias in favour of economic freedoms in the yardstick of European constitutionality as enshrined in the founding Treaties, the structural limits to the competence of courts as institutions to solve legal issues which involve complex multilateral relationships and complex factual backgrounds, and perhaps even more fundamentally, the inflated use of a rhetoric of

¹² It must be added that this process of judicialisation does not correspond to the ordinary growing institutional salience of courts in the development of their case law, as was the case with the European Court of Justice until the late seventies, and as is usually the case with national constitutional courts. The difference lies in the fact that constitutional review of legislation tends to be based on both an explicit constitutional mandate and in the likelihood of a pathological decision of representative institutions, which should be redressed to reinforce the very basic presuppositions and preconditions of democratic decision-making. Thus, when the ECJ review national legislation by reference to fundamental economic freedoms, but regarding the latter as an operationalisation of the principle of non-discrimination on the basis of nationality, the ECJ was arguably mending one democratic pathology resulting from the fact that non-nationals could not make use of the national democratic process to denounce their being discriminated, and to press in favour of the necessary amendment to the law to put an end to that situation.

'integration' which hides (perhaps even from judges themselves) the commodifying effects of its decisions. In that regard, the key move has been the reinterpretation of the normative basis of Community economic freedoms, no longer considered as the mere operationalisation of the principle of non-discrimination on the basis of nationality, but as self-standing freedoms, the substantive content of which is to be defined *autonomously* from the common constitutional traditions of the Member States.¹³ This implies subjecting the whole of the national legal order to constitutional review by reference to Community constitutional standards, and thus tilting the substantive contents into the direction of a set of economic freedoms constructed as the realisation of the principle of private autonomy. This has resulted in the double move of (a) reduction of multilateral legal relationships to bilateral ones, thus excluding a whole range of relevant legal arguments from consideration, and threatening to undermine the very logic of public institutions;¹⁴ (b) shifting the burden of argumentation against socio-economic redistributive institutions, as the two-limb test of European constitutionality makes the social purpose irrelevant for determining the first limb of the test, namely, whether a fundamental economic freedom is violated, contradicted or breached by the national norm. The overall result is the colonisation of the solidaristic and redistributive logic of taxes, non-contractual liability and non-contractual welfare benefits by the individualistic and commutative logic of private and economic law. This is reflected in the extremely narrow definition of tax avoidance in *Marks and Spencer*¹⁵ and the reduction of the principle of 'coherence of the tax system' as a justification of a breach of economic freedoms

¹³ See the 'obstacles' jurisprudence opened by C-55/94, *Gebhard* [1995] ECR I-4165; the 'citizenship' jurisprudence inaugurated by C-85/96, *Martínez Sala*, [1998] ECR I-2691 and C-413/99, *Baumbast*, [2002] ECR I-7091; the 'competence' jurisprudence led by C-367/98, *Germany v Parliament and Council (Tobacco Advertising)*, [2000] ECR I-8419.

¹⁴ This is clearly the case with non-contractual state liability, which tends to be considered as if it was just another case of *private* non-contractual liability, losing of sight the fact that when the state is involved, the principle of equality before public charges must result in a radical reconfiguration of rights and obligations; but is also the case with non-contributory welfare benefits, where the 'bilateralisation' of the institution is visible in the denial of the relevance of long-term membership to the social community as a criterion of entitlement (as not even *Collins* fully acknowledges that welfare institutions are indeed allergic to the idea of citizens as permanent potential movers which underlies the characterisation of the European citizen in the case law of the ECJ -a characterisation which reinforces the prominence of the market perspective, and of the marketisation of political concepts.

¹⁵ C-446/03, *Marks and Spencer*, [2005] ECR I-10837.

to the requirement of equivalence of obligations and benefits to a single taxpayer. This is perhaps canonically reflected in the redefinition of the breadth and scope of the right to free movement of capital in *Golden Shares*,¹⁶ by establishing a normative hierarchy between the Treaty itself (and specifically, between free movement of capital as the cornerstone of the single market, and the provision of ex Article 295 concerning the ecumenical approach of Community law to the national regulation of property – including the nationalisation of whole sectors of the economy, as indeed was the case in the founding Member States, and may end up being the case again as the financial crisis unravels into a structural crisis of the economic model of the last twenty years).

d) The actual distributive outcome of the case law increasingly threatens the solidaristic ethos of national welfare systems, and may prevent the emergence of a ‘we-feeling’ at the supranational level. First, it alters the political chances of getting redistributive programs passed, given the risk of not controlling criteria of access to the benefits. Second, it overstretches the fiction that there is already a considerable degree of European solidarity, at the same time as undermining existing national solidarity.

The second set of preliminary findings concerns the overall interpretation of the case law of the ECJ by reference to the RECON model. The Court has actually reinforced the weight assigned to freedom as negative economic freedom, something which fits quite neatly within the federal liberist model. This is so for three closely related reasons. First, what is rhetorically presented as a shift from non-discrimination to citizenship is in legal dogmatic terms a shift from the definition of the yardstick of European constitutionality by reference to national constitutional standards (the ones that actually filled in the formal principle of non-discrimination as equality of treatment) to its definition by reference to what cannot be but transcendental standards (as it only makes sense to define ‘obstacles’ in a manner autonomous from national law; otherwise, no national norm would ever qualify as an obstacle to the exercise of an economic freedom). But such a shift implies a move away from standards of review defined in the national fundamental law through wide-ranging constitutional debate to standards of review which cannot

¹⁶ C-367/98, *Commission vs. Portugal (Golden Shares)*, [2002] ECR I-4731.

but be defined by the judges sitting in the European Court of Justice by reference to their own conception of what is market integration about. Second, the shift is one that expands the subjective and objective scope of application of a legal order which is formally and substantially defined by reference to what remains economic goals and economic values. Third, the extension of the horizontal constitutional review of national laws without the corresponding increase of the capacity of the European Union, in formal and material terms, to step in and undertake the social re-regulation of problems which used to be handled by national law, creates a further bias in favour of economic values.

The third set of preliminary findings concerns the specific research questions described previously. Our research reveals the fundamental importance of the coherent division of powers between levels of government in the legitimacy equation of the European Union. In particular, the case law of the Court is based on a clear-cut divorce between the allocation of negative constitutional powers and positive legislative powers. The expansion of the objective and subjective breadth and scope of the fundamental economic freedoms has transformed the liberties in a universal yardstick of European constitutionality, which consequently limits the choices left to national law-making processes, to the extent that all national laws, without exclusion, will be declared invalid if in breach of a fundamental economic freedom. The fact that this 'horizontal effect' of fundamental economic freedoms has not come hand in hand with the expansion of the positive legislative powers of the European Union, entails that the political steering capacities lost at the national level have not been compensated with new political steering capacities at the supranational level. The net result is no other than a net disempowerment of public decision-making processes. Such disempowerments must be regarded with suspicion, and are to be regarded as clearly counterproductive from a democratic standpoint unless it is possible to show that political decision-making in this concrete area was likely to result in decisions undermining the reproduction of the democratic setup and decision-making processes, something which is clearly not the case on what concerns, say, the allocation of non-contributory welfare benefits. Our analysis and reconstruction of the case law of the ECJ has nothing so conclusive to say concerning the nature of the social deficit (although the jurisprudence of the Court seems to indicate that there is at least some correlation between the

European social deficit and the insufficient and very limited opportunities for actual democratic decision-making) or the relationship between democratisation and social acceptance of the democratising measures (only perhaps one *a contrario* observation, concerning the limited leverage of taking decisions on the basis of certain fictions with the hope that the decision will turn the fictions into actual facts; that performative wizardry seems not to be properly operative on what concerns the socio-economic structure of the European Union).

Table 7.5: Summary of analytical dimensions and indicators for the Renationalising variant 1: *Intergovernmentalism*

Ideology of socio-economic integration	Institutional configuration of the socio-economic structure of the European Union				Mechanisms of European socio-economic integration
	Allocation and exercise of Powers	Institutional setup	Decision-making processes	Policy instruments	
The liberal common Market	Intergovernmentally negotiated division of competences	Supranational institutions as political agents of national institutions	European decision-making process should ensure the transmission of national democratic legitimacy to European legal norms (classical Community method)	Hard law; with preference for directives or recommendations on what concerns welfare systems	Limited need of European socio-economic integration (it takes place at the national level)
Intergovernmental market integration coupled with autonomous national welfare systems	Democratic hierarchy a) All powers to Member States unless explicitly said something else (residual national powers)	Supranational decision-making involves exclusively institutional actors		High degree of institutional robustness on markets; low degree of institutional robustness on welfare systems	Intergovernmental Redistribution of Resources by reference to national aggregated indexes European budget financed by national direct contributions (absence of genuinely European taxes)
Economic freedoms as operationalisation of the principle of non-discrimination on the basis of nationality (review of national norms which exclude European citizens from rights granted to nationals)	b) Primacy of National Constitutional Norms over Supranational norms Action at supranational level justified as a means of overcoming the insufficient regulatory, taxing and macro-managing capacities of Member States	Key role assigned to the Council as main transmission belt of national general wills Collaboration between institutions across different levels of government (comity)			European expenditure levels calculated by reference to national contributions or national wealth (absence of individual entitlements)

Table 7.6: Summary of analytical dimensions and indicators for the Renationalising variant 2: *Governance*

Ideology of socio-economic integration	Institutional configuration of the socio-economic structure of the EU				Mechanisms of European socio-economic integration
	Allocation and exercise of powers	Institutional setup	Decision-making processes	Policy instruments	
The single limited market through common regulation	Treaty-based rigid and clear-cut division of competences which includes specific mandates to supranational institutions	Supranational institutions as parts of a complex supranational regulatory agency or as means ensuring that principals (Member States) can review compliance of the agent with the mandate	European decision-making Processes confined to regulatory matters on economic issues	Hard law: Statutory Instruments and other general administrative regulations	Denial of the relevance of mechanisms of supranational socio-economic integration
Regulatory market integration which stops at meddling with national welfare systems	Limited powers to European institutions based on constitutional mandate			High degree of institutional robustness on markets; No institutionalisation of common decisions on welfare systems	European budget limited to the operative cost of European institutions
Economic freedoms as limits to political intervention in the operation of markets (review of national laws aimed at protecting public interest in efficient regulation that maximises social welfare, not so much private autonomy)	Primacy of supranational norms based on their 'speciality' (and thus not extending to primacy over national constitutional norms)	Supranational decision-making involves institutional actors working in tandem with stakeholders			No European taxes (but for those with purely regulatory purposes or exclusively aimed at recouping the costs of running European institutions)
	Action at supranational level justified as a means of ensuring a stable institutional and decision-making process for issues which require the stability that politically influenced decision-making cannot offer ('depolicitisation' of economic regulation)	Preeminence of Commission and specialised agencies Relationships between institutions based on principal/agent principles			No European expenditures aimed at individual persons

Table 7.7: Summary of analytical dimensions and indicators for the Federalising variant 1: *Deliberative constitutional politics*

Ideology of socio-economic integration	Institutional configuration of the socio-economic structure of the EU				Mechanisms of European socio-economic integration
	Allocation and exercise of powers	Institutional setup	Decision-making processes	Policy instruments	
The supranational social rechtsstaat	Constitutionally established division of competences	Supranational institutions as part of a full-blown multinational federation with 'universal' political competences	European decision-making processes aimed at forging the European volonté générale	Hard law: Regulations and directives	Major need of European socio-economic integration
Part of the whole structure of socio-economic integration, which implies an economic regulatory framework and institutions of distributive justice	Universal competences of supranational institutions Democratic hierarchy a) Proportionality test for the assignment of competences b) Primacy of supranational over national norms	Supranational decision-making mainly involves institutional actors		High degree of institutional robustness on markets and welfare systems	Equality of civic and political rights plus individualised redistribution of economic resources calculated by either reference to a baseline (the level of need of each individual) or to socio-economic differences (the disparity in the distribution of income in a given society)
Economic freedoms as (weaker) part of the canon of constitutionally protected freedoms (review of national norms aimed at 'defeasible' protection of economic freedom)	Action at the supranational level justified by need of creating state capacities at a level such that markets can be regulated and corrected (supranational reregulation)	Preeminence of European Parliament Collaborative relation between levels of government (constitutional loyalty)			Major European budget Wide-range of European taxing powers, critically including the power to collect some of the key taxes of the tax system Wide-range of European programs of individualised entitlements

Table 7.8: Summary of analytical dimensions and indicators for the Federalising variant 2: *Neoliberal constitutionalism*

Ideology of socio-economic integration	Institutional configuration of the socio-economic structure of the EU				Mechanisms of European socio-Economic integration
	Allocation and exercise of powers	Institutional setup	Decision-making processes	Policy instruments	
The Neoliberal single Market	Constitutionalised division of competences	Supranational institutions as part of the limited government of a federation of Member States with limited governments	European decision-making processes should be limited and self-contained (in accordance with the paradigm of Lockean constitutionalism)	Hard law: constitutional rulings High degree of institutional robustness on markets and welfare systems (with limited negative powers that foster non-public decision-making)	European socio-economic integration to be achieved spontaneously and cannot be actually fostered in a lasting way by European institutions Equality of civic and political rights, plus stake in the higher welfare levels and economic opportunities deriving from European integration European budget limited to render possible the provision of a limited number of public goods Allocation of negative constitutional power over taxes to the supranational level Welfare entitlements inexistent or limited to individualised flat guaranteed income
Single market as the means of entrenching the proper regulatory framework and avoiding its political distortion	Self-restrained exercise of universal competences (mainly as negative powers) Normatively based division of competences a) 'Subsidiarity' of public/collective to private/individual b) Primacy of supranational over national norms	Supranational decision-making is as far as possible devolved to non-public institutions and actors (societal self-regulation) Preeminence of the European Court of Justice as constitutional court competitive relation between levels of government ('a market of public regulation')			
Economic freedoms as transcendental values which compose the core of any yardstick of constitutionality (review of national legal 'obstacles' to the single market)	Action at the supranational level justified by reference to the need of protecting private autonomy (fully blocking politics into socio-economic matters)				

Table 7.9: Summary of analytical dimensions and indicators for the *Cosmopolitan post-national union*

Ideology of socio-economic integration	Institutional configuration of the socio-economic structure of the EU				Mechanisms of European socio-economic integration
	Allocation and exercise of powers	Institutional setup	Decision-making processes	Policy instruments	
A piecemealed economic union of variable dimensions	Flexible division of competences (reflexivity based on cosmopolitan mechanisms)	Supranational institutions as means of structuring a system of multilevel governance	European decision-making processes aimed at	Soft law: Benchmarks, agreements and letters of understanding	European socio-economic integration to be composed by national socio-economic integration and communicative forms of integration at a supranational scale
Compartmentalised levels of economic integration depending on area and objectives	Trust model in the exercise of competences	Participation of both institutional, non-institutional and foreign but concerned actors		Low degree of Institutional robustness on both markets and welfare systems	
	Division of competences with variable geometry				
Flexible and variable degree of protection of both economic freedoms and fundamental rights	Action at the supranational level to be justified both upwards and downwards (contributing to democratic decision-making on socio-economic matters across the board)	Preeminence of ad hoc institutional structures where all formal institutions participate			
		Collaborative relation between levels of government ('partnership')			

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Chapter 8

Reconstituting democracy in Europe and constituting the European demos?

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Introduction

The debate within RECON work package 8 'Identity and Enlargement', focuses on the processes of re-constructing collective identities in contemporary enlarged and enlarging Europe. Changes in the identity formation in Europe are not solely pertinent to the integration process, which is undoubtedly the most unique and distinctive process on the continent. Traditional forms of identification both in Western and in Eastern Europe are also challenged by globalisation and individualisation questioning traditional notions of confined nationness and popular sovereignty (Beck and Grande 2007). In facing these challenges, some authors have concluded that by entering the era of post-modernity we also enter a new era of post-democracy, in which collective identifications of the people are becoming moving targets, increasingly restraining the possibilities of democratic will formation (Crouch 2004). The question of how collective identities can sustain a democratic polity therefore needs to be addressed with new urgency.

Within social sciences and history, collective identities are commonly conceptualised within the paradigm of social constructivism (Eisenstadt and Giesen 1995; Eder et al. 2002). Against primordialism, it is assumed 'that interests and derived policies are shaped within

particular framework of meaning and are not exogenously given. Actors do not have preferences and interests that are external to their understanding of the social world and their own identity and place therein' (Larsen 2004: 64). Collective identity should therefore not be studied as something external to democracy. WP 8 will rather be concerned with how collective identities are given meaning and form through democracy and democratisation. The democratic transformations of Central and Eastern Europe can in this sense be considered as the prime example for developing further this discourse theoretical understanding of collective identities. They illustrate how democracy does not rely on pre-established identities of the people (in spite of the fact that many groups, especially in the new Member States, insist on their ethnic, religious or cultural belonging), but should rather be conceived as a way of discursively constructing the collective identity of the people.

The major aim of WP 8 is to introduce such a discursive understanding of collective identities to systematise the relationship between European polity building and democracy. The discursive paradigm simply states that collective identities emerge as a way of structuring and controlling the boundaries of social relations (Eder 2008). This is done through codes of distinction that classify inclusive and exclusive relationships and specify how the two can be meaningfully linked together (Giesen 1992). Collective identities are at the same time tied to justificatory practices, through which people *claim* belonging and recognition by others. In quintessence, the discursive paradigm states that the social and political order correlates with the justificatory order of society (Boltanski and Thévenot 2006). Any political order is stabilised to the extent that collective identity contestations are confined by discourses that recognise the 'unity' and 'diversity' of social relations within that order (and beyond it) (Olsen 2007).

If we accept these basic insights about the correlation between social and political order, and the justificatory order of society, we can meaningfully ask how collective identity building correlates with the efforts of polity building as they were recently undertaken within the framework of the EU. The constitutionalisation of the EU implies a process of re-constructing collective identities. If the RECON models are primarily understood as blueprints for constructing the democratic polity in legal and institutional terms, they also need to

correspond to specific modes of constructing the collective identification of the people that *constitute* the democratic polity. Accordingly, case studies within WP8 are designed in a way to provide systematic insight in the interrelation between the dynamics of changes of collective identity formation and political preferences on democratic processes on all possible levels: local, national and supranational.

In this chapter, we want to undertake the necessary steps for conceptualising the RECON polity models in relation to collective identities. The major question is how different options for the reconstitution of democracy in Europe can be related to the expression of collective identities. By underlying a discourse theoretical perspective on the emergence of a stable and sustainable political order in Europe, we can postulate the correspondence between democratic polity building and collective identity building. A European collective identity can then be perceived in terms of the discursive representation of the underlying demos of a European democracy.

Collective identities and democratic practice

A conceptual clarification

Before we can explore how collective identities can meaningfully be given expression within a macro-setting of political order, we need to understand the micro-dynamics of constructing social bonds through democratic practices. For that purpose, we will need to rely on a relational notion of collective identities. The identification of the self takes place in relation to a significant other. The concept of identity, as it is commonly used in social sciences, involves the idea of dynamism and contextuality. It is generally accepted that identity is a process of building social bonds through the exchange of meaning, the construction of images of the self or the engagement in a dialogue with partners (Eder 2008). The creation of the self-image of a person or a group is relying on the active *participation* of individuals in common activity. It is equally relying on *representation* of the social bonds in terms of images and discourses, which express the internal coherence and the external boundedness of the group. Significant others, in relation to whom we construct our identity, constitute a frame of reference in which identity can be given expression. Identity is a process, and not a fixed structure; it is a dynamic construction of images and discourses, interrelating with others. One can even say that there is no identity, but processes of identification, of mutual

construction of symbolic images of self and other (Ardener 1989; Barth 1969; Elias and Scotson 1965; Mach 1993).

