

## 1. Introduction

The EU constitutes a new type of political order which escapes the traditional dichotomy of international versus domestic governance. Not only positive political science but also normative political theory is struggling to cope with the implications of this fact. Whilst positive political science searches for new ways of conceptualising political order above intergovernmentalism and below statism, political theory is struggling with applying the concept of democracy to a political unit which is more than an international regime but less than a nation-state.

The problem is how to conceive of the EU and assess it normatively. The deliberative approach is interesting while it at least in some of its variants tries to bridge the gap between normative and positive theory. Regarding the latter it proposes to see the EU as supranational entity made up of deliberative processes in forums and decision-making bodies beyond the nation state – and has coined the term deliberative supranationalism. Deliberation means that actors, when they try to harmonize their action plans justify their stands and points of view, and in the process of reaching agreement actors learn and may change preference. With regard to normative theory, deliberation means that the processes have been of such a quality that they induce legitimacy.

This introduction to the workshop proceeds in four steps. We will first situate the workshop in the general debate and argue that the “*sui generis*” EU needs a *sui generis* normative approach for a convincing critique. We will secondly introduce our approach to analysing the EU and present our main arguments. Thirdly, we will discuss some basic conceptual issues that are tied to our subject matter and will, finally, outline the research agenda.

## 2. The debate

Our approach to analysing the EU is inspired by three observations. All three of them highlight distinctive features of the EU that underline that any easy identification of the EU with either a nation state or an international regime is hard to sustain. The first observation refers to the role *rights* in the EU, the second refers to the mode of *interaction* in the EU, and the third to the EU’s mode of *compliance* enforcement.

Direct legitimation: For political science, the entrenchment of individual rights is crucial for assessing whether a given political order is of an international or domestic type. Traditionally, the international system is viewed as an order in which states, or more exactly: state executives, play the decisive role. They are the ones who monopolize the access to the bargaining table, who have superior knowledge of the issues at stake and who control the outcomes of political processes. Any crucial role for individuals outside state executives is excluded. The EU, however, is different. Like in an international regime, there can be little doubt that the member state executives are the most important actors who control intergovernmental treaty making and reforming conferences, who staff the primary legislative chamber of the EU and provide the EU with most of its administrative staff. Unlike an international regime, however, the EU also provides for a formal EU citizenship, a charter of basic rights, a supranational Court of Justice and a directly elected Parliament. This gives the directly elected representatives of the people a right of co-decision in European law making, gives individuals the right to sue their governments if they disobey European law and increasingly tries to integrate civil society groups in advisory bodies. Hence, there is not only an indirect mode of legitimation, stemming from democratic processes in the Member States, but an direct mode of legitimation based on participatory rights as well.

Getting to yes: A second difficulty in categorizing the EU connects with the discursive character of the EU. Whilst international regimes are traditionally viewed as sites for preference aggregation and power politics that leave only in areas of minor importance the space for deliberative interaction, a number of empirical contributions underline that policy deliberation plays a crucial role in the EU. Both in the Council and in more technical comitology committees, the highly legalized character of the EU compels Member States to give reasons for their preferences and