Identity seen as a dynamic process of negotiation of meaning is inseparably interconnected to the process of social activities, of involvement in meaningful relations with others. It does not, however, necessarily mean that the process of collective identity formation automatically assumes its full rationality and awareness of the participants. Very often people use without reflection the traditional images to communicate or to express themselves. On the other hand, the more an identity formation process shifts the emphasis from the collective level to the individual, the more reflexive this process is supposed to be. The negotiation of meanings and processes of social activities are two sides of the same coin – in fact one socio-cultural process of negotiation of meaning in complex interactions in which, in particular, power relations play an important role (Cohen 1974). Identity is activity; it is action in relation with others, creating and transgressing all boundaries, active realisation of the feeling of belonging and symbolic identification. If the individual or a group remain passive, unable to develop action, then it is difficult or even impossible to build or rebuild identity in a changing environment. This is especially important in a situation in which the frames of reference of identity, a social environment within which identity is constructed, change. Migration would be an obvious example, in which migrants must have a need and the opportunity to be active, to develop meaningful activities in the new environment, in the new social and symbolic frames of reference. Then their new identity may be created (see Mach 1998). One can ask if a similar process is developing in Europe after the recent enlargement, in the changing social and symbolic frame of reference. New and old Europe are undergoing a process of negotiation of new boundaries and with new partners of interaction, of dialogue and negotiation with new 'significant others'.

There is also another question concerning the process of identity formation in modern, anonymous media democracies. The normative expectation is that in a democracy, the collective identification of the citizens must be expressed through democratic deliberations and equal consideration with others. We want to propose that this requirement of active involvement of the citizens needs to be qualified. Symbolic expression requires linguistic competence, self-

awareness and often courage to challenge commonly accepted images – especially in the changing frames of reference. In all modern Western societies, the active participation of the citizens in the generation of collective identities is increasingly replaced by the collective representations generated through the mass media. Official identity discourses are heavily determined, and often dominated by the mass media, which impose the language – the conceptual framework in which identity may be expressed. Poland would be a good example of a situation in which the dominating identity discourse as expressed by the media is nationalistic and Catholic, and requires a lot of courage and competence to challenge it by expressing one's own different identity. Therefore it is easier to conform, and remain within the official frame of reference in the symbolic expression of identity, while at the same time being actively involved and participating in actions and deliberations, in relations and dialogues which cross traditional boundaries and constitute the new belonging and effectively the new identity. One may not even be completely aware of the symbolic meaning of one's involvement, but when the question of identity is asked, and it may not be asked very often, then it becomes clear that traditional concepts and identity images do not correspond to actual involvement.

One of the most important consequences of the change in political reality and the processes of integration is the process of Europeanisation of collective identities and the new and widely discussed concept of European identity. The empirical research on micro processes of identity formation in Western European countries leads to the conclusion that in various countries under different circumstances the process of Europeanisation constitutes an important element in changes of collective identity (cf. Risse 2001). This is occurring through the mechanism of the 'resonance' between national and supranational level. According to Risse, 'ideas about European order and identity constructions about Europe and the nation-state emanating from the transnational level will interact with given collective nation-state identities. Such political visions and identity constructions are the more likely to impact upon and to be incorporated in collective nation-state identities, the more they resonate with the ideas about the nation and political order embedded in this collective understanding' (ibid.: 202). In this kind of approach 'Europe' is brought into national identities. This mechanism can have a significant impact on the reconstruction of the political identities

under the changing context of political reality in the European Union. As Risse rightly observed, 'people need to make sense and develop collective understandings of political processes in the EU. If more and more competences are transferred to the EU level and made subject to joint decision-making involving supranational institutions, we should expect that this emerging European polity impacts upon the way individuals and social groups view themselves and the nation-state' (ibid.: 200). In this approach, the change of the political frames of reference will influence significantly the collective identification of the people of Europe, and with this also the kind of legitimacy on which democratic order and democratic political institutions can be built.

All these aforementioned aspects bring up the following questions: How can collective identities be sustained in the ongoing process of nation state transformation? What kind of commitment and involvement of the citizens as members of what kind of democratic polity can be promoted? In relation to what images, symbols and discourses can the new European social and cultural space be defended? The special interest for us is: What kind of political identification – and as a result loyalty and legitimacy of the new type of polity – will emerge from this process?

Situating collective identity building in relation to democratic polity building

After having clarified how collective identifications are generated at the micro-level of social interaction, we need to relate these basic processes of constructing social bonds back to the macro political setting of democratic order. Micro processes of identity transformation and the question of the Europeanisation of collective identities help us to clarify the particular notion of the demos that is underlying democratic politics. The micro/macro link is taken for granted within the constitutional setting of the nation-state that unifies the plural identitarian practices by underlying the notion of a demos. Such a demos can then be claimed to constitute the democratic polity. The problem with the re-constitution of a European democratic order is how this micro/macro link of collective identification of the citizens as members of the demos can be meaningfully defended.

The uncertainty about the possibilities of a democratic settling of European integration is to a large extent related to the seemingly

obvious absence of a European demos. In one way or the other democratic legitimacy needs to be grounded in the collective will of the members of a constituted political community. As far as the EU is concerned, the plausibility and requisiteness of Europe as a demos is tested out in the long-term process of constitutionalisation. European integration has not only dismantled the old Europe of independent nation states, it has also formally embraced democratic principles and procedures, but it has not yet consolidated democratic practice engendering citizens' trust and solidarity. The question is if and under what conditions institutional and constitutional designing can be conveyed to a self-recognising political community. The search for the reconstitution of democracy in the EU correlates with the search for the expression of the collective identity of the underlying subject of a European democracy.

The meaning of operationalising collective identities in relation to the RECON models

What can it mean to operationalise the RECON polity models in relation to collective identity? The discursive paradigm examines collective identities as a way of contesting the boundaries of social relations. This conceptualisation helps us to clarify the analytical status of the RECON models. In relation to collective identities, the use of the RECON models cannot be analytical in the sense of corresponding to specific types of collective identity. The models will be rather used to demarcate spaces of identity contestation in relation to the democratic project applied to the EU. In this political struggle about the democratic reconstitution of Europe, the models are not category devices to map the plurality of existing identities, but political narratives that can help us to reconstruct the dynamics of ongoing identity contestations.

To proceed with our operationalising task, we therefore first of all need to make clear *what* needs to be operationalised. Our discursive approach implies that we cannot aim at an operationalisation of collective identities as a form or a substance, but as a claim for substantiation. Accordingly, there can be no 'ideal identity' in relation to an 'ideal polity'. There can be no indicators or criteria to tell us that there is an underlying collective identity of a particular category (e.g. a strong or a weak identity, an ethnic or a civic identity). There can be only discursive practices that claim for one type of identity or the other. What we find empirically are not

collective identities but discursive contestations about identity in the attempt to stabilise social relations within the polity (or beyond it). Collective identities can in this sense not find a form or a resting point (like 'civic' or 'ethnic'); they can be said to be always salient and never latent. Identitarian practices are therefore seen as necessarily unconcluded, since the question of collective identities only opens up when there is an attempt to verify it.

If collective identities need to become salient in order to see them, we cannot measure and categorise collective identities through opinion surveys. Our own concept corrects this common view on collective identities as the aggregation of individual attitudes in a couple of important respects. A first caveat refers to the measurement of belonging through the subjective positioning of individual actors in terms of proximity and distance to the political community. The 'subjective identity paradigm' is based on the assumption that by providing citizens with good knowledge of the EU and good reasons to trust European institutions, individual identifications would follow automatically. It has been objected that there is a long way from individual identifications to collective identities (Eder 2008). A collective identity is different from what we measure with the degree of identification with a pre-established political category (such as the EU). For the operationalisation of the RECON models in relation to collective identities, this means that we cannot allocate collective identities to polity models by simply asking people whether they feel national or European. We can, for instance, not conclude that a European identity exists, if the majority of Europeans feel attached to Europe and the EU or are proud to be European. We can also not measure 'support' to the EU and to democracy as an indicator of the coming into being of a European demos that would substantiate a federal model of European democracy.

The demos that is underlying RECON model 1 and 2 either in the form of the national community of citizens or in the form of a community of constitutional patriots can only be given meaning in discursive contestations and not in substantial terms through socio-demographic indicators of groupness, culture or territoriality. The demos is not a pre-existing sociological category, the demos and its acclaimed identity only come into being as an act of representation. Collective identities do not exist as latent attitudes but only through the efforts to substantiate them. Opinion polls remain 'meaningless'

as long as they are not becoming themselves the object of identity politics, for instance, by using the results of an opinion poll to claim for the existence of a European identity. This is the irony of the literature on a European collective identity, which in order to avoid producing 'meaningless results' is forced to enter itself into the arena of identitarian politics.

The discursive paradigm of collective identities does not take the indicators that are used to measure strong or weak identifications at face value but as part of the story telling of belonging to the political community (Eder 2008). Following this paradigm, the meaning of collective identities is not simply contested; the problem is rather that meaning is only constructed through such contestations. The political community as a reference object of collective identity contestations is a projection of discourse, not its underlying basis (Laclau 2005). The demos is the 'empty signifier' of democratic discourse that functions as long as nobody notices that it cannot be given substance (Luhmann 2000: 333).

Identities can in this sense not be rooted in the feelings of belonging to a particular group of citizens. The groupness to which collective identities relate, and the acclaimed strong or weak feelings of attachment it presupposes, do not exist prior and independently of identity talk but because of its narrative constructs and performances. In this sense, European identity can only relate to a new contested field of performing collective identities without being linked to any substantialist identities that would cause or underlie these conflicts.

We now argue that the discursive practice of contesting the basic legitimacy of the EU is at the same time to be understood as an identitarian practice of differentiating possible states of worth within that polity. In the evolution of modern societies, there is a direct link between degrees of societal complexity and the proliferation of collective identities as narrative constructs, which demarcate the boundaries of social relations and establish rules of inclusion and exclusion (Eder 2008). A transnational, heterogeneous and internally differentiated setting such as the EU is therefore not in need of less, but of more collective identities. European integration creates an imbalance between new hegemonic expressions of unity and the continuous strive for differentiation of its constituting parts. In debating the legitimacy of the EU, a new balance is searched between

unification (integration) and differentiation, a process, which, for the time being, remains highly contested and unconcluded (the 'unfinished character' of the EU). The constitutionalisation of the EU therefore leads to a situation, in which Europeans, who claim at the same time to be nationals or regionals or even internationals, revitalise old narratives and test out new expressions of the self of the political community. The search for democratic legitimacy of the EU provokes substantialists identity claims in terms of new practices of differentiation and new hegemonic expressions of unity.

Relating these conceptual thoughts back to the RECON modelling task, we can now see that the question of how to introduce European identity and mobilise it in a multi-identitarian field has a clear political connotation. To the extent that European actors, institutions and even political scientists become engaged in a process of democratic polity building and designing, they enter European identity politics by actively promoting trust and solidarity of European citizens. In this political struggle on the institutional-constitutional design of the EU, the question of how multiple identities can co-exist and co-evolve in Europe becomes vital for modelling different paths of reform and testing out their viability (Eriksen and Fossum 2007).

The question of European democracy is then typically reconstructed as the confrontation between different identity projects, in which the designation of the constituting people through national democracy is put into question. In the political struggle about the democratic reconstitution of Europe, such competing solutions to the quest of allocating the popular sovereignty of the people crystallise in different master stories which are held together by a narrative that signifies a particular polity-constituency relationship. The RECON models provide three modes for constructing political narratives of collective identity projects with regard to the consolidation of democratic order in Europe. They correspond to such narratives or 'master frames' for locating public authority and popular sovereignty in Europe. As a political narrative, the RECON models demarcate a *polity* in legal-institutional terms and they demarcate a *constituency* in identitarian terms. The status of collective identities is thus crucial for establishing the internal consistency of the model (or rather the consistency of the narrative that constructs the model), since collective identities refer to the differential principle that allows us to distinguish the democratic subject to which popular sovereignty is allocated.

Modelling a European democratic polity in relation to collective identity

For the analytical purpose of reconstructing collective identity formation in Europe (WP 8) we thus propose that the RECON models should not be used as evaluative schemes for testing out the viability of different options for the democratic reconstitution of Europe. We rather propose that the RECON models should be applied as narrative templates for signifying possible constituents of a European democracy. The model building exercises should hence be considered as part of the story telling about European democracy. The three different narratives for the institutional-constitutional designing of the EU related to a particular vision of popular sovereignty can be distinguished as follows:

Audit democracy: Zero-sum relationship between existing national identities

This story builds on the classical division of labour between fully sovereign nation states allocating popular sovereignty and negotiating the quest of collective identities, and an international or European arena of interest negotiation¹. National governments appear in this story as delegated national interest representatives. The kind of trust and solidarity that is needed to make democracy work would be provided by relatively stable and historically rooted national identities. It is only on the basis of the particular notion of nationness that the citizens can participate in opinion-forming processes and put the decision-makers to account. Different national identities would stand in a zero-sum relationship and European integration is aimed at taming potential conflicts between them. A European identity would not only be unnecessary, it would also potentially harm the integrity of the national community. This is manifested in the increase of conflicts between the two levels that can only be overcome by a clear delimitation of competences and a self-restriction of the EU to market-building, negative integration and auditing the normative integrity of the Member States.

¹ See Risse (2004: 248) and Checkel and Katzenstein (2007) for an understanding of zero-sum and positive-sum identity games.

Federal democracy: Zero-sum relationship between European and national identities

This story applies elements of the established plots of the history of nation building to the European Union. In a federal Union, the interrelation between collective identities is likewise perceived as a zero-sum game with the new elements of supranational identification slowly replacing the traditional elements of national and subnational identities. The European institutions appear in this story as common interest representatives. Democracy would be grounded in a thick European identity with the potential to overcome national identity, or at least allowing for restricted identity pluralism by territorially demarcating the sub-identities within the federal union. A strong political identity needs to prevail at the federal level grounded in constitutional patriotism, which gives expression to the will of unity of the new political entity rooted in citizenship rights and practice and establishing bonds of mutual recognition between its plural cultural expressions (Magnette 2007).² Citizens' allegiance to the EU would thus be formed in purely political terms, '[hinging] on the validity of legal norms, the justification of policies, and the wielding of power in the name of fairness' (Eriksen and Fossum, chapter 1 of this volume). At the same time, this political loyalty to the EU needs to be strong enough to specify criteria of membership and setting the terms of inclusion and exclusion. The federal political union would ultimately need to generate trust and solidarity among the European citizens as members of a sovereign political community to which persisting cultural particularities can be clearly subordinated.

² It should be noted that, in spite of these categorizing efforts, there remains a basic ambivalence in the status of 'constitutional patriotism' in relation to collective identity formation. It is meant to be a 'thin identity' in the sense of being constituted by an attachment to abstract universal norms and principles, and thus giving expression to a cosmopolitan vocation. At the same time, it is meant to be a 'thick identity' in the sense of being anchored in a historically specific culture and in a particular institutional setting (Kumm 2005; Fossum 2007). While the former refers to an undifferentiated and thus basically non-identitarian world, it is only through the latter operation of bringing in social differentiation that a principled need for demarcating an identitarian space emerges.

Cosmopolitan Europe

Positive-sum relationship between nested identities

This story combines elements of human rights universalism and global solidarity with a particular democratic arrangement. In a post-national, cosmopolitan Union, the interrelation between different identity discourses would lead to a positive-sum outcome. European identity would be nested happily in persisting patterns of national identification (Checkel and Katzenstein 2009: 5). In order to be able to display this reconciliatory function, the European constitutional project needs to give expression to a cosmopolitan vocation that can be transposed to the universal and inclusive community of democracy (Eriksen 2006). European institutions would appear in this story side by side with international organisations and global civil society as elements of an inclusive and encompassing democratic process that represents humanity. The EU-setting would thus be post-national, in the sense of renouncing on a strong identity, and the persisting plural identities would be significantly constrained by the necessity to respect diversity and cosmopolitan values. In this sense, there would be an institutional guarantee that the particularity of collective identities is always counterbalanced by reflexivity, which is displayed in the discursive references to the 'unity in diversity' of the shared political space of Europe. There would be only 'weak' and 'self-restrained' collective identities under the common principle of 'shared humanity'.

Democracy as a way of substantiating collective identities

Against the common view that holds the self-identified political community as prior and independent of the design of the polity, we have proposed in the previous section that research on collective identity should clarify how democracy operates through the identification of popular subjectness. This should result in a distinction of specific political narratives or discourses of how the demos is signified and recognised through the unfolding of democratic practice within the European setting. Research into the dynamics of collective identity formation in Europe should therefore not be constructive, but reconstructive. It should not propose better or more coherent identity narratives to *construct* the distinct and internally coherent demos that is underlying European democracy. Research should rather *re-construct* how people narrate their belonging, how

and by whom such narrative are amplified and what effects they have on stabilising or de-stabilising the collective bonds and drawing the boundaries of the social.

In light of this operationalising task, we believe that the RECON polity models remain ambivalent with regard to the constitutive or constituting role of the demos and the constructive or re-constructive approach towards collective identities. As we will try to demonstrate in the following, this ambivalence originates in the double allocation of the people in the architecture of the democratic polity. The demos or the collective will of the people are the founding myth and the telos of democracy. This double allocation of the people has been referred to as the paradox of democracy (Mouffe 2000). It refers to the need to postulate the presence of the demos, before it can be claimed to come democratically into existence (Offe 2003: 154).

Our central proposition is that whenever the constituents of a democratic polity refer to collective identities, they confront this basic underlying paradox of democracy. The research task then consists in developing an operational understanding of democracy and of democratic practice as modes of de-paradoxisation of the undecidability of collective identity. According to Niklas Luhmann (1997: 1061), complex societies *proceed* through displacements of their constitutive paradoxes in time. De-paradoxication is achieved through proceduralisation, which does not resolve, but dissolves, the constitutive paradox of the social. The displacement of the paradox of the underlying unity takes place through practices of differentiation, which allow to demarcate shifting boundaries and to establish flexible rules of inclusion and exclusion. This meets with our understanding of the RECON polity models as narratives of postulating a polity-constituency relationship that is held valid for the particular social and political space that is demarcated by European integration. At the same time, the RECON narratives are *operationalised* as scripts of social practices, which differentiate this polity-constituency relationship over space and time. The question then is not only how and by whom the narrative is generated, but also how it is taken up as a script that instructs democratic practice. Under these assumptions operationalisation can only mean proceduralisation. Operationalisation should start with proceduralising the RECON model assumptions to be able to test out how democratisation in Europe

proceeds through images and discourses that claim for the existence of the collective will and popular sovereignty.³

The democratic undecidability of the *pouvoir constituant* thus results in a principal ambivalence of the RECON polity models with regard to the status of collective identities. This is translated into two opposing views about the causal and directional processes of the constitutionalisation of the democratic polity. The first view holds the self-identified political community as – at least partially – independent of constitutional designing. European collective identity is seen as the basic infrastructure of a European democracy. The second view observes how EU-democracy *operates* through the identification of popular subjectness (i.e. through discourses that signify the people as constituent power of the EU). Collective identity is seen as a product of entering into democratic practice.

By claiming a zero-sum relationship between collective identities, RECON model 1 and 2 are relying on a substantialist notion of collective identities. Democracy is claimed to be rooted in a popular subject, which again is given substance in a historically and culturally distinct identity. This view on collective identities as the cultural expression of unity and diversity of a political community replicates the self-description of democratically constituted nation states. In a democracy any exercise of power needs to be justified as an articulation of popular will and subjectness. Whether emphasis is put on the idea of democracy as a process of collective will formation or on the idea of democracy as a control of power, a strong voluntaristic assumption is made, which puts trust in the freedom and autonomy of the ‘people’ to be their own master in history.

RECON model 1 and 2 can thus be said to continue a ‘nationalistic’ tradition of substantiating collective identities by applying the basic rhetoric of popular sovereignty as a source of democratic legitimacy. They differ, however, in their assumptions of how the demos can come into existence. In RECON model 1 we can assume that the mainstream of collective identity formation will still be within the national framework. The Europeanisation of the national identity in

³ For such a procedural translation of the RECON model assumptions see the contributions to this report from WP 5 on the public sphere and civil society by Liebert and Trenz.

this model is limited and will not necessarily bring any changes in solid national foundations, while the resonance with the European substance will rather enforce national identification. The nature of the collective identities will be more stable than changing and historically rooted in pre-political bonds.

Following the narrative of RECON model 1, the democratic subject is searched for in the manifestations of culture, traditions and distinct ways of life, which demarcate the plurality of European nation states. It is assumed that such distinct national identities can be traced back in historical accounts, located in socio-structural terms or counted empirically (e.g. through public opinion surveys). With a view on Europe, RECON model 1 would also recognise the distinctiveness of Europe as a civilisation (Giesen 2003; Kaelble 2001, 2009; Eisenstadt 1987) or as a space of cultural diversity and multiple, historically rooted identities (Shelley 1995; Fossum 2001; Landfried 2002). The decisive point, however, is that this European commonness provides only weak indicators for an identity that would be able to sustain democracy. RECON model 1 therefore concludes that the EU suffers from a democratic deficit, which cannot easily be overcome by institutional reform and is partially grounded in a deficit of social and cultural integration (Cederman and Kraus 2005). The formal democratisation and constitutionalisation of the European Union would remain incomplete as long as the emerging polity cannot rely upon a robust, durable and self-identified political community (Bartolini 2005). Without such a constituted political community or *demos* any democratic solution would be unfeasible.

In the eighteenth and nineteenth century process of nation building, two historical modes of defining the exclusiveness of national identities have been developed in parallel and in partial demarcation to each other. National identity has been grounded either in a strong ethnic bond or in a historically grown civic practice. Ethnic and civic identities constitute two competing, and often exclusive trajectories of constructing national citizenship and belonging (Brubaker 1992). The ethnic type of belonging is oriented towards the past, emphasising tradition, common roots, and cultural substrates (Geertz 1973; Eriksen 1993). As such, it was frequently implemented in Central and Eastern Europe, often explicitly as a counter-project to the French Revolution (Francis 1965). Nationalists of the ethnic type tend to be exclusive and anti-modern, sceptical about innovation and change

which may bring new ideas and new identifications. Nationalists of the ethnic type do not trust 'national others' and foreign ideas in general. They are collectivistic, placing collective values, such as family or religion, above individual ones, such as freedom, human dignity, and free choice. In facing European integration, ethnic nationalists frequently opt for closure and xenophobia and express their unwillingness to be part of supranational structures.

The more open societies of Western Europe, which in the tradition of the French Revolution celebrate dialogue, plurality of ways of life and mutual respect have traditionally rejected such rigid constructions of a closed, ethnic, exclusive nation. Instead, a civic model of nation develops, which proposes to build collective identity on citizenship, civic values, liberalism and negotiation of meaning. Such a civic nation postulates an open, dynamic and future-oriented social bond. Membership is based on choice and negotiation, opening the possibility of inclusion and the establishment of different levels of social organisation (e.g. in a federation). In facing European integration, civic nationalists often emphasise the limited resources of trust and solidarity among the co-nationals, which cannot easily be transposed to the transnational level.

In facing new challenges of immigration, multiculturalism and shifting allegiances of the citizens, we also observe how traditionally defined civic and ethnic components of collective identities can be quickly transformed and re-arranged. Although national identity remains the main frame of symbolic reference for many people (Smith 2001), European societies are on the move towards re-defining the bonds of the social. Especially the ethnic concept of nation, traditionally developed in many European societies, is now more and more often seen as not only unfashionable and parochial, but also counter-productive in facing global and European challenges.

RECON model 2 starts from the same premises of a plurality of cultural expressions that substantiate distinct national identities, but goes one step further by sustaining the transformative force of European integration in re-shaping collective identities. It further specifies the mechanisms through which such a political community of the Europeans can be given substance. This is basically achieved through the constitutional designing of the emerging European polity that is given a democratic form and thus would be able to re-direct

citizens' allegiance and create the kind of trust and solidarity that is necessary to sustain a European democracy. The democratic reconstitution of Europe would in this sense be followed by the reconstitution of the social carriers of democracy. The research task then would go beyond the mapping of existing plural identities and would embrace the conception of political strategies to overcome the deficit of social and cultural integration. Whereas RECON model 1 would stop with the diagnosis of collective identity cleavages that mark the European space, RECON model 2 would need to address the question of the peaceful co-existence of different identity projects and how they could be put into an hierarchical order. For this purpose, notions of federalism are typically introduced and, for example, linked to some notion of constitutional patriotism to distinguish between 'strong' and 'weak' elements of collective identity.

On the basis of RECON model 2, it is also frequently sustained that political identities are mouldable through political intervention and can be actively promoted to supersede other residual forms of cultural identity, which are more resistant to change. In the literature on European collective identity formation efforts have been made to demonstrate that co-existing plural identities are not only possible, but also normal (Herrmann et al. 2004). Academic work can thus indirectly back the identity selling efforts of European institutions, by demonstrating, for instance, through opinion surveys that individuals can, and in fact do, hold multiple identities (Risse 2004). It needs to be critically noted, however, that such surveys intrinsically replicate the substantialist notion of collective identity. By measuring collective identities at the aggregated level of individual attitudes, they are usually relying on predefined categories to which the respondents have to react, but in which the individual life histories of the people tend to disappear (Eder 2008).

Beyond identity?

Much of the debate about the possibilities of democracy beyond the nation state has focused on the question of whether collective identities are constitutive for or derivative of democracy – with RECON model 1 taking the former and model 2 the latter position. Many, and in particular liberal and deliberative theorists, have also argued, however, that democratic rules and procedures should be understood in purely universalistic terms and therefore detached from the particularity of collective identity. In the following, we will

basically argue that there can be no 'beyond identity' in relation to democracy. There can be, however, a reflexive mode of dealing with collective identity contestations in democracy.

RECON model 3 constitutes one possible political narrative to conceptualise democracy 'beyond identity' but also exemplifies the intrinsic contradiction such a project runs. In relation to collective identities, RECON model 3 does not negate the possibility of belonging and boundaries, but puts them under the constraint of universal discourse and procedures. This opens the possibility of a positive-sum relationship between nested identity games. Instead of searching for the possibilities of a peaceful co-existence and the harmonious relationship between plural identity projects under the European umbrella, RECON model 3 counts on the transformative power of identity talk and practice. The narrative of RECON model 3 is therefore not simply based on the preservation of existing plural identities. It rather looks at identity transformation as a creative and open-ended process, in which the validity of the collective project needs to be constantly reconfirmed and the boundaries of the social remain contingent. This introduces an ambivalence into identity discourse, since the underlying constituents are no longer seen as fixed and homogeneous. It is sustained that criss-crossing public discourses linked to shifting allegiances can also generate democratic legitimacy (Eriksen and Fossum, chapter 1 of this volume). Types of identity and degrees of attachment may vary and must be constantly renegotiated through the democratic process. Collective identity is then no longer seen as a stable resource on which democracy can draw but a shifting target that is contingent on the democratic process.

Instead of relying on collective identity as a pre-political category or as a substantialist feature of individuals and groups (the participatory perspective of 'nationalists'), RECON model 3 self-reflexively recognises the contingent ways of narrating collective identities. It thus turns from a substantialist to an operational notion of collective identity formation as a consequential effect of entering into a shared discursive practice. This has consequences for how research on collective identity formation in relation to the reconstitution of EU-democracy within WP 8 can proceed. One problem related to this notion is, how research can still underlie collective identity as a *category of analysis* while at the same time recognising its character as

a *category of practice* (Brubaker and Cooper 2000: 5). In searching for the essence of 'sameness' or 'groupness' of the Europeans research can only find 'identity talk' and 'identity politics'. Secondly, research would need to look at social groups not as carriers of collective identities, but rather as containers of identity discourses and practices. We need to understand how different role ascriptions of European and national actors are embedded in a plural and multi-level representative field, which is given discursive form and which signifies the social groups or the 'people' as the carriers of identity.

Does RECON model 3 open the path for introducing a non-substantialist notion of collective identities? There are two readings of how to underlie a positive-sum relationship between nested collective identities as part of the narrative of a post-national democratic polity: the politics of recognition and the politics of deliberative supranationalism.

Politics of recognition

The first notion of how to narrate collective identities as elements of a post-national democratic union refers to the politics of recognition. Within this paradigm, the promoters of a European democracy would need to pay tribute to the existence of multiple identities. Democracy would be made possible through the recognition of diverse life forms and belongings (Honneth 1995). While it would be no longer necessary to ground democracy in a substantial and homogeneous demos (either the civic or the ethnic variant), the substantialist paradigm is nevertheless maintained with regard to the recognition of diversity. Democracy can in this sense always be seen as the positive-sum outcome of balanced conflicts and diversity. An encompassing legal and institutional framework provided by universal law, international organisations and global civil society would be sufficient to guarantee such positive sum outcomes and could substitute the hierarchical institutions of the nation state or of a European constitutional order.

The solution proposed within the politics of recognition paradigm is thus that a positive-sum game between nested identities would facilitate democracy while preserving collective identity. Therefore the only criterion of European identity is acceptance of the basic principles which govern the process of negotiation and participation in the common social, political and economic space. Those values

include in particular the rule of law, the principle of openness, tolerance and dialogue as the only methods of solving problems, and respect of human rights, especially freedom, equality, dignity and the principle of non-discrimination, as they are expressed in the Charter of Fundamental Rights.

Politics of deliberative supranationalism

The second notion of how to narrate collective identities as elements of a post-national democratic union refers to the politics of deliberative supranationalism (Eriksen and Fossum 2000). The legitimacy of the proposed system stems from the process of deliberation based on reasoning. The basis for legitimacy in an internal sense is given by participation. Agreement is reached during the proceedings according to communicative rationality. Moreover, deliberative democracy 'disconnect[s] collective will-formation in modern politics from the notion of a pre-existing system of common values and affiliations. In this perspective, there is a separation of politics and culture, of citizenship and nationality, of ethnos and demos. Discourse theory departs from a substantive, or ethical conception of citizen autonomy, which emanates from the convergence of tradition and community-type bonds on the basis of which it is possible to reach an agreement and forge a common position' (Eriksen and Neyer 2003: 8). And this moment is crucial for attaching studies on the formation of collective identities and the third model.

Contemporary societies are characterised by fluid and multiple identities (Eriksen 1993; Bauman 2004). One should not expect that identity, once constructed in a process of interaction with significant others, will remain stable over a longer period of time. Not only can we construct and reconstruct our identity in a relatively free process of negotiation, but we do not have to be consistent in our understanding of relations with others, our self-image and our involvement in social relations. We can and do change our belonging and our understanding of who we are and what it means. Our individual biographies are therefore processes of dialectical relations between looking for our true self and fluid, ever-changing identifications in a changing environment. We are also involved in multiple identifications. The more complex the social relations in which we are involved, and the more free we are in constructing our identity in the network of relations with others, the more identifications we have. They may coexist, well integrated in our symbolic model of the

world, or they may be in conflict with one another. Such conflicts, should they arise, contribute to further dynamism of identity. Such a concept of dynamic and contextual identity seems to be compatible with the model of deliberative democracy. The essence of democracy in this model is in dialogue and negotiation among partners who collectively constitute a public space of balance of power and meaning. People collectively solve their problems and create social relations through negotiations and deliberations, in which others are considered to be partners whose active participation is necessary for the building of collective identity and the network of social relations. Others are involved in negotiation of equal basis, while openness and tolerance inform the negotiation process. The foundation of common values is necessary for such a platform of negotiation to develop, but these values are interpreted in the dialogue. Deliberation means involvement and active approach. The question is whether such a process is currently developing across national boundaries. Europeans are traditionally used to planning and executing their life activities within the national framework of reference. Education, language, professional career, family life, economic activity – all this happened within national borders, while supranational involvement was exceptional. Dialogue with national others was determined by the concept of 'the foreign', one who did not belong to 'our' world, with whom one could exchange views, but who was not seen as a partner of negotiation with a significant influence on our life in our country. Differences across national borders might be interesting to know, but they were 'foreign', therefore of no direct significance for us. Contacts with 'foreign' countries were, as a rule, controlled and coordinated by nation-states – citizens of nation-states delegated the right and the mission of maintaining international relations on national agencies. Individual citizens remained largely restricted to national frames of reference.

The question is whether this is changing today, and how this process of negotiation is developing. EU institutions, including those providing financial support to regions and local communities, not only help them to overcome economic and social problems, but encourage them to be active in the European frame of reference. European citizenship stimulates political participation and individual identifications with communities in which people happen to reside, whether they originally come from there or not. Due to the system of

distribution of European funds, more and more people act 'as Europeans', in a European, and not a national, frame of reference.

Democracy and identity are matters of representation – political and symbolic. As we mentioned above, identity is action. Therefore one may perhaps suggest that democratic deliberation is the process of creating new identity – thorough involvement in meaningful relations. Political representation and symbolic representation (creation of images) together constitute the process of formation of collective identity.

The RECON model 3 also suggests a very significant shift of emphasis in the process of identity formation from the collective to the individual, and from collective identity mobilisation from above to collective identity mobilisation from below. This explains the WP 8 research commitment to micro studies of collective identity transformation. As outlined at the beginning of this paper, this addresses in particular the question of the Europeanisation of individual life projects. If identity is fluid and negotiable, if it is a process of construction rather than a relatively stable structure, then a free human individual, a deliberating citizen is the most important, key element of this process. Belonging to a community depends on individual activity and creativity. One has to be active and accept the rules of the game, which are negotiated in a dialogue. Activity of creative individual citizens shapes collective belonging – you belong to us if we together become engaged in common problem-solving. In this model there are no established structures. European citizens are free to create their Europe through continuous deliberative construction of new forms of activity and through solving common problems. Dialogue and negotiations are essential – while the concept of tolerance acquires a new meaning – to be tolerant means not just to accept that others can be different elsewhere, but that we ought to be open and allow for the possibility of changing under the influence of others.

Such a concept of identity also implies that the question of European borders needs to be reformulated. There is no point in trying to establish permanent boundaries separating those who are European from those to whom this identification is denied. Borders are flexible and they can be transgressed by active individuals who are able and willing to engage in the process of negotiation and make an active contribution to the common European social space.

To conclude this section, we can summarise that the politics of deliberative supranationalism – in contrast to the politics of recognition – are characterised by the attempt to de-substantialise collective identities. Discourse is recognised as the driving force in the making of collective identities and rational discourse also constrains expressions of collective identities by introducing the universal moment of ‘shared humanity’. The positive-sum outcome of ‘shared humanity’ is thus achieved through a reflexive operation of those who are involved in the ‘making of’ collective identities. Reflection is a way to overcome the conditionality of collective identities, because it confronts the participants of discourse with a notion of universal validity beyond the particularity of meaning. In this last sense, the ‘cosmopolis’ can be said to rely on discourse and ‘shared humanity’, and not on collective identity (Eriksen 2006). As we will argue in the following, this attempt to de-substantialise collective identities introduces a tension with the concept of democracy, because it de-substantialises at the same time the notion of popular sovereignty on which democracy is based. The question that needs to be raised in the last part of this chapter is how the ‘shared humanity’ of the cosmopolis can be turned into the collective will of the demos that underlies democracy. How can the ‘cosmodemos’ be constituted through the expression of a collective identity?

From ‘shared humanity’ to collective identity

By shifting from a substantialist to an operational perspective on the ‘making of collective identities’, RECON model 3 attempts to reconstruct democracy as a justificatory order, in which individuals draw on particular principles and discourses to define their common world. From the research perspective, this ‘linguistic turn’ in the study of collective identities can be accommodated by analysing the narratives and discursive practices that claim for collective identities in relation to European integration in general, and European democratic polity building in particular. In line with this, WP 8 assumes that there can be no substance of collective identity which exists independently of its discursive representation. Notions of collective identity need to be discursively represented and have no existence ‘beyond discourse’. The analytical programme that follows is linked to ‘identity politics’ as the dynamics of raising and contesting identity claims. The non-substantialist notion of collective identities would help to demarcate either a polity of recognition or a

polity of deliberation, in which competing identity projects need to be accommodated by common rules and procedures.

The question that remains to be answered at the end of this paper is whether such a non-substantialist notion of collective identity is also sustainable from the participatory perspective of democracy. To the extent that RECON model 3 embraces a project of democratic polity building, it shifts back from a deconstructive to a constructive notion of collective identities. It does not underlie an operational understanding of democratic practice and identity talks but returns to the substance of democracy and collective identity. The proposition to be made at the end of this paper is that such a rhetoric shift is not inconsistent with democratic theory but intrinsic to any attempt of demarcating the collective will of the people. Democracy, in one way or the other, needs to signify popular sovereignty. It needs to identify the people, to give them a name and a substance. Collective identities fulfill precisely this purpose of giving hegemonic expression to popular sovereignty. They primarily help to stabilise and equip social relations and to *objectify* them in such a way 'as to give them body, performance and presence' (Boltanski and Thévenot 2006: 185). What are under these premises the conditions for turning the 'shared humanity' as the 'positive sum outcome' of RECON model 3 into a collective identity that signifies popular subjectness and sovereignty?

In order to explore this intrinsic relationship between democracy and substantive identity claims, it is useful to recall, once more the basic operational requirements in the making of collective identities. In the conceptual part of this paper, we have claimed that collective identities do not exist as latent attitudes, but only through the efforts to substantiate them. From this perspective, a non-substantialist notion would be a contradiction in term, precisely because the basic operation of signifying the popular subject of democracy remains incomplete.

One must conclude therefore that RECON model 3 provides an incomplete democracy narrative as long as it does not locate popular sovereignty in relation to substantive identity claims. In order to objectify the collective, a justificatory practice cannot rest uniquely on the requirement of 'shared humanity'. The identitarian moment is introduced only at the point of combining the cosmopolitan principle with the principle of differentiating possible states or worths for the members of the collective. Collective identities specify commonness

through distinction. They are thus made up of two opposing forces: The first strive consists in what RECON model 3 has identified as the requirement of 'shared humanity'. It consists in the escape from singularity, individualism and distinction. As an identitarian narrative, democracy postulates a relation of equivalence among human beings in as far as they all belong to a collective that includes and transcends them. Democracy consequently works to attain what is naturally common, what belongs to all, to break down isolation and to unite. This cosmopolitan strive for 'shared humanity' is counterbalanced by the requirement of differentiation and isolation of the popular will and subjectness. As an identitarian narrative, democracy justifies a relation of difference among human beings, which is found in the dignification of the personal, the individual right, and the authorisation of the singular will. This includes formulas to express the worth of the particular group and to embody the collective, to draw the boundaries of belonging and to set the rules of inclusion and exclusion.

By applying this operational perspective, the positive sum outcome of a *reconciled* collective identity of RECON model 3 is revealed as a new hegemonic expression of popular sovereignty. RECON model 3 remains an incomplete identity narrative as long as it does not designate a polity-constituency relationship that unites the universal moment of 'shared humanity' with the particular moment of differentiating popular subjectness. Such a specification of the conditions of how democracy works could classically rely on the citizenship narrative of RECON model 1 and 2. Yet, our change of research perspective allows us to turn from the substance of the 'demos' to the process of its substantialisation. Democracy is precisely about this process of signifying popular will and sovereignty (Laclau 2005) and it remains dubious whether this can be done without underlying a substantialist claim for collective identity. If RECON model 3 in turn rests merely on the cosmopolitan denotation of shared humanity, the popular sovereignty remains un-signified. The cosmopolitan Europe would fall back to naturalism by delineating a primordial state, that would be a-social and a-political in the sense of barely relying on natural signifiers of shared humanity.

The corresponding research programme consists in analysing discourses, which substantiate collective identities by signifying the people as the constituent power of the EU. This is a reconstructive

tasks, which analyses how the discourse of EU democracy constructs its own object or how the 'represented' of a European democracy is constituted through the acts of representation. Constitutional debates provide a prime example for these dynamics of underlying notions of 'collective will', 'the people', 'popular sovereignty' or claiming belonging and identity. Comparative research on EU-constitutional debates is concluded and results on media debates are available (see Trenz 2008, 2009; Vettters et al. 2009; Trenz et al. 2009; Liebert and Trenz 2008a and b). As a further research strategy for linking 'EU-polity narratives' to collective identities (integrating WP1, WP5 and WP8), it is proposed to re-construct more systematically and also critically *how* and *at which points* 'European cosmopolitanism' as manifested in the unspecified claims for overcoming the particularity of collective identities by reference to universalism is turned into new identitarian practices. In particular in cooperation with WP1, this implies normative consistency tests of the underlying model assumptions on relating particularism and universalism. In its existing form, the RECON models have a tendency to treat particularism and universalism as special cases, the former opening up to collective identities and contextualised versions of democracy (RECON model one and two) and the latter demarcating a basically identitarian free world of a cosmopolitan version of democracy (RECON model three). From a discourse theoretical notion of collective identities, the RECON models would rather need to specify the mechanisms of substantiating collective identities at the interface between claims for universalism and particularism. References to 'shared humanity' and to 'differentiating parts' therefore need to be singled out in each model in order to be able to arrive at a consistent account of collective identity. The model building exercise of relating the polity and the constituency of a European democracy should in this sense be considered as part of the narrative construction of Europe. European identity discourse would not be exceptional but rather follow the general rules of debating democratic legitimacy, which combines the cosmopolitan rhetoric with a differentiating identitarian practice. This could contribute to our understanding of how and why the attempts to initiate a positive sum game of collective identities continuously (and inevitably) fall back into a zero-sum logic of demarcating collective identities (the paradox of cosmopolitanism).

Eastern enlargement and the resurgence of collective identities

If these insights into the nexus of democratic claims and popular claims hold true, the democratic transformation of Central and Eastern Europe should be considered as a prime example for testing out the intrinsic link between democracy and collective identity. In this context, the research programme of WP8 follows two interrelated objectives. First, it addresses the crucial question of the nexus of democracy and collective identity formation at the various levels of governance of the compound EU-polity. Second, it analyses the formation of collective identities with regard to enlargement processes. Special emphasis is on a comparison of the 'old' and 'new' Member States in confronting particular contextualised (foremost national or European) belongings with wider cosmopolitan attitudes, based on the analysis of multiple identity developments emerging in the process of EU constitutionalisation, democratisation and enlargement. The triadic analytical skeleton underlying the RECON framework provide useful narratives that link constitutional analysis and political practices in ordering the results of the accelerating fluctuation in the collective formation of identity in Europe.

There are, however, major problems with application of the models to the research on identity changes. The first two models – as it has already been mentioned – are very well-defined, conceptualised and operationalised. Within social sciences methodological nationalism, the nation-state and national citizenship have constituted the major frame of reference for research on the types of collective identification. The multinational federation model is of a novel character. However, other federations in the course of history and these existing today, provide useful material which allows for comparison. It is also quite conspicuous that a federal vision for Europe is somehow present in political and social understanding and the language used for description of processes in contemporary Europe, even though references to a federal state model remain – at least in the case of Central and Eastern Europe – rather marginal.

The third model seems to be most challenging. The major problems stem from the fact that the model is still *in statu nascendi* and is largely an idea for the future. With a relational approach both to democracy and identity, taking such a processual approach makes the difference

between the third and the second model clearer, but it does not clarify all the problems with the differentiating between the two. The second model – European federation – is a top-down construction which not necessarily presupposes the activity and subjectivity of citizens, while the third model relies on the bottom-up approach and cannot develop without (horizontal) negotiation, deliberation and meaningful communication. Collective identity in the third model is dynamic and more inclusive, but nevertheless, this ‘in principle’ inclusive nature of the third model does not eliminate the problem of demarcation of the popular will of a European democracy.

In the course of research within WP 8, the initial plans were to obtain empirical data which would put the emphasis on introducing the RECON epistemological models in the perspective ‘from below’, working out a methodology to reconstruct categories for defining national, European and supranational identities to be implemented in textual and discourse analyses. It was – for various reasons – not an easy task. As a result of the first round of empirical research, it was concluded that the ‘grassroots’ level and very local – sometimes very traditional communities – could not serve best as the grounds for possible redefinition of democracy in Europe. During the second round the sample was changed to focus on the young, dynamic and educated communities as well as elites – and the results are more promising in a sense of looking for the traces of the second and third model (Galent and Kubicki 2009). Our intention was to identify empirical evidence of the existence of the development of meaningful interactions among the citizens on a supranational level within the European framework transgressing national boundaries and the Europeanisation of identities through meaningful involvement in social networks. We expected in-depth interviews and systematic observation of activity of local community and individuals to provide evidence of the existence of such processes. In some cases our research confirms that new supranational relations between citizens on the European level are being constructed (Galent and Kubicki 2009, Niedźwiedzki 2009). However, the dominant identity is still constructed within traditional frames of reference, mainly national, and to some extent also local, and as such is informed by dominant public discourse which is characteristic to the first model.

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Chapter 9a

Reconstituting democracy in Europe's post-national constellation By dint of conflict of laws

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Preliminary: On the interdisciplinary dialogue between law and political science

RECON embodies a project in democratic theory with a practical purpose. It seeks to explore – empirically as well as normatively – the political options for the reconstruction of deliberative democracy within the process of European integration (Eriksen and Fossum 2007). Essentially, RECON is, therefore, a political science project, or, more precisely, a project in ‘applied political theory’. As jurists, we are neither able, nor willing, to contribute some genuine political science facet to this project. We take the interdisciplinary nature of our contribution not as an incentive to depart from our own discipline and, despite our origins, assume, for once, the role of political scientists. This could only lead to amateurism. We share, in turn, Friedrich Kratochwil’s view that ‘good interdisciplinarity’ presupposes not only familiarity with the respective disciplines and the ability to ‘translate’ the respective insights, but also the ability to examine critically the blind spots of each discipline by looking at them from the perspective of the other (Kratochwil 2009). To this effect, we hope that we can contribute to RECON's research by such

an exercise in 'translation', thereby addressing the subject in both the vocabulary and logic of our own discipline.

According to our conception and experience, the interdisciplinary dialogue between law and political science is particularly fruitful when legal scholars are able to demonstrate how the options in politics and political science and their corresponding debates find reflection in law.¹ The observation that the positions, approaches, and controversies in political science re-surface in legal contexts and reflections does not, however, mean that they could simply be translated from a political science vocabulary into a legal one, like the transfer from a foreign language into one's own language. Instead, the process indicates a complementary relationship. An option or controversy in political science *corresponds* to an option or controversy in law. This weaker notion of correspondence (instead of a translation) relates to the fact that the conceptual fields in both disciplines are not congruent. The main reason for this is that law (and the study of law) orients itself essentially towards valid law (albeit without being bound to its doctrinal form).² Only what can be conceived as a variant of applicable law can also become the object of meaningful legal analysis. In contrast, political science, and, in particular, political theory is able to approach matters far more freely. The options that it develops do not need to be grounded in the existing legal figures and concepts; political theory can, therefore, operate far more innovatively and with more imagination.

This difference is directly linked to another one: the inherent dynamic of law takes, as its starting point, the notion of the coherence of law and the associated logic of legal concepts (we are, of course, aware that this is an often questioned assumption). Thus, legal options and controversies initially emerge as controversies about the substance of, more or less, fundamental legal concepts. This is the base for the autonomy of the realm of law and, hence, of the study of law³ – a

¹ For an excellent explanation and illustration, see Klages 2009.

² This characterisation of the study of law is also taken up by Habermas (2001). He apparently assumes that this indicates a lack in considering the internal nexus of law and democracy. But when democracy is meant to operate particularly within the mode of law, law committed to democracy must grasp and capture the intrinsic logic of law.

³ See Weinrib 1995: 204ff. His argument relates to private law but is of general validity; see Teubner 1989.

datum that political scientists, as partners in conversation, have to endure in the interest of justified autonomy. This has significant implications in the given context, especially for the question of how autonomous law, as just introduced, can address those models for the reconstruction of democratic relationships under the conditions of European integration that are so central to the RECON project.

Introduction: Mirroring the RECON models in European constitutional theory

Tellingly and significantly, it seems quite easy to identify the analogies between the three RECON models and the three fundamental concepts in European constitutionalism. These three conceptualisations, which correspond to the RECON models, and which are each meant to capture the nature (or the finality) of the European Union in terms of constitutional theory, are confederation (*'Staaten(ver)bund'*), federal state (*'Bundesstaat'*) and federal union (*'Bund'*).

The conceptual difference between these three fundamental conceptualisations of the nature of the European Union (or, perhaps, it would be better to say, of its potential nature) can initially be found in the varying assignment of 'sovereignty', in the sense relevant for public international law, and this means sovereignty in its outward-looking sense. In an understanding of the European polity as a 'confederation', sovereignty would remain at Member State level. If the European Union had developed into a federal state, sovereignty would have been abolished at the Member State level and would have been newly created at Community level. In a conceptualisation of the European Polity as a federal union, sovereignty would be divided between the Member State and the Community level, or rather, it would 'remain in the balance'⁴ – as an external division of sovereignty is actually not possible.

⁴ The concept of 'Bund' has been rediscovered by Schönberger (2004), thereby exploring work by Carl Schmitt, in particular his *Verfassungslehre* (1993: 363 ff). According to Schmitt, the Bund is an entity established by a free agreement between the constituent Member States. It establishes a lasting order, charged with the realization of the objectives common to the Member States among which the achievement of the lasting peace is paramount. As such the Bund requires a significant change in the legal and political status of the Member States; for a very precise detailed analysis cf. Avbel 2009.

Each of the three competing concepts corresponds to an idea of whether a legal constitution for the European Union is conceivable. The 'confederation' is linked to the rejection of the term 'constitution' with reference to the existing European Union (Kirchhof 2006);⁵ the notion of a European Union as a federal state requires – at least for the moment of its realisation – a European constitution. In contrast, the characterisation of the European Union as a 'federal union' is usually linked to neologisms, in particular, the term '*Verfassungsverbund*' (Pernice 1996).

However, since the advent of a democratic modernity, state sovereignty not only possesses an exterior aspect, but also, and particularly so, an interior one. This internal aspect concerns the structure of the separation of powers, which, under democratic conditions, requires the supremacy of parliamentary legislation *vis-à-vis* the administrative and judicial application of law (Maus 2005). To allocate sovereignty to the European or the Member State level with regard to the processes of integration means, therefore, that we must determine the level at which this supremacy of parliamentary legislation has to manifest itself. On the other hand, this concerns the equality of all citizens with regard to their participation in the legislative process. Here, in order to establish the locus of sovereignty means that we must identify the political and legal unit at which the freedom and equality of all citizens is assured, in particular, through the equal right to vote. Thus, the proponents of the concept of the European Union as a confederation demand no changes to the separation of powers in the current institutional order of the Union; they also see the unity of citizens, equipped with equal democratic rights, established at Member State level (Kirchhof 2006).⁶ However, the proponents of a European federal state – given that they are aware of the intrinsic link between sovereignty, law and democracy – had to push for a fundamental reorientation of the political order of the European Union;⁷ such a new order would not only require a 'regular', *i.e.*, a democratic, separation of powers in analogy to the state and under the inclusion of the supremacy of the parliament, but it would also reconstitute the right to vote of this parliament with

⁵ Kirchhof is former Judge of the Federal Constitutional Court and served as reporter for the Court's Maastricht-Judgment).

⁶ His main concern is the strengthening of national parliaments.

⁷ See also Eriksen and Fossum 2007: 19ff.

regard to the equality of all European citizens as such. In contrast, the proponents of the third option, the federal union, are rhetorically and conceptually in a difficult situation, as sovereignty might be divided, as mentioned above, while the same cannot be said of the democratic separation of powers or the democratic unity of citizens enjoying the same rights.

With direct reference to the RECON models, one can say that the conceptual option of a confederation refers to the option of a reconstitution of democracy at the Member State level; hence, it refers to Model 1 ('Audit and Delegated Democracy'). The conceptual option of a European federal state refers to the option of a pending reconstitution at European level; hence, it refers to Model 2 ('Federal Democracy'). Similar to Model 3 ('Regional European Democracy with Cosmopolitan Imprint'), the conceptual option of Europe as a federal union initially implies that both other options, which advocate a reconstitution at the Member State or Community level, are inappropriate.

As already argued above, in the following, we are not concerned with further developing the already introduced translations of RECON models into legal concepts, according to the standards and criteria that dominate RECON's political science contributions; instead, we want to introduce the specific *legal form* of the debate in constitutional theory and its substantial state. First and foremost, this leads to a significant narrowing of our focus: the option of Model 2, the transformation of Europe into a multi-national federal state, plays no role in the debates about the constitutional doctrine of Europe. Even if one strongly emphasised the decentral nature of the existing political and legal order of Europe, it would not be possible to interpret the current constitutional situation as a manifestation of a federal state. The principle of enumerated competences, as the basis for autonomous action at the Community level, is too distinctly developed and is, therefore, logically connected to the lack of a *kompetenz-kompetenz* linked to Member State sovereignty. Similarly obvious is that, even according to the version of the Treaty of Lisbon, the European legal order will also, in the future, be based upon interstate treaties, so that the famous point about Member States being the 'masters of the Treaty'⁸ still remains valid. Finally, from a

⁸ Bundesverfassungsgericht, in: BVerfGE 89, 155, 190 (Brunner v. The European

legal perspective, it has to be said not only that the current European legal order cannot be interpreted as a federal state and that the political change of this situation cannot be expected, given the failure of the constitutional Treaty of Rome and the difficulties with the ratification of the Treaty of Lisbon, but also that, in many, if not all Member States, national constitutional law will stand in the way of the nationalisation of Europe. In particular, the German Federal Constitutional Court has emphasised this point in its ruling of 30 June 2009 concerning the Treaty of Lisbon.⁹ The reconstitution of democracy at European level would, therefore, require revolutionary acts in many, if not all, Member States, revolutionary acts that would repeal the constitutionality of the respective Member States. However, law, naturally, has nothing to say about revolutionary acts, as they epitomise the 'extra-legal' (*Außerrechtliche*) (Cf. Kant 1968: 420). In this respect, Model 2 and the corresponding legal concept of a European federal state can only play a peripheral role in our contribution to RECON.

In contrast, the conception of Europe as a confederation, according to RECON Model 1, remains a highly relevant pattern for the constitutional interpretation of the European legal order. Against the backdrop of the increasing political criticism of the concrete forms of the process of European integration, which, in particular, found expression in the failed ratification of the constitutional Treaty of Rome, this interpretation has regained currency and the ruling of the Federal Constitutional Court on the Treaty of Lisbon will further increase its significance.

A number of issues concerning constitutional doctrine can be listed, which all rely upon the interpretation of the European Union as a confederation: upon this basis, one will deny European law its 'autonomy', famously invented by the European Court of Justice. Following conceptual consistency, this, from the outset, prevents the supremacy of European law from being recognised unconditionally, at least as far as it is meant to exist *vis-à-vis* national constitutional

Union Treaty, [1994] 1 CMLR 57) (par. 112) (*Maastricht*) and again recently, Bundesverfassungsgericht, as of 30.6.2009, par. 231 *et passim* (*Lisbon*). Available at: <www.bundesverfassungsgericht.de>; preliminary English translation: <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>.

⁹ Bundesverfassungsgericht, as of 30.6.2009, pars 228 and 263.

law (and, in particular, national fundamental rights), or in cases in which European competences are exceeded. Finally, the democratic legitimization of the generation of European law has to be achieved by strengthening national parliaments and not by a strengthened European parliament.¹⁰

In this context, it would have been a highly rewarding endeavour to see whether the political and political science objections that Eriksen and Fossum (2007: 15ff) have raised against a reconstitution of democracy in Europe, according to RECON Model 1 – which we share *grosso modo*¹¹ – could also be expressed in the form of complementary (law-) doctrinal arguments against the notion of Europe as a confederation.

However, it is not our aim to pursue such an endeavour in the present context. Our concern and, thus, our focus is on the third alternative with its constitutional notion of Europe as a 'federal union'. We argue that the notion of Europe as a 'federal union' is the best complement of RECON Model 3. We suggest that this concept of a constitution for the 'post-national constellation' to be developed further and defended against the proponents of a confederation (and RECON Model 1). Unfortunately, this conceptual programme has hitherto made little progress in law or in political science. As we stated above, the introduction of the concept of a federal union (and, in this context, of a '*Verfassungsverbund*' and a 'constitutional treaty') had, at its origin, the function of leaving behind the dichotomy of federal state and federation (Model 2 *versus* Model 1) and of opening the conceptual opportunity for a third option (Model 3). Initially, it is argued that, in a union, sovereignty is divided between the super-ordinate and sub-ordinate level, or is 'in balance', and that it can actually find its foundation in a constitutional treaty, the subjects of

¹⁰ Bundesverfassungsgericht, as of 30.6.2009 (Lisbon), pars 406ff.

¹¹ As an aside, a remark on Chalmers (2005) and Kjaer (2009) arguing: 'The main concern of Joerges is the ability of the law to curb the territorially based power of the nation states. This is a relevant objective. But as argued by Chalmers, territorially vested authority is no longer the only form of authority [...].' This, however, is a thorough misunderstanding. We do defend democracy but not the state as such, let alone the territoriality principle as it was understood in international private and public law. We do understand state's territoriality as a still valid possibility-condition of democracy (and are supported, we think, by Kant: see Maus 2002: 239ff.

which can be both Member States and citizens. But this is where the tricky questions only begin.

Just to name two fundamental questions: first, if sovereignty is divided between the European Union and Member States, then, this has implications for the notion of the democratic sovereignty of a people of free and equal citizens, as neither the European, nor the Member State level encompasses the democratic people as such a unit. Second, given the division of sovereignty, no level is meant to possess a *kompetenz-kompetenz*, in this case, the omnipotence of a (constitutional) legislator, which characterises democratic orders, has ceased to exist.

However, the third question which concerns us regarding the concept of the European Union as a 'federal union', refers to the relationship of/between the two distinct levels, which, according to the notion of the 'federal union', are *both* sovereign *and* democratic, independently of each other. The point that both are active upon the basis of a division of competences (Eriksen and Fossum 2007: 27ff)¹² is not an answer to the question, but is, instead, a rewording of it. A clear division of competences (even if it were clearer than that applicable to the European Union) does not, however, prevent the legal regulations, which are generated due to the competences of the different levels, from coming into conflict with each other. Many proponents of the notion of a federal union argue in favour of such a case, with positions which take the paradigm of 'curtailed federal statehood' as a point of orientation. In other words, although the form of the federal state is not a relevant pattern of interpretation for the European Union or its future, all federal elements available are still inscribed into the form of the federal union. In particular, these include 1) the supremacy of European law, supremacy also with regard to national constitutional law, 2) the allocation and control of sovereign activities according to competences by the Union, as well as the control of European legal acts by dint of fundamental rights at European level and, hence, by the European Court of Justice as a ultra-constitutional court.

¹² However, Eriksen and Fossum claim to draw clear bounds on integration to secure an equilibrium between economic and social protection (ibid.: 32).

We consider the notion of the 'federal union' as a curtailed federal state to be mistaken. It is questionable not just because of the comparatively low level of democracy and the separation of powers established at European level. In addition, such a concept leads – as both others and we ourselves have argued in detail (Joerges 2005; Rödl forthcoming 2010; Joerges and Rödl 2009a; Scharpf 1999; Höpner and Schäfer 2007) – to a liberalist transformation of Member States' social orders. This is the reason why we confront the notion of a curtailed federal state with the one of a constitution under conflict of laws, while developing a positive conception of a federal union (or RECON Model 3). A constitution under conflict of laws assumes that with the establishment of the Common Market, characterised by the opening of national borders for goods and services, and far-reaching supranational regulation of the resulting crossborder competition, the Union has become the arena for a number of horizontal legal collisions between Member States as well as vertical legal collisions between the Community and Member State level. Instead of lending – quasi-federally – the European level supremacy in this situation, a European federal union and its *Verfassungsverbund*, in as far as it is meant to embody a third option between federal state and confederation, should aim at recognising *all* the legal norms involved in collisions as equal. It should then – as a modern and universal conflict of laws has always demanded in its original area of international private law – try to establish a careful settlement between the competing, substantial legal concerns of the involved politico-democratic units.

The conflict-of-laws approach to the European constellation

We are by no means the only ones to plead for a turn to conflict of laws at all levels of governance. It may, therefore, be useful to start with a note explaining the specifics of our approach by contrasting it with its most prominent neighbour, namely, Gunther Teubner's resort to conflict of laws as a means of operationalising (juridifying) systems theory at all levels of governance,¹³ and the suggestion developed in collaboration with Andreas Fischer-Lescano to reconstruct transnational law as a law of regime collisions (Teubner and Fischer-Lescano 2004).¹⁴

¹³ See, for example, Teubner 2004.

¹⁴ We draw in the following parts on Joerges and Rödl 2009b.

To restate their core argument briefly: the societal division of labour, so fundamental for societal modernity, can no longer be framed by the nation state. Instead, the highly differentiated societal spheres, which are domestically already only reflexively governable, push their respective law beyond the boundaries of the nation state. These processes trigger functional transnational legal regimes – some of public, some of private, some of hybrid character – to emerge, which manifest themselves as autonomous legal constitutions. After the erosion of the state's ability to govern and due to the solipsism of the highly-differentiated sub-systems, courts come into play both as *fora* and actors alike in this situation. They find themselves confronted with the collisions of the laws of these functional regimes, which they take as merely legal conflicts and upon which they decide; however, at the heart of these conflicts lies the collision of the incommensurable rationalities of the differentiated functional sub-systems. The judicial mediation of conflicts – and here their form under the conflict of laws becomes significant – should not give precedence to one societal rationality over the other, in order to reconstitute societal hierarchies; instead, it is important that none of the competing rationalities gains absolute primacy; all rationalities should be given as far-reaching a validity as possible, even in the case of conflict.

Our resort to conflict-of-laws methodologies is equally comprehensive. In our understanding, however, conflict-of-laws is a response to the complexity of conflict constellations in our societies, a response which requires the co-ordination or balancing of conflicting concerns. The 'proceduralisation of the category of law'¹⁵ is the response to this *problématique* within constitutional democracies. This is a notion which we retain in our re-interpretation of European law as a 'new type of conflict of laws'. The challenges of the European constellation are, however, distinct in two ways. As already underlined, we start from a democracy failure of nation states, which European law is to cure.¹⁶ As we framed it back in 1997:

¹⁵ The notion of proceduralisation was developed by Rudolf Wiethölter (1982) in his analysis of the litigation on the constitutionality of Germany's co-determination law; Jürgen Habermas took the notion systematically up in his *Faktizität und Geltung* (Habermas 1992: 516–40, 1998: 427–46). For a more recent account see Lafont 2003.

¹⁶ It is worth noting that Jürgen Habermas (1990: 503) has pointed to the 'ever greater gap between being passively affected and actively participating' already in his very first essay on European integration. The Luhmannian parlance should not distract from Habermas' democratic concerns. They coincide with our argument that the

The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes.

(Joerges and Neyer 1997: 293)

If the legitimacy of supranational institutions can be designed in order to cure these deficiencies – as a correction of 'nation-state failures', as it were – they may then derive their legitimacy from this compensatory function.

The responses that European law can provide are, however, limited. The European Union is not a comprehensive polity; it lacks a *kompetenz-kompetenz* and its legislative activities remain restricted to 'limited fields'. The most important limitation, which has begun to come to the fore quite dramatically in the recent jurisprudence of the ECJ, stems from the 'social deficit' of the integration project. Fritz Scharpf's notion of the 'de-coupling' of the (largely European) economic constitution from the (primarily national) social constitution captures this *problématique* well. What we praise as Europe's chance to cure its democracy deficits turns into a threat here. Europe simply does not have the means to develop an equivalent to the welfare traditions of the democracies of Western Europe. Undoubtedly, a destruction of Europe's '*Sozialstaatlichkeit*' is a democratic problem only if one assumes that democratic governance pre-supposes that the European citizens *should* be in a position to influence the economic and social organisation of their societies.¹⁷

These remarks should suffice as a basis for the following elaboration of our three dimensional conflict-of-laws approach. In each of the three dimensions, we will take up a *problématique* of exemplary

supranational European law of conflicts of law has to counter the democratic deficits of nation states: its inability to include those concerned into national decision-making.

¹⁷ On this premise, see Joerges 2005: 462-64.

importance. We will first comment upon the tensions resulting from the disjuncture of the economic and social spheres, which seemed to be in equilibrium during the 'golden era' of 'embedded liberalism'.¹⁸ We will then illustrate the second dimension of our approach by referring to the European handling of problems of the risk society, herein defending the notions of transnational problem-solving which take law – not exclusively – as a product of judicial legal practice, but provide for the participation of both experts and societal actors, and for procedures which ensure the democratic legitimacy of the outcome that this generates. Our third point concerns the normative relationship between civil and public constitutions. The empirical emergence of para-legal 'civil constitutions' (*Zivilverfassungen*) (Teubner 2004), especially in the transnational context, can hardly be doubted. However, we argue that the coexistence of civil and public constitutions should not be seen as a factual pluralism of autonomous and equivalent codes. At this point, we would, instead, like to introduce an asymmetry, which has to exist in the relationship between civil and public constitutions. This argument is grounded in the fact that every civil constitution and its law are made subject to examination under the public constitution (Möllers 2004). We illustrate this point with the process of European norm-generation.

The first dimension: the recent responses of the ECJ to the social disembedding of the European economy

The recent jurisprudence of the ECJ on the impact of European primary and secondary law on national labour law has attracted unprecedented Europeanwide critical attention. We were among the first to articulate such critique (Joerges and Rödl 2008), which we do not need to reiterate here. Suffice it to underline the conflict-of-laws dimension of the, by now, (in)famous decisions in *Viking*¹⁹ and *Laval*.²⁰ In both cases, the ECJ has attributed an extremely far-reaching and rigid meaning to the supremacy doctrine. European economic liberties were applied to Finnish trade unions in order to restrict their exercising of the right to strike in *Viking*; the Posted Workers

¹⁸ The term has been coined by Ruggie 1982.

¹⁹ Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti, judgment of 11 December 2007.

²⁰ Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet, judgment of 18 December 2007.

Directive was interpreted as a comprehensive regulation which restricted the right to strike as guaranteed under the Swedish constitutional law in *Laval*. As Loïc Azoulay (2008) has pointed out, this jurisprudence represents a move away from the original construction of the common market, from 'partial integration' to a regime of 'total integration' (ibid.: 1346). The revolutionary character of this move becomes apparent in the most basic exercise that students of conflict of laws have to undertake in the search for the applicable law, namely, that of 'characterisation'. Economic liberties and collective labour law are very different species; to assign supremacy to the former is a misconception of this discrepancy. Similarly, a directive with very limited objectives and the unspecified 'social dimension' of the Union cannot trump the labour and social constitution (*Arbeits- and Sozialverfassung*) of a Member State.

Let us briefly restate the institutional background of these objections:²¹ the primarily economic orientation of the integration project and its detachment from statal welfare functions has never been substantially changed. During the formative era of the European Economic Community, this configuration did not cause serious concerns. It seemed safe to assume that both spheres could peacefully coexist: while the Common Market would provide all those involved with increases in prosperity, the Member States would remain responsible for the (re-) distribution of these gains. Implicit to this was the assumption that the freedom of trade and services in the Common Market would not lead to direct Europeanwide wage competition among workers from different Member States; given that the price of human labour, if measured upon the basis of its productivity, was at a comparable level throughout the Community, distortions of this initial equilibrium – this was the third assumption – could be counter-balanced by re-adjustments in the then still flexible exchange rates (Rödl, forthcoming).

These assumptions are of a constitutive importance for the defence of statal welfare functions because all welfare states restrict wage competition among employees through minimum legal working conditions and/or the legal sanctioning of collective bargaining. It is the very objective of labour law to exempt labour, the false commodity, from the regular competitive market mechanisms. To be sure,

²¹ See, more comprehensively, Joerges and Rödl 2005; Rödl, forthcoming.

the opening of national economies for free trade in goods and services threatens these historically grown, but also hard won, limitations. This threat is felt whenever a new state whose limiting mechanisms are less effective or geared towards lower standards becomes a member of the Union. This is why enlargement has caused foreseeable social tensions that could not be sufficiently cushioned by transfer payments (Cf. Ross 2002: 336).

However, the competition in goods exerts pressure on the welfare states of 'old Europe' only indirectly, and is much softer than an imposition of direct wage competition through legal *fiat*, which is precisely what happened in the *Rüffert* case.²² At issue was the compatibility with European law of a so-called '*Tariftreuegesetz*'. This type of legislation is a weak *ersatz* for an industry-wide collectively-binding wage agreement. It has been enacted in a number of *Länder* with social democratic governments, and requires 'loyalty' (*Treue*; compliance) with local collective agreements.²³ Firms which make contracts with a public authority are therefore bound to pay their employees according to the locally relevant wage agreements. By dint of this instrument, which is also correctly termed a 'small extension of a collective agreement', the binding force of industry-wide wage agreements can, at least in the area of public work, be enhanced. This is of particular importance in the construction industry. This legislative technique ('*Tariftreuegesetzgebung*') was contested on legal grounds in Germany, but, in the end, its constitutional validity was clearly confirmed by Germany's constitutional court.²⁴

The ECJ, however, declared Lower Saxony's *Tariftreuegesetze* to be incompatible with the freedom of services as guaranteed by Article 49 TEU and the Posting Workers Directive.²⁵ This directive stipulates that a number of core labour provisions, which are prescribed by law or by a legally-binding collective agreement in the building industry, also apply to employees who are posted into the host state only temporarily. The EJC interpreted this directive in a surprisingly extensive way. The Court declared that any conceivable means other

²² Case C-346/06, *Rüffert v Land Niedersachsen*, Judgment of 3 April 2008.

²³ For an overview, see Schulten and Pawicki 2008.

²⁴ Bundesverfassungsgericht, judgement of 3 November 2006 Available at: http://www.bundesverfassungsgericht.de/entscheidungen/ls20060711_1bvl000400.html.

²⁵ Directive 96/71/EC, OJ L 18/1996, 1.

than those explicitly named in the directive for extending domestic working conditions to posted workers, to be prohibited by the directive.²⁶ The German mode of extending collective agreements limited to the public sector seemed so implausible to the ECJ that it did not pass the first step of the justification test for the limitations of fundamental freedoms: it seemed incomprehensible that the law was indeed meant to protect employees.²⁷

Once again, the ECJ assigned supremacy to the economic 'laws' of the European market over the social objectives of national legislation. It thereby touched upon a condition which is of central symbolic and practical importance for the survival of the modern welfare state under conditions of open borders and transnational markets. To be sure, legislation such as that at issue in *Rüffert*, has always been, and is bound to remain, politically contested.²⁸ However, it is for precisely this reason that the legitimacy of European intervention into such a contested field is extremely problematical. The ECJ has taken a clear position against a classical concern of the labour law of all West European democracies.

The *Rüffert* ruling illustrates rather graphically that societal conflicts can underlie collisions of different – in this case economic and social – 'rationalities', which nation states had managed to pacify by the recognition of both the 'laws' of the market *and* the exemption of labour relations from ordinary market governance. The seemingly neutral appeal to a legal rule, which subjects these orders to the general discipline of a federal order or to the European principle of primacy, seems simply misplaced. Similar reasons militate against a general precept of proportionality or mutual considerateness. In constellations such as that of the *Rüffert* case, an application of such principles would foster the 'invasion of the market' into spheres which have been exempted from its rules after decades of social and constitutional contestation. European law and its institutional actors should understand and respect the societal backdrop of the shape of Union competencies, according to which the articulation of social rights largely remains with the Member States.

²⁶ The ECJ did again not mention, let alone discuss, the opinion of his Advocate General (AG Bot in *Rüffert*; AGs Mengozzi and Poiares Maduro were treated likewise in the *Laval* and *Viking* judgments, notes 20 and 21 *supra*).

²⁷ Case C-346/06 (note 23), par. 40.

²⁸ See, with many references, Kittner 2005.

The second dimension

Substantive conflict-of-laws against technocratic rule

While Europe has failed to develop transnational labour and social constitutions, Europeanisation exerted remarkably progressive and modernising effects in the field of so-called social regulation, in particular, the regulation of health and safety at work, and environmental and consumer protection. As, in the 1980s, all institutional actors agreed that integration should be pushed ahead by the 'completion' of the internal market, it became quickly apparent that this project required extensive regulatory and institutional reforms. Advocates of a neo-liberal market-Europe, found this irritating, but the development did not really come as a surprise as Europe's strive for market building encountered a number of nationally-established regulative practices, which it could not easily abolish: thus, extensive regulatory reforms seemed to be a more attractive alternative.

In view of its problem-solving ambition, modern regulatory politics requires that expertise be taken into account, for example, when it deals with the uncertainties of the risk *problématique*, complex economic issues, or the social implication of a particular policy choice. Furthermore, it/this seems often well advised in order to ensure the co-operation of societal actors. With regard to all these aspects, the European level of governance was badly equipped for the tasks that its project required. This weakness translated into innovative constraints, opportunities and risks. For the architects of the Internal Market, it was not really an option to establish a hierarchically-structured bureaucracy or European agencies modelled on American patterns. Instead, it seemed obvious to return to those practices with which Europe had already established a level-transcending, continuously active, 'political administration', *i.e.*, the committee system as first developed in agricultural policy.

In official parlance, this institutional arrangement is termed 'comitology'.²⁹ Its obscure sound equals the complexity of its task to reduce the functional and structural tension of the Internal Market project. Often enough, the implementation of pertinent regulatory policies touches upon politically-sensitive topics. The comitology system has

²⁹ For details, see Falke 2000 and Vos 1999, 2009.

then to mediate between functional requirements and normative concerns. The composition of committees will therefore mirror the task of taking different strands of expertise into account before coming to a practical synthesis. Thus, comitology more or less succeeds in adequately mirroring the given plurality of interests and political diversity which have to be balanced in the implementation process.

In our introductory remarks, we introduced comitology as a mode of conflict mediation that cannot be understood as merely an 'application' of law to the problem at hand. The irrefutable need to include scientific and practical expertise in the search for the proper regulatory measure also affects its transnational operation. An exclusively judicial treatment of these collisions would be confronted with an irresolvable dilemma, as only two equally inadequate possibilities would be available: Courts could either stress the territorial scope of a Member State regulation, according to the tradition of public conflict of laws,³⁰ and would thereby fail to build up the Internal Market; or they could, instead, establish a pure country of origin principle, which would realise a liberalist conception of conflict of laws (Grundmann 2003) – and would thus risk the discontent of the citizens of the Union with such de-regulatory perspectives. The 'third way' we are advocating are transnational substantive provisions which are neither identical with the provisions of one of the concerned jurisdictions nor represent prerogatives a super-ordinate federal legal level and retain hence the function of collision norms as 'material norms in the conflict of laws' (*kollisionsrechtliche Sachnormen*).³¹ In contrast to the norms of public and liberalistic conflict of laws, such substantive solutions cannot emerge in strictly and exclusively legal operations. Instead, these substantive responses have to be generated in procedures which mirror their political implications and mediating functions. It is precisely for this reason that comitology is an appealing institution. Its 'regulatory committees' resemble 'mini-councils', whose legitimation is derived from the delegation by democratically-legitimated Member State governments. With the inclusion of competing concerns and the introduction of scientific and practical

³⁰ See, for this tradition, for example, Kegel and Seidl-Hohenveldern 1978.

³¹ See, earlier, Steindorff 1958.

expertise, a 'discovering procedure of the praxis'³² has been established, which is based upon the productivity of the co-operative handling of complex conflict situations; some significant pieces of evidence indicate that the considerations of problems are usually conducted in an objective-deliberative manner, which is, unfortunately until today overly, insulated from the broader public.

These failures are by no means a particularity of the European constellation. At all levels of governance, the edge of bureaucracy with regard to knowledge and power threatens to undermine the constitutionally-foreseen relationship of legislation, government and bureaucracy.³³ Everywhere, and hence also in supranational contexts, it is important to prepare for the risks posed by increasingly detached European and international functional bureaucracies and expert circles.³⁴ Some appropriate safeguards can be discerned in the comitology system, for example, the transparency of the comitology towards the European Parliament and the recognition of the rights of the individual citizen to information,³⁵ as well as the safeguard clauses in all pertinent secondary legislation, which does not allow permanent opt-outs, but ensures political rights to renewed consultation and decision-making.³⁶ However, more advanced proposals regarding a deeper and primarily procedural constitutionalisation of the comitology system have to consider two difficulties. The first one concerns the barriers of comprehension between experts and the general public. The second one results from the socio-economic and cultural dependencies of risk politics. Constitutionalisation has to take into account the fact that a plurality of expertise in the decision-making process has to be guaranteed, and that the social and political plurality of Europe is respected in order to allow

³² For the term itself, Joerges 1981, 1985, 1986.

³³ See the seminal study of Schluchter 1985.

³⁴ We are in agreement with Schmalz-Bruns' apposite phrase that this is the 'normative point of constitutionalisation of supranational-administrative legalisation', thus his 'An den Grenzen der Entstaatlichung' (Schmalz-Bruns 2007: 290).

³⁵ Article 5 par. 5, sec 7, 3 of the Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, 28 June 1999, Q OJ L 184/23, on the one hand, and CFI, Case T-188/97, *Rothmans International v Commission*, Slg. 1999 II-2463, on the other hand.

³⁶ See Article 95 pars 4-8 and par. 10 TEU and as a recent quite spectacular example the Decision of the European Council of 2 March 2009 upholding Austria's import prohibition against genetically modified maize; see GMO Compass (2009) and the analysis of De Matta (forthcoming).

European publics to observe each other mutually and to raise the awareness for the concerns of others.³⁷ If all these considerations complicate unitary decisions, then this is, at least normatively, no disadvantage; on the contrary, it corresponds to the plurality of the EU. The practical prospects for these suggestions to be implemented are, however, slim. Regulative politics reacts in its dominant strands with a centralising 'scientification' of the increase of regulative tasks and the growth of socio-economic diversity, the latter being mainly a result of the Eastern enlargement; this strategy only accepts the objections to environmental and health risks, which can be backed by scientific proof, as relevant. In this way, the normative potential of comitology is eroding.³⁸ It is increasingly replaced by European agencies, which work on cognitively understood risk analyses, while the risk management itself remains with the politically responsible actors – as if the cognitive-scientific and practical-political dimensions of risk regulation could be clearly kept apart. The factual strengthening of scientific consultation in European risk politics accommodates the interest into common European and unitary decisions, and facilitates the integration of European policy into global efforts; in the end, this fact also tends to accommodate the marketing strategies of global corporations, which do not want to be concerned with the impact of legal regulations on the well-being of domestic pigs or on innovation in genetic engineering for Polish agriculture. It is in this tendency to detach European regulative policies from their distributive implications that the disjunction of market integration and social integration is reproduced.

The third dimension: Conflicts of public constitutionalism and private transnationalism

Even if these governance arrangements with which Europe organises the economic and social regulation of the Internal Market often include non-governmental actors, in the above-outlined 'old' comitology an administrative component still dominates. For the practically enormously influential area of standardisation, which affects all aspects of production and consumption, the opposite relationship exists. Here, state, bureaucracy and European

³⁷ For the concept of a European public, we refer to the work of Klaus Eder, in particular, his 'Zur Transformation nationalstaatlicher Öffentlichkeit in Europa' (Eder 2000).

³⁸ But see for a more positive account Vos 2009: 49ff.

Commission are in no way absent, but they have taken a role on the sidelines – as observers and facilitators.

In Europe, this change in position took place in 1985 by dint of the 'new approach to technical harmonisation and standards'. Its (success) story is fantastic:³⁹ after the cumbersome efforts, which had occupied the EEC from 1969, to eliminate the so-called non-tariff trade barriers had turned out to be in vain, Lord Cockfield designed a bundle of shrewdly tuned measures on behalf of the European Commission. By these means, European legislation disburdened itself significantly by focussing on essential safety requirements. The concretisation of the latter was delegated to the European standardisation organisations CEN, CENELEC and ETSI. The inclusion of non-state actors signified *de facto* a delegation of legislative competencies. At a first glance, this might seem downright paradoxical: the regulation of this 'private transnationalism' (Schepel 2005) has turned out to be far more intense than in previously public policy fields, which are now covered by new governance arrangements. Widely accepted and stable procedures have emerged, which synthesise legal principles, professional standards and participation opportunities, and lead repeatedly to consensual problem-solving.

Significantly, European standardisation shares many characteristics with comitology. In particular, it has refrained from centralisation, and, with its non-unitary network structure, guarantees that national delegations can make their perspectives/viewpoints be heard. Not only the bureaucracies, but also courts are always latently and, at times, actually present. Standardisation happens in their shadow. It has detached itself from state law, but remains transparent and in contact with governmental actors. For Schepel, the recipe for successful standardisation is that its procedures follow political, and not economic or scientific, standards: fair procedures, transparency, openness and balanced interest representation are the yardsticks according to which consultations within the respective institutions are geared. They neither foster scientific knowledge nor economic efficiency, but aim at the recognition of their results by state law (Schepel 2005: 223).

³⁹ See the reconstruction by Schepel 2005, esp. p. 35ff.

Thus, we are confronted with a constellation in which coercive state law and the norm-generation of non-state actors complement each other productively. The assertion that the process of standardisation develops and maintains such sensitivity at all levels of governance seems, at least, plausible to us, as Schepel's observations coincide with historical studies reconstructing the transformation of the one-dimensionally construed consumer into a politically-active market citizen (Soper and Trentmann 2007), with sociological analyses diagnosing the moralisation of markets (Stehr 2007) and a plethora of economic sociological studies conceptualising markets as social institutions (Beckert 2002). To generalise this point, law can, and should, be based upon the fact that the modern economy and its markets do not function like automatons following the money-mediated steering mode of supply and demand. Instead, they have to determine politically important regulations. Law can assume that the producers of these norms are, in principle, interested in their recognition, especially by constitutional law. Therefore, law can, and should, influence the very generation of these regulations.

As in the case of comitology, we have to ask ourselves to what extent such interactions can be understood under the conflict-of-laws approach. In contrast to questions of recognition, with which the conventional law of conflicts is confronted with in relation to foreign law and foreign judgements, here, we are faced with para-legal alternatives to state law. However, at the same time, regulatory issues are concerned, as in comparable national constellations, with the solution for which the state law lacks resources and expertise (Schanze 2005: 90-91; Schepel 2006). The transition to procedural forms of regulation in national law correlates with the willingness to recognise the results of societal norm-generation, which, first, is bound to substantial preconditions, second, follows some procedural demands or at least corresponds to recognised practices, and third, whose results do not have to be accepted by state legal systems, with whose *ordre public* they are not compatible.

The notion of the recognition of non-state law in the conflict of laws under pre-conditions does not represent a radically new turn in thinking about the conflict of laws. Instead, an approach is adopted and generalised which is since long accepted and practiced in private international law namely, the recognition of the rulings of private courts of arbitration by state law (pars 1059ff German Code of Civil

Procedure);⁴⁰ they are also subject to objective pre-conditions as well as procedural and material requirements, which are more substantial than the recognition of foreign law (Article 6 EGBGB) or the recognition of foreign judicial decisions (Article 328 German Code of Civil Procedure). This analogy also stresses the asymmetry of what has already been outlined: private standardisation seeks the recognition of state or European law; the former depends upon the latter and therefore operates in its shadow.⁴¹ This enables us, in 'old European' terms, to stick to the notion that law can only claim validity if those legally or factually subject to it can see themselves as its equivalent authors - this seems only conceivable in procedures that come under public constitution.

'Beschluss'

Let us resume the strand from the introduction on the legal-constitutional complementarities with the RECON models: we understand our conceptual project as an elaboration of Model 3, the regional European democracy with cosmopolitan imprint, as an intermediate between Model 1 ('audit democracy') and Model 2 ('federal state'). Our main concern is to conceptualise this model not in terms of a curtailed federal state - which is the legal-constitutional version of Model 3 prevailing in European constitutionalism - but in terms of conflict of laws. To be sure, we have to elaborate further and concretise our approach in all of its three dimensions; we have to be more precise in outlining links with legal theory, integration theory, and theories of International Relations. However, it should, nevertheless, have become clear what our reference points are, and where we would like to go.

Most important for us are the challenges to law posed by the post-national constellation. We are concerned with advancing law's twofold task: to grant and safeguard individual *and* social freedom. This requires the forms of individual freedom to find articulation in public-democratic procedures. The post-national constellation leads, on the one hand, to ('vertical') collisions of societally-generated norms with publicly-constitutionalised law, and to ('horizontal')

⁴⁰ See, in the context of the debate about a 'private law beyond the state', Rödl 2008: 764ff.

⁴¹ This aspect seems also to be central in Herberg 2007. According to our understanding, Günther 2003: 305ff. and Möllers 2004.

collisions among these norms, on the other hand. In such a pluralist context, law can only remain democratically legitimate if societal norm-generation becomes publicly appropriated as granted autonomy. Moreover, there are also conflicts of publicly-constituted legal orders in the fragmented global multi-level system. Here, law can only preserve its democratic legitimacy only if it protects democratic autonomy and compensates for the democratic deficits of political fragmentation (Bast 2009; Möllers 2005: 223; Beckert 2002).

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Chapter 9b

Cosmopolitanisation in the EU and Canada

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Introduction

There is a widely held sense today that states have become far more closely linked together than before. What is also notable is that this covers a broad range of domains: political, social, cultural, economic, and legal. Tight links are amplified by the revolution in microelectronics, in information technology, and in computers. New international and transnational actors have emerged. States are faced with a whole range of boundary-spanning problems pertaining to environmental degradation, international crime, terrorism, tax evasion, and so forth. In response to the recent financial crisis and the ensuing economic downturn, states all around the globe have been compelled to take drastic measures to face a crisis that is clearly global in character and whose global character has exacerbated its severity and effects.

Many analysts conclude on the basis of the developments spelled out above that today's process is *unprecedented* in both spatio-temporal and organisational terms. The argument is that global flows are far more extensive, intensive, and have a far higher velocity and impact than was the case in earlier processes of globalisation. Contemporary globalisation is also more strongly institutionalised than before,

through international organisations, treaties, regimes and conventions, and networks and patterns of interaction and contact. The upshot is that the present situation is unique, notably in its *confluence* of factors and processes (Held et al. 2000).

These processes have helped to re-ignite scholarly and political interest in that age-old doctrine of *cosmopolitanism*, a doctrine with roots as far back as the ancient Greeks and the Roman Stoics (Seneca, Marcus Aurelius and Cicero). The contemporary process of globalisation is not only broad and encompassing; the focus on universal human rights makes it quite natural to consider this process in a cosmopolitan light. Further, because many of the states that are becoming globalised are democracies, today's discussion has taken on a distinctly modern tenor in that cosmopolitanism is generally considered in relation to and with direct reference to *democracy* (Archibugi et al. 1998; Beck 2006; Beck and Grande 2007; Held 1993, 1995; Held et al. 2000).

The contemporary debate on cosmopolitanism was initially dominated by political theorists, but in recent years a broad range of academic disciplines have become engaged (Holton 2009). This has extended the focus of debate from cosmopolitan principles and their normative merits to the type of practical arrangements that might sit with cosmopolitan principles, and this again has become coupled with a focus on the extent to which practical arrangements *actually* work according to cosmopolitan principles. Nevertheless, as Holton (2009) concludes, based on his comprehensive multi-disciplinary survey of the many different strands of cosmopolitanism, precisely where we stand today in relation to a cosmopolitan world requires far more systematic attention. The research on the *cosmopolitan imprint* on actual practice is still in its infancy. One problem is that the increased interest in cosmopolitanism has not taken people closer to an agreement on what cosmopolitanism is; rather

[P]aradoxically, the idea of cosmopolitanism has now expanded in so many different ways that it cannot be easily identified with an explicit philosophical outlook or political theory enshrined in a set of formal principles to which adherents must sign up or commit.

(Holton 2009: 5)

The other problem which is hardly rendered more manageable by the proliferation of approaches is that much of what is going on and might be understood as cosmopolitan has not been couched in or justified as cosmopolitan, whether by decision-makers or by analysts. This also applies to the European Union where most EU integration scholars have paid scant, if any, attention to cosmopolitanism. There are some exceptions (Beck and Grande 2007; Delanty and Rumford 2005; Eriksen 2006). Beck (2006: 114) sees the EU as a case of 'institutionalised cosmopolitanism'. As such, it is a central ingredient in the emergence of second – cosmopolitan – modernity (Beck 2006). Cosmopolitanism, to Beck, is thus both a recent phenomenon and a defining feature of (second) modernity. From this we could say that one response to the lack of explicit cosmopolitan articulation referred to above is instead to claim that cosmopolitanism is effectively everywhere.

RECON is well set up to explore the actual salience of the cosmopolitan dimension. It operates with several model configurations of the EU and the broader global context in which the EU exists. RECON's two first models enable us to consider in a systematic manner how resilient the vestiges of the state-based (Westphalian) system are, and through comparison with the third regional-cosmopolitan model we get a better sense of the overall cosmopolitan thrust.

RECON WP 9 on global transnationalisation and comparison of EU democratisation with other relevant entities contains two-subprojects that deal with these two themes, respectively. This chapter falls under the heading of subproject two which looks at post-national convergence through examining the prospects for convergence between the EU and states along cosmopolitan (Model III) lines. This raises the question of how to compare the EU with the states that are most prone to cosmopolitanism. The EU is a supranational organisation that not only sits on top of a collection of states but also transforms these. The EU is a multinational and poly-ethnic entity and is uniquely complex in both institutional and cultural terms. These features suggest that the EU's cosmopolitanism and its cosmopolitan thrust will reflect its distinct features and may not resemble the processes whereby individual non-EU states become cosmopolitan.

Any effort to compare the EU with non-EU states must therefore take proper heed of the differences between these types of entities.

This chapter devises an analytical-comparative framework to study the cosmopolitanisation of different political entities. It starts by defining what is meant by cosmopolitanism and outlines the core components that we need to look for in any process of cosmopolitanisation. But the differences between the EU and non-EU states suggest that cosmopolitanisation can proceed along several distinct paths, and through different conveyors. The main categories we find in the literature are global, regional, state-based and societal. That there are different paths also suggests that the indicators to measure cosmopolitanisation will vary depending on which path is considered. We therefore need to (a) identify the main paths and spell out the relevant criteria for cosmopolitanisation; (b) test these out on the most relevant states and the EU; and (c) look for patterns of post-national cosmopolitan convergence across paths.

This chapter outlines three main cosmopolitan 'paths'. There is as noted above a growing academic interest in the EU as a cosmopolitan entity but thus far little systematic effort has been undertaken to compare and contrast the EU with cosmopolitanising states. RECON model III (see notably Chapter One above) represents an effort to spell out what a regional-cosmopolitan EU might look like. This chapter complements that work through outlining a (alternative or complementary) state-based cosmopolitanising path, which will help us establish how flexible and malleable the state-centred model is in terms of post-national democratic inclusion/'cosmopolitanisation'. In this chapter the focus is on one state, Canada, which as we shall see is an interesting state to compare the EU with in terms of cosmopolitanisation. There are important parallels between the EU and Canada that add to the relevance of such a comparison, namely that both are fundamentally contested entities; both are multinational and poly-ethnic in character; and both have been involved in long and protracted processes of constitution making.

What is cosmopolitanism?

Cosmopolitanism's structuring normative intuition is moral universalism (Habermas 1997: 135; 2006). The modern version of cosmopolitanism is generally associated with Immanuel Kant, notably his *Zum Ewigen Frieden* which was first published in 1795.

Kant's vision is that of the emergence of a global legal order, which unites all peoples and abolishes war. Jürgen Habermas, in his reformulation of the Kantian cosmopolitan ideal, aimed as it is at rendering cosmopolitanism relevant to the contemporary world, underlines how cosmopolitan restructuring pertains to: (a) the external sovereignty of states; (b) states' internal sovereignty; and (c) the very meaning of peace. On the first point, each world citizen has rights which have to be such institutionalised as to be able to bind individual governments. The overarching community thus needs sanctioning powers. Within such a construction:

The external relationship of contractually regulated international relations among states, where each forms the environment for the others, then becomes the internally structured relationship among the members of a common organisation based on a charter or a constitution.

(Habermas 1997: 127)

The second point, that of internal sovereignty, pertains to a world community that is made up of citizens rather than a world made up of sovereign states:

The point of cosmopolitan law is [...] that it goes over the heads of the collective subjects of international law to give legal status to the individual subjects and justifies their unmediated membership in the association of free and equal world citizens

(ibid.: 128)

The third and final requirement speaks to the reciprocal democratisation of individual states and the community of states. The ensuing conception of war and peace then also changes: the cosmopolitan notion does not simply refer to crimes committed *during* war; war itself becomes a crime: the crime *of* war can be prosecuted.

We see from this that cosmopolitanism presupposes a major process of transformation wherein all states succumb to a global order, either by ceasing to be states or by transforming so much as to cohere with the core tenets of cosmopolitanism. This takes us to the notion of cosmopolitanisation, which is best understood as a process of

entrenching cosmopolitanism. It is obvious that such a process must focus on moral universalism. Core elements of moral universalism notably pertaining to human rights must be legally entrenched in positive – cosmopolitan – law. Moral universalism is not necessarily footloose; all cosmopolitan arrangements are steeped in distinct institutional-cultural contexts. The cosmopolitan thrust then hinges on compliance with the requirements of basic human rights, inclusion (or openness), and reflexivity. With inclusion I refer both to the physical inclusion of others (non-nationals, members of other cultures etc.), as well as to the taking into account of the interests and concerns of non-nationals. Further, the institutional and cultural setting must leave space for or be compatible with reflexivity, which as Habermas underlines is closely connected with moral universalism.

Reflexivity here refers to the extent to which the polity is open to challenge, reinterpretation and amendment. It entails a process that is open to deliberative challenge, a process of critical self-examination on who we are, who we should be, and who we are thought to be. Rights that ensure individual autonomy – private and public – are critical institutional preconditions for reflexivity.

Precisely how a process of cosmopolitanisation can take place – along which possible paths or routes it can unfold – requires closer scrutiny.

Cosmopolitanisation: different paths

Some scholars distinguish between a top-down and a bottom-up approach to cosmopolitanisation (Holton 2009). The former is then understood as a process of forging cosmopolitanism through entrenching norms and institutions in a formal and hierarchical manner; the latter refers to how societal factors and actors foster cosmopolitanism through lived practice, as a way of life. If we disaggregate these notions we find that the top-down approach can have carriers or paths at different levels of governance: the global, the regional, and the state level, whereas the latter mainly has a societal (global and transnational) path. All depend on certain basic legal preconditions best associated with cosmopolitan law but the paths differ in how they stand in relation to this law. Most states, albeit hierarchical and able to impose their will in a top-down manner will nevertheless also be norm-takers (bottom-up relation) in a global system of law. This suggests that the top-down/bottom-up distinction is less useful to discern similarities and differences between cosmopolitanisation

paths. A more apt distinction is the one between three different paths: global, regional and state-based.

Note that states will figure in all of these three paths, but their 'stateness' and roles will likely vary considerably. The paths are analytical constructs; what is important to establish is the salience of each and whether they are distinct or complementary – in a mutually reinforcing manner. How they relate to each other matters a lot to the overall cosmopolitan thrust.

Cosmopolitanisation through the 'global route'

The most obvious global route would be to establish a global polity, which of course transcends the Westphalian state-based order. This first path can thus be conceptualised through the manner in which a global structure is erected. This could manifest itself in the emergence of cosmopolitan law and the cosmopolitanisation of the UN system. It would then also entail provisions for uplink to this norm-set in the constitutional arrangements of states (some states such as Germany already contain such provisions).

This process presupposes a transformation of the *system of states*, where states renege on their sovereignty and submit to a set of global cosmopolitan norms, rules, and institutional arrangements. The global arrangement is thus the main carrier of cosmopolitan norms, although the norms permeate the entire structure, which is thus transformed so as to help sustain this global arrangement. David Held and associates have in numerous writings provided a clearly elaborated cosmopolitan model (Held 1993, 1995; Archibugi et al 1998; Held et al. 2000).

A (institutionally weak) global route might be Kant's conception of a *federation of nations*. This notion envisages cosmopolitanism through the emergence of cosmopolitan law and a world made up of constitutional states which together sustain the arrangement through voluntary yet 'permanent' compliance (Habermas 1997: 117). Kant's weak notion of federalism was intended to protect against the oppressive potential built into the strong concentration of power within such a global system.

Another (also likely institutionally weak) possible route to cosmopolitanism with a more recent vintage goes through the emergence of a global public sphere and civil society (cf. Bohman 1999; 2007; Dryzek 1999). This does not need to be made up solely of civil society but can also include governmental bodies. In that sense it can be a necessary supplement to the global-institutional route.

A number of global-cosmopolitan visions (differently institutionally entrenched) are available. How far has the world moved in this direction? A very brief sketch would include the UN system and developments in international and cosmopolitan law. Of particular importance to the role of states is that state sovereignty is challenged by major transformations in the realm of international law. The first is the recognition of individuals and groups as legal subjects of international law. Second, the realm of international law is shifting from primarily being focused on political and geopolitical matters to an increased focus on regulation of economic, social, communication and environmental matters. Third, is the change in the sources of international law – which far more than before include international treaties or conventions, international custom and practice, and ‘the underlying principles of law recognised by “civilised nations”’ (Held et al. 2000: 63). This has also led to an increased focus on the relation between the individual and her own government.

International law recognises powers and constraints, and rights and duties, which have qualified the principle of state sovereignty in a number of important respects; sovereignty *per se* is no longer a straightforward guarantee of international legitimacy. Entrenched in certain legal instruments is the view that a legitimate state must be a democratic state that upholds certain common values.

(ibid.: 65)

These legal developments are not uniform across the globe and have been carried further in Europe than anywhere else.

One obvious problem with this global strategy is that of fashioning a global structure without it becoming oppressive. The main problem here is of course the lack of democracy but many also hold up the problem of scale: even when a global system of government is entrenched in democratically accountable institutions, this might

produce a pattern of centralisation that is insensitive to difference and diversity.

The fear of oppression has made many analysts, including Habermas and even Held to argue that cosmopolitanism does not entail abolishing states but rather to reconfigure state sovereignty to suit a system based on cosmopolitan law. The legal developments that have already taken place lend some credence to such approaches. But there are also clear limits to the effective reach of these legal provisions because they all depend on states for their proper effectuation.

Another problem stems from the requirement that the global process must be universal in the sense of being applicable to all states at the same time and at the same magnitude. The pattern of globalisation that drives much of this process is highly asymmetric (Bohman 2007: 13); hence it offers limited assurance of sustaining a *global* or universal pattern of transformation.

The problems that beset global solutions have prompted many analysts to cast their glance below the global level and focus on those parts of the world that hold the greatest potential to cosmopolitise. This takes us to what I would label as the second, the regional-cosmopolitan path. The focus here is on the EU exclusively; it is the only trans/supranational regional entity with explicit cosmopolitan traits.

Regional cosmopolitanisation

Cosmopolitanism 'is not part of the self-identity of the EU [...]' (Rumford 2005: 5); many scholars nevertheless recognise the EU as a part of, and as a vanguard for, an emerging democratic – cosmopolitan – world order.¹

A number of analysts argue that it is possible to make the EU into a regional-cosmopolitan entity. This is normally seen to occur through states entering into binding co-operation which in turn transforms this system of states into a regional-cosmopolitan entity. This presupposes (a) a set of states that are willing to embrace

¹ Habermas 2001, 2006, see also some of the constitutional proposals submitted to the Convention.

cosmopolitanism and by implication rescind state sovereignty; (b) the development of a set of regional institutions with an explicit cosmopolitan vocation, and powers to hold the states to the cosmopolitan creed; (c) a pattern of transformation of the states into subunits of the regional-cosmopolitan entity; and (d) a commitment and active measures on the part of the regional entity to foster cosmopolitanism across the globe.

Ulrich Beck and Edgar Grande provide the most elaborate position here. But Beck also goes further. To him, Europe forms a central ingredient in his attempt to forge a cosmopolitan sociology wherein methodological cosmopolitanism replaces methodological nationalism. Beck also devises an analytical framework with a set of criteria for discerning how cosmopolitanised a given society is. The distinction between normative cosmopolitanism and concrete patterns of cosmopolitanisation is devised so as to permit normative evaluation of the cosmopolitan practices that are uncovered, although it should be added that the normative position is greatly underspecified (Smith 2008). Beck and Grande understand the EU as a case of institutionalised cosmopolitanism, and the most promising case of cosmopolitanism around, albeit one that is also deformed by technocracy, inadequate democracy; stubborn national self-assertiveness and other deficiencies.

Beck and Grande see this process of cosmopolitanisation as largely compatible with states; at stake is whether states are inclusive and tolerant or accepting of difference/diversity. To Ian Manners, however, the EU's normative potential stems from its having transcended the state. 'Normative power Europe' depicts the EU as distinctly different from the nation-state. The term helps to highlight the normative – cosmopolitan – merits associated with this. He argues that 'the central component of normative power Europe is that it exists as being different to pre-existing political forms, and that this particular difference predisposes it to act in a normative way' (Manners 2002: 242).² The EU's normative propensity, Manners argues, stems from (a) the particular historical context within which it was forged, which highlighted the need to entrench *peace* and move beyond aggressive nationalism; (b) the EU's hybrid and less bounded and more permeable post-Westphalian form; and (c) its legal

² For a thorough criticism of this notion see Sjursen 2006.

constitution, which highlights human rights. Understood from this perspective, the EU forms a fledgling regional-cosmopolitan entity. The idea here is that (a) there is a system of global-cosmopolitan norms; and (b) these are supplemented and reinforced by regional entities such as the EU. The advantage of this conception is that cosmopolitanisation need not be a globally-uniform process; it can be driven by regional-cosmopolitan vanguards.

One of the central issues thus refers to how distinct from a state-type entity a cosmopolitan EU will be. Many analysts understand the EU as the most explicit case of transnational governance (Bohman 2007 and Cohen and Sabel 1997, 2003). This position highlights how states are transformed and tightly interlinked in various networks and modes of interaction. This suggests that the cosmopolitan drivers are found not in state-based hierarchical structures but in modes of interaction that tie states in with transnational society within the ambit of an emerging global public sphere.

Another position on EU cosmopolitanisation goes through the supranational government – or deliberative democratic supranationalism model (associated with Eriksen and Fossum 2004, 2007) – propounded as RECON Model III. It also understands the EU as a vanguard and forerunner for a more comprehensive global transformation, which reconfigures sovereignty in a procedural-democratic and less territorially exclusivist manner, but at the same time also emphasises the cosmopolitan potential embedded in some of the state-based organisational and institutional features (understood under the heading cosmopolitan *government* – not governance).

We have seen that analysts differ in how they understand the state's role to be in a cosmopolitan Europe (and world). An important consideration for the distinctness or the complementarity of the different paths is whether the nation-state is foremost a brake on/barrier to, or conducive to cosmopolitanisation.

Cosmopolitanisation through individual 'vanguard' states

The third path posits that individual states can become cosmopolitanised; they can serve an active *generative* function. This stems from the notion that the transformations we see taking place in today's world are not only driven by centralising processes or supranational/global dynamics, outside of the purview of states; they are also actively propelled by states. The process is uneven because far from all states are 'cosmopolitically disposed', but the idea here is either that there are aspects of the state that lend themselves to cosmopolitanism or that there are certain states that are willing and able to act as *cosmopolitan vanguards*. This path shares with the regional-cosmopolitan one listed above that there might be a significant cosmopolitan thrust 'from below' the global level, but also assumes that such a thrust can emanate from within and be carried forwards by states.

The most obvious such thrust could presumably emanate from *vanguard states*. There are several relevant categories of such vanguards. One is the Dutch notion of *gidsland* which roughly speaking refers to 'guiding nation'. Joris Voorhoeve (1979) links this notion up with what he labels Mundial Policy which is really a global orientation and shares much in common with cosmopolitanism. More specifically, with *gidsland* is meant:

a nation that progressively guides other countries, locked up in pitiful nationalist struggles for power, dominance and religious zeal, to the proper international behaviour that consists of respect for the international legal order, rights of men and free trade as the best way of ensuring prosperity for all. The Netherlands as a *gidsland* saw itself as a role model for other states by teaching them how to behave properly on the international scene, how to become 'good' states.

(Herman 2006: 863)

Other relevant labels are: Canada as a model citizen; the EU as a normative power; and Sweden as a moral superpower. They are all normative in the sense that they speak to certain core principles and standards. One aspect is whether such a state is able to lead by example. Another and closely related is that such a state situates itself within a particular norm-set, which it commits itself to comply with.

How consistent a state is, is relevant in terms of whether it contributes to foster a cosmopolitan world by fully submitting to a system of norms, or whether it is simply a state that sets up standards it uses to moralise over others, but does nothing to comply with itself. In this latter case the resort to normative language may be mere cheap talk or may be a case of normative language being used in a strategic self-serving manner.³

The other proposition here is that we may not need to go beyond the statist framework to look for cosmopolitanism and cosmopolitanisation processes. The state itself may contain traits that are able to sustain a greater-than-anticipated cosmopolitan thrust. Why could that be? First is because the constitutional democratic state is based on a set of principles that can be universalised *both* between different states *and* between different 'polity' levels or sites (in particular, state and supranational sites), such states may converge around a cosmopolitan norm. Second, is that state sovereignty has changed in today's world; thus leaving more space than before for states to tone down their exclusionary attributes, and to rely on more inclusive conceptions of community and (national) identity. Of interest here is also the cosmopolitan status of cases with possibilities for territorial exit through democratic means that Canada has established and the provisions for voluntary withdrawal from the EU (first formalised in the now defunct European Constitutional Treaty and in the yet-to-be-fully-ratified Lisbon Treaty).

Indicators of cosmopolitanisation

This effort to devise and to test out specific indicators of cosmopolitanisation differs from those of for instance Beck (2006) and Holton (2009), because my focus here is more specific, namely state-based cosmopolitanisation. However, the relevant criteria must reflect the presence of the other paths; they must be such designed as to take heed of the fact that in today's world the state's external environment is made up of global institutions which contain elements of cosmopolitan law (Habermas 2006). Further it of course also implies that the study of cosmopolitanisation of states in Europe must

³ All the notions presented here have proven prone to double-talk and hypocrisy (see the contributions by Bosold and von Bredow 2006; Dahl 2006; Thomsen and Hynek 2006 and Fossum 2007).

necessarily take the developments in the EU properly into account. In today's world, then, state-based cosmopolitisation is a matter for states of linking up to and enforcing, a set of global human rights, not inventing such.

What, then, would be the most salient factors to look for? Since my main concern is with the state, the focus is naturally on doctrinal, political and structural factors, not social or societal ones. The latter are of course important but they are at a minimum mediated by – encouraged or stymied by – the dimensions that are focused on here. The three central dimensions that appear particularly relevant are: (a) doctrinal/programmatic cosmopolitan commitments; (b) structural cosmopolitan orientation/propensity; and (c) reflexivity-inducing features. In order to capture the cosmopolitan dimension properly, I use the terms 'outside-in' and 'inside-out'. The first speaks to the degree to which cosmopolitanism is entrenched in global doctrines, universal principles, as well as legal rules and provisions. In a system of states these take on an external character. Their combined strength and effectiveness hinge greatly on the other dimension, that of inside – out, which reminds us that any state orientation will be reflective of the domestic context in which it was forged – of the values, world-views and structured considerations of what is good and valuable, just and fair that are operative in that context. How the inside-out links up with the outside-in is therefore important, as it tells us about the degree of consistency in norm embrace- and enforcement (and alerts us to hypocrisy, cheap talk and double standards).

The first set of factors is the most obvious and refers to the explicit embrace of cosmopolitan norms and principles. This can either occur, through the state developing cosmopolitan doctrines on its own, or it can occur through the state simply downloading and applying a set of cosmopolitan principles from global arrangements. This latter version we may label as 'outside-in', that is, straight adoption of external cosmopolitan norms, rules, and principles.

The second set of factors refers to the structural-institutional entrenching of cosmopolitan principles and arrangements in the basic state setup. Entrenching these and applying them in a consistent manner also outside the state would be a strong case of 'inside-out').

Bills of rights are important here insofar as they contain fundamental (individual) rights that lend themselves to universalisation. The cosmopolitan imprint here would be apparent for instance in the range and character of rights that are offered to non-citizens within the state's territory, as well as such provisions as dual citizenship. Insofar as such a process is the result of copying or diffusion across states or through the embrace of regional (ECHR) or global (UN) cosmopolitan principles, this can also be seen as a case of 'outside-in'. But for it to be cosmopolitan proper, we would also expect the state to propound those very same rights consistently also outside of the state's boundaries. This could then be referred to as a case of 'inside-out', that is, the external projection (of internally embedded) cosmopolitan norms, rules and principles.

The third set of factors starts from the recognition that cosmopolitan democracy is premised on *reflexivity*. With reflexivity, is meant the extent to which the polity is open to challenge, reinterpretation and amendment. As noted above, it pertains to openness to deliberative challenge, critical self-examination on who we are, who we should be, and who we are thought to be. Rights that ensure individual autonomy – private and public – are critical institutional preconditions for reflexivity. An interesting question is to establish what institutional-constitutional conditions best ensure reflexivity. As part of this we should also consider the role of contestation notably constitutional contestation over the polity's basic constitutional make-up and (national) communal character – *provided* the contestation takes place through democratic means, and there is an onus on finding proper justifications. When recourse to violence is somehow ruled out (by common understanding, or sanctions, or both), efforts at handling deep tensions over different conceptions of justice and the good life, will tend towards universal 'global' solutions, which can more easily be embraced by all. This might also be the only way in which to hold such a state together.

The following are a set of provisional criteria for how a state may cosmopolitanise (and encompasses all three dimensions listed above):

- a) *Doctrinal*: the strongest case would be explicit embrace of cosmopolitanism but cosmopolitanisation can also be found in

more inclusive and reflexive doctrines that are set out to replace nationalism and which are meant to apply both internally and in the state's external relations.

This includes a new *terminology of association*: a new semantics that forms an alternative to nationalism and speaks to a more inclusive form of association and mode of community.

- b) *Constitutional-institutional*: the post-national doctrine and the cosmopolitan terminology of association make up constitutional essentials

This includes a set of basic rights that ensure citizens' private and public autonomies. It also includes a *global uplink*: the state willingly submits to supranational or international legal bodies or arrangements founded on basic rights; seeks to harmonise its own provisions with these (outside-in); and actively propounds these in its external relations (inside-out). Consider for instance the German Constitution's articles 23-26 that are effectively cases of 'outside-in', where Germany's legal order is tied in with international law and organisations (UN and EU), in accordance with normative requirements.⁴

It also includes the relevant *legal-institutional* provisions and arrangements so as to entrench the cosmopolitan doctrine in policy programmes and legal-institutional arrangements. This encompasses inclusive provisions for access; low thresholds for acquiring socio-political recognition of outsiders on a par with citizens; provisions for voicing dissent that are available to insiders and outsiders alike; and arrangements for responding to such in a systematic and ongoing manner.

- c) *A different configuration of exit, voice and loyalty*: Relevant provisions are those that induce or compel the state to fixate less on instilling loyalty than would the nation-state; such a state would encourage voice; and be open for different forms of exit.

⁴ The German Constitutional Court in its ruling on the Lisbon Treaty notes that 'The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual commitment *pari passu*, which secures peace and strengthens the possibilities of shaping policy by joint coordinated action' (German Constitutional Court 2009: Section 220).

This list of criteria specifies some of the elements that we may discern from the three dimensions that were singled out above (doctrinal, structural and reflexive). Their relative weight and importance will vary depending on whether the state has an explicit commitment to cosmopolitanism as doctrine, or harbours internal tensions that for their handling require cosmopolitan-type solutions.

In the next section I will develop and apply these criteria to the case of Canada.

Canada – Cosmopolitan vanguard or a case of ‘stumbling into cosmopolitanism’?

Canada has often been presented as a political system with a more collectivist political culture than the more individualist U.S. (Lipset 1990); thus a less likely candidate for cosmopolitanism. From this comparative U.S.-Canada perspective it would appear to be Canada’s handling of difference/diversity and not its stance on moral universalism that would hold out the greatest cosmopolitan promise. But the U.S. melting-pot shaping of community has a clear nation-building objective, which can be turned inward, become introvert and defensive and evade/undermine global norms and obligations (such as what happened notably during George W. Bush’s presidency).

A closer look will also reveal that most of the cosmopolitanisation criteria (a through c) sit well with Canada. Hence, to establish the salience of this statist route we will assess Canada against these criteria, in order to establish how cosmopolitanised Canada has become.

Doctrinal

Canada, noted Stephane Dion, former Minister of Intergovernmental Relations and present leader of the federal Liberal party, a few years ago, is ‘a country that works in practice but not in theory’.⁵ This certainly is the case when considered in relation to nationalism, but not necessarily with regard to cosmopolitanism.

⁵ <<http://counterweights.ca/cms/content/view/215//>>.

Nevertheless, it is probably fair to say that *historically speaking* many of the unique traits of Canada that appear to dispose it in a cosmopolitan direction stem from the country's historical onus on accommodation of difference and diversity (cf. Mendes 2008), rather than from any conscious or programmatic effort to promote cosmopolitanism. To understand its cosmopolitanism, careful excavation of ongoing practice is thus required. But this effort is greatly aided by the many efforts to understand Canada in more principled and theoretical terms. What is also interesting in this connection is that the Canadian experience with accommodating diversity has generated a sense in Canada (however contested this may be) that its uniqueness and its struggles have brought forth something valuable, and this is distinctly different from traditional nationalism: 'The Canadian approach to diversity strengthens Canada's reputation as a just and fair society. Canada is renowned for its rich cultural mosaic and the Canadian model has become an example for the rest of the world.'⁶ The general principles that are used to depict Canada are cultural and linguistic tolerance, inclusive community, federalism, interregional sharing, democracy, rule of law, and equality of opportunity, as well as respect for and accommodation of difference.

Federalism has played a key role in the accommodation of difference, but has been 'stretched' or extended, precisely to accommodate deviations from the nation-state model.⁷ Federalism, as principle and as mode of attachment, is distinct from nation, and a federation need not be a state: 'the federal principle represents an alternative to (and a radical attack upon) the modern idea of sovereignty' (LaSelva 1996: 165). In no other country is this tension more apparent than in today's Canada. Analysts use the term federation and confederation almost interchangeably, with few attempts to differentiate between them. They also supplement the federal component with other terms such as 'multinational federation' (Resnick 1994; Gagnon and Tully 2001), 'asymmetrical federalism' (Webber 1994), and pluralist federalism, executive federalism, and federalism as cultural compact.

⁶ 'Foreword by the Prime Minister', in Department of Canadian Heritage 1999, *10th Annual Report on the Operation of the Canadian Multiculturalism Act*, Ottawa: Minister of Public Works and Government Services Canada. Available at: <<http://dsp-psd.pwgsc.gc.ca/Collection/Ci95-1-1998E.pdf>>.

⁷ Federalism is distinct from nationalism and a federation need not be a state. Daniel Elazar has observed that 'the federal idea and its applications offer a comprehensive alternative to the idea of a reified sovereign state and its applications' (Elazar 1987: 230).

To Sam LaSelva, the Canadian experiment has been that of creating a political nationality through federalism. The existence of a French-Canadian (mainly catholic) and an English-Canadian (majority protestant) community meant that the essential challenge was to create a sense of common allegiance, whilst also respecting the uniqueness of each group. This was a very different challenge from that facing the American founders. 'Canadian nationalism presupposes Canadian federalism, which in turn rests on a complex form of fraternity that can promote a just society characterised by a humanistic liberalism and democratic dialogue' (LaSelva 1996: xiii). To address this, Canada had to develop its own special version of federalism. La Selva attributes this to one of the founders, George-Étienne Cartier, and argues that this notion is based on federalism as a way of life.

For Cartier, the justification of federalism was [...] that it accommodated distinct identities within the political framework of a great nation. The very divisions of federalism, when correctly drawn and coupled with a suitable scheme of minority rights, were for him what sustained the Canadian nation.

(LaSelva 1996: 189)

Such accommodation of difference presupposed tolerance, co-operation, mutual accommodation, and minority justice. The requisite sense of attachment is not nationalism but *fraternity*. Nationalists appeal to the value of fraternity but confine it to one group, or culture or language community, whereas federalists *expand* it: 'the idea of fraternity looks two ways. It looks to those who share a way of life; it also looks to those who have adopted alternative ways of life' (LaSelva 1996: 27). Intrinsic to this idea of fraternity are a reflexivity and other-regard that break down the distinction between us and them intrinsic to nationalism.

The idea of *fraternity* can be seen to have structured inter-cultural relations within Canada. It marks those that seek to hold the country together, as well as those that seek to separate from it. What gives Quebec nationalism its strength, as Charles Taylor (1993) has noted, is *recognition*. The quest for recognition revolves around the need to ensure recognition of the special status of Quebec, as a distinct nation

or society *within Canada*. Even most Quebec sovereignists insist on a formal arrangement with Canada *after* Quebec independence. They have opted for *sovereignty-association*, or some other close relationship with Canada, rather than complete independence. For instance, on June 12, 1995, 5 months before the second Quebec referendum, the key proponents for sovereignty signed an agreement which would commit the Quebec government to propose 'a treaty on a new economic and political Partnership' with Canada after a successful referendum on sovereignty.⁸ A significant aspect of Quebec separatism is the redefinition of the terms of communion rather than outright separation from Canada.

The practice of accommodation of difference has spawned efforts to develop more inclusive doctrines of community than that of nationalism. Canada has officially embraced multiculturalism⁹ and multilingualism; it has developed specific provisions on aboriginal self-government; and it has been committed to a cosmopolitan-oriented notion of human security. These doctrines and policy stances may be seen as efforts to give meaning to and to offer more principled justifications for an ongoing practice, rather than serve as self-standing programmatic doctrines that have by their adoption served to reorient policy or institutional arrangements.

The way these have been adopted, that is, largely from an ongoing practice, does not mean that they are devoid of inspirational content or principled orientations. Consider multiculturalism: understood *as doctrine* it is premised on the notion of integrating immigrants from diverse cultural backgrounds into society - without eliminating their characteristics. Multiculturalism as doctrine is about the just integration of immigrants. It seeks to avoid the twin evils of assimilation and ethnic separation or ghettoisation. It is also an ideology that speaks to interethnic tolerance and the benefits that

⁸ Cited in McRoberts 1997: 225. Lucien Bouchard, leader of the Quebec separatists in the federal parliament proposed that the nature of this partnership could be inspired by the European Community.

⁹ The Canadian multiculturalism policy was introduced in 1971 and in 1988 it became officially enshrined in the Multiculturalism Act. The policy had four objectives: 'to support the cultural development of ethnocultural groups; to help members of ethnocultural groups overcome barriers to full participation in Canadian society; to promote creative encounters and interchange among all ethnocultural groups; and to assist new Canadians in acquiring at least one of Canada's official languages' (Kymlicka 1998: 15).

accrue to society from its diversity (Norman 2001). This doctrine is premised on the notion that integration or incorporation of people from different backgrounds is a two-way process, which places requirements on those that integrate, but also on those who are already there. The essence is to heighten social inclusiveness as well as self-reflection on the part of both the arriving minority(ies) and the receiving majority, to ensure a process of mutual accommodation and change.

The many attempts to grapple with the whole complex of identity politics and the accommodation of multiple forms of difference have led to a whole new vocabulary to properly depict the types and forms of difference that make up Canada. In addition to the ones mentioned above, we might add the effort to depict the entity through the notion of *cultural mosaic* (as opposed to the American notion of melting-pot), *pluralistic civilisation* (LaSelva 1996: 165), and *poly-ethnic society*. Charles Taylor has argued that Canada is marked by 'deep diversity' and James Tully has talked of the need for 'diversity awareness'.

In other words, we see that the practice of accommodation in Canada has spawned efforts at establishing alternative, more inclusive doctrines than nationalism as well as a whole range of concepts to depict the more complex conceptions of community and composite ways of living together that mark Canada.

Constitutional-institutional

Canada's original constitution, much of which is still retained today, was the British North America Act, 1867. It was a British statute that was formally amended by the UK Parliament until the patriation in 1982. A central theme in Canada's constitutional history is the gradual transition from colony to nation, a process that was greatly complicated by the fact that Canada was the offspring of *two* colonial settlers in North America, Britain and France. This produced two important historical traits with significant long-term effects on Canada's cosmopolitan vocation. As part of a cosmopolitan British Empire many British-Canadians felt a strong tension between imperial and national belonging, which heightened the sense of communal ambiguity: 'The unending debate over the appropriateness of any particular boundary between imperial and domestic

always had one set of protagonists arguing, in effect, for a transnational definition of community that encompassed United Kingdom kin' (Cairns 1995: 104). Further, Quebec's insistence on distinct community status effectively thwarted any effort to establish a Canadian nation based on an ethnic homogeneity.

Canadians could not reach agreement on the mode of community and instead sought to handle the tensions that the competing visions brought. The main effort to break the deadlock was the patriation of the Constitution in 1982. The foremost element here is the Charter of Rights and Freedoms (1982). The Charter spoke to every citizen as a rights holder and a stake-holder in the constitution and the process of constitutional change. The Charter institutionalised and constitutionalised reflexivity through rights. There was also a clear political purpose associated with introducing the Charter, namely to deflect political attention away from Quebec nationalism and federal-provincial concerns. To this end the Charter included provisions that gave special constitutional attention to minority language rights, aboriginal rights, gender rights, and rights for ethnic minorities. These provisions have later been called group-based rights and have been touted as vehicles to weaken territorially based nationalism, and notably governments' – in particular provincial ones' – hold on the population.

The introduction of the Charter contributed to the mobilisation of a great number of self-conceived constitutional stake-holders, in particular women's groups, gays and lesbians, Aboriginals, immigrants and disabled people. Some of the groups given special attention in the Charter issued demands for direct participation in the process of intergovernmental negotiations, and Aboriginals or First Nations groups later obtained such. The Charter as it has been handled by the courts has been handled in a manner that shows great sensitivity to Canada's diversity; thus this institutional mechanism represents a clear case of injecting a cultural dimension to the rights-based universalism we normally associate with Charters and Bills of Rights. But the Charter also reconfigured legislative-judicial relations. It contained a mechanism for fostering dialogue between the Court and legislatures. The system of competitive parliamentary government referred to above was made to co-exist with – to compete with and to be harmonised with – Court-based litigation. The argument here is that two sections of the Charter (section 33, the notwith-

standing clause, and section 1, the reasonable limits provision) both inject an element of deliberation between courts and legislatures (Hogg and Thornton 2001: 106; Kelly 2001: 321). On section 1 Hogg and Thornton note that:

[W]hen a law is struck down because it impairs a Charter right more than is necessary to accomplish the legislative objective, then it is obviously open to the legislature to fashion a new law that accomplishes the same objective with provisions that are more respectful of the Charter right. Moreover, since the reviewing court that struck down the original law will have explained why the law did not satisfy the s.1 justification tests, the court's explanation will often suggest to the legislative body exactly how a new law can be drafted that will pursue the desired ends by Charter-justified means.

(Hogg and Thornton 2001: 108-9)

The Charter spurs legislative sequels in which Charter dialogue takes place between the legislative and judicial branches of government. Thus, the Charter also fosters an element of 'institutional reflexivity', in that it encourages an inter-institutional dialogue on the relationship between individual rights and collective goals (established through democratic procedures). This is one of a number of mechanisms that seek to reconcile rights-based universalism with sensitivity to difference.

Canada has never succeeded in reaching an agreed-upon constitutional arrangement. Even the 1982 Constitution Act, which the country abides by, has not been signed by the province of Quebec. This set the country off on a process appropriately labelled as 'mega constitutional politics', which

[G]oes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based. Mega constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic. The second feature of mega constitutional politics flows from

the first. Precisely because of the fundamental nature of the issues in dispute - their tendency to touch citizens' sense of identity and self-worth - mega constitutional politics is exceptionally emotional and intense. When a country's constitutional politics reaches this level, the constitutional question tends to dwarf all other public concerns.

(Russell 1993: 75)

Mega constitutional politics can take place within an established constitutional framework, but is more appropriately labelled as constitution-making, as in principle the entire constitutional system is 'up for grabs'. This process has touched on virtually all aspects of the Canadian political system and society and has produced a wide array of radical proposals for how to address these challenges.

One way of interpreting this process and its results is to label it as a 'constitutional catharsis' (Fossum 2007). This has three facets: The first is a reconfigured conception of justice and constitutional recognition: weak and disenfranchised groups received some form of constitutional recognition. Canada's constitutional contestation and Chartered transformation have helped to shift the political and popular conceptions of what justice requires from a strong pre-Charter concern with accommodating Quebec nationalism to the present onus on rectifying historical injustice wrought on Aborigines, as well as the accommodation of demands from other groups in Canadian society (*i.e.*, women's groups, gays and lesbians and disabled people). The second feature of constitutional catharsis pertains to heightened constitutional reflexivity: the Canadian political system appears to have developed a more principled approach to the settlement of issues that have not gone away (one element of this is dealt with below on exit). The third aspect refers to more inclusive democratic norms permeating the political system. Quebec separatists for instance have increasingly justified separation in more inclusive terms, to the extent of labelling Quebec a multicultural society and hence echoing the multicultural character of Canada. Some separatists now argue that a future independent Quebec will have to be a multicultural state.

These brief comments on the constitutional-institutional structure show the country's historical background has predisposed it to a difference-accommodating cosmopolitanism. In recent years, through

constitutional and other institutional changes we can discern a stronger onus on moral universalism through individual rights entrenched in such legal-institutional mechanisms as the Charter of Rights and Freedoms, the legal provisions and policy measures underpinning its multiculturalism program, and the human security program.

These traits are clearly manifestations of the country's particular historical experiences but also reflect its place in the world. The introduction of the Charter was of course shaped by the strong international rights-consciousness in the post-war period. As such this was a case of 'global uplink' (or outside-in), modified to suit local conditions.

Global uplink

In terms of official foreign relations, the clearest manifestation of a cosmopolitan-inspired 'global uplink' was Canada's official embrace of the notion of *human security*. 'For Canada, human security is an approach to foreign policy that puts people – their rights, their safety and their lives – first. Our objective is to build a world where universal humanitarian standards and the rule of law protect all people; where those who violate these standards are held accountable; and where our international institutions are equipped to defend and enforce those standards. In short, a world where people can live in freedom from fear.'¹⁰ This doctrine bespeaks a notion of global responsibility. It highlights the need for a *consistent pursuit* of justice, a pursuit that does not stop at the state's borders. The same commitment is found in that one of the core aims of Canadian foreign policy since 1995 has been to project Canadian values and culture abroad. These values are: 'respect for democracy, the rule of law, human rights, and the environment' (Canada 1995; Nossal 2003). This can therefore be understood as a case of 'outside-in', the internal embrace of a set of global cosmopolitan norms. It must be noted that the operational commitment to human security has abated in recent years but Canada is still a major player within the UN system, for

¹⁰ DFAIT Human Security Programme. <<http://www.humansecurity.gc.ca/psh-e.asp>>, 16.07.02. Canada was active in the development of ICC. The president of the International Criminal Court and its chief architect, Phillippe Kirsch is also a Canadian.

instance in peace-keeping missions. It has also consistently sided with the UN (rather than with the Bush-US).

Further, when we talk about the global context from the perspective of outside-in it is also a point to consider the effects of a post-war development, namely the First-World boomerang effect of global decolonisation, which saw 'internal colonies', notably aboriginals claiming recognition and compensation for historical oppression, marginalisation and outright exclusion. This process took place in a world marked by a far more pluralist and critical global public opinion:

Ours is a world in which memories of racism, of European imperialism and its accompanying humiliation, generate critical international scrutiny of the manner in which all of the European countries treat their domestic, especially non-white minorities. Political executives now operate in the glare of an international public opinion sensitive to rights, racial inequalities, to women, and to indigenous minorities.

(Cairns 1995: 116)

In Canada today the question of aboriginal self-government raises a number of thorny questions pertaining to openness and inclusion-exclusion.

A different configuration of exit, voice, loyalty

Cosmopolitanism presupposes reflexivity; this can be effectively fostered through individual rights, as noted. How then to ensure that the state's ability to instill loyalty does not impede the critical reflexive thrust? Every state has numerous means for instilling loyalty. In the cosmopolitan polity citizens' allegiance to the polity is grounded on the universal principles' constant embedding in institutional form, a form of allegiance that is constantly subject to deliberative challenge, and as such is marked by considerable ambivalence. As the character of this grounding varies, allegiance is also always necessarily conditional. Every state offers a set of tools for reducing such conditionality. This suggests that all polities need provisions for exit for persons and arguments; the question is whether this should also be extended to territorial sub-units. Canada has done so and done so more explicitly than the EU the only other polity with such a provision (explicitly set out in the yet-to-be-

adopted Lisbon Treaty but actually exercised in 1984 when Greenland left). To install democratic provisions for territorial exit (which may result in the break-up of a state) has profound implications for community and identity; the option of territorial exit through democratic means greatly reduces the state's ability to instill loyalty and allegiance, notably where there is a penchant to leave. Can such procedures then be cosmopolitan? For one, the procedures must be consistent with basic human rights; democratic; such set out as to be properly reciprocal; and open and subject to global scrutiny as to legitimacy. Unilateral provisions or provisions that do not include proper consultation and reciprocity are of course entirely incompatible with cosmopolitanism. I will now briefly spell out how these provisions have been set out in Canada.

In Canada the issue of territorial exit has its roots in the spectre of Quebec separation which has been high on the political agenda since the 1970s. Two secession referenda have been held in the province of Quebec. The latest referendum in 1995 saw 49.4 per cent voted Yes, whereas 50.58 percent voted No (the No side won by a mere 54,288 votes). In the aftermath of the referendum, the question of Quebec separation was taken to the Supreme Court, which handed down its advisory opinion in 1998.¹¹ It stated that Quebec has no legal right – under Canadian or international law – to unilaterally secede from Canada. But it went on to note that:

Our democratic institutions accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognise.¹²

¹¹ Canada, Supreme Court *Reference Re Secession of Quebec*, [1998] 2 SCR 217. Available at: <<http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html>>.

¹² Ibid.

The federal government in 1999, through the so-called Clarity Act (An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference) established a set of more specific procedural guidelines for how secession might proceed. Canada is thus the only country in the world to have spelled out a set of *democratic* procedures for separation or break-up.¹³ These apply not only to Quebec, but to any province. These provisions coupled with the obligation to negotiate (subject to certain conditions) ensure at least some central elements of reciprocity. Actual negotiations with a province would not be bilateral –between the federal government and the relevant province – but would be conducted among all the governments of the provinces and the federal government.¹⁴

Provisions for territorial exit can spur reflexivity, because the very availability of a set of procedures for exit makes it more important for those seeking to hold the entity together to justify the merits of staying together, in order to ensure that exit remains a distant prospect. Further, in line with what has been said before on cosmopolitanism's onus on openness to the world, it should be clear that provisions for territorial exit should only really be considered under the cosmopolitan heading insofar as the world community is asked to serve as an impartial referee. This point figured in the Canadian Supreme Court secession reference:

The ultimate success of [an unconstitutional declaration of secession leading to a *de facto* secession] [...] would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession, having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition'.¹⁵

This statement can be construed as a warning not to proceed unless the condition of reciprocity is complied with. But its emphasising

¹³ Note that the Draft Treaty establishing a Constitution for Europe contains a provision (Article I-60) that permits voluntary withdrawal from the Union. Cg00087/en04.

¹⁴ Bill C-20:3.1. Available at: <<http://www.canlii.org/ca/as/2000/c26/sec3%2Ehtml>>.

¹⁵ Canada, Supreme Court *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

legitimacy can also be seen as a powerful reminder of the need to act in a manner consistent with global standards of legitimacy.

Conclusion

This chapter has shown that in order to compare the EU to other instances of cosmopolitanisation, it is useful to consider cosmopolitanisation in the contemporary world as unfolding through different paths or routes. One such is through the development of a global legal-political order that transcends the states. The other pertains notably to the EU as a case of a regional-cosmopolitan entity, where the states that come together to form the entity, set up one that transcends those very states. The third is through individual states. Three possible categories of states were listed here. The first was cosmopolitan vanguards, that is, states that propounded cosmopolitan doctrines. The second category was that of constitutional democratic states that ensured a certain 'fusion' between their constitutional systems and those of higher-level units (cf. Germany in relation to the EU and the UN). The third category was states with historical-cosmopolitan traits brought about through internal conflicts and disagreements, which they sought to handle peacefully and democratically and which therefore compelled them to forge more universal justifications for why they should continue to exist as individual states.

These three paths (global, regional, and state-based) are not distinct today; they are complementary. How complementary they are in overall terms is important to establish. Consider the EU here: Germany has played a central role in entrenching the EU's fundamental rights-driven cosmopolitan thrust, and part of this again relates to Germany's constitutional uplink to global cosmopolitan law.

It would appear that the degree of complementarity will vary with region; with Western Europe and North-America at the top. Overall we might argue that the paths operate at different speeds, which would render significantly varying cosmopolitan thrusts across the globe.

The fact that it might be possible to single out a distinct statist path is nevertheless interesting in a world where so many scholars underline

that cosmopolitanisation is best carried out through transnational and other non-state-based structures. It suggests that if established states can be cosmopolitanised, then the cosmopolitan pull may be considerably *stronger* than what is generally anticipated. Does this also mean that the state-centred polity is more flexible and malleable than what is generally assumed with regard to its propensity for post-national democratic inclusion/'cosmopolitanisation'? The discussion provided here would suggest a guarded positive response. Canada as I showed might not be a case of doctrine guiding practice, but rather one where history and practice are important in driving doctrine. The conflicts facing Canada required more inclusive and universal responses. These responses we should note could most easily be universalised in a sustainable manner when and insofar as the world itself was conducive to such more universal solutions. That is probably also why Canada's cosmopolitan imprint is stronger now than it was before. So the state-based cosmopolitan route, for its sustainability, is dependent on at least a modicum of cosmopolitanism institutionalised at the global level. One of the issues brought up by the Canadian case is that it is important to consider more closely the role of contestation for cosmopolitanisation: Can a non-contested state obtain an equally strong cosmopolitan thrust? Further, can a cosmopolitan thrust be sustained if contestation abates? Does contestation produce the same effects in cosmopolitanisation terms within the EU as within states?

In this chapter I have identified three possible cosmopolitan paths. The relative cosmopolitan salience of each of these three paths requires attention; the same applies to how they interact. This subproject will address this through a deeper comparison of Canada and the EU. The next general RECON task is to establish the democratic implications of this.

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RECON seeks to clarify whether democracy is possible under conditions of pluralism, diversity, and complex multilevel governance. In order to get a proper handle on the democratic character and quality of what is unfolding in Europe, a set of proper democratic benchmarks are needed. RECON spells out three different models for democratic reconstitution in Europe. The first posits that democracy can be reconstituted as a combination of audit democracy at the Union level and representative democracy at the member state level. The second model posits that democracy can be reconstituted through establishing the EU as a multinational federal state. The third posits that European democracy can be reconfigured through the EU serving as a regional post-national Union with an explicit cosmopolitan imprint.

RECON studies the question of democracy in the EU across a broad range of subject areas. This brings up major challenges pertaining to research approach, research design, and research coordination. How can we recognise the different models across the different institutional, constitutional and policy areas of the project? The purpose of this report is to move from theory to practice. However, the contributions are not mere instances of operationalisation of the three RECON models to all the project's relevant subfields. Instead, each contribution applies the RECON framework to its subject area with due attention to the particular methodological issues and the main lines of debate.

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Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research. The project has 21 partners in 13 European countries and New Zealand and is coordinated by ARENA – Centre for European Studies at the University of Oslo. RECON runs for five years (2007–2011) and focuses on the conditions for democracy in the multilevel constellation that makes up the EU.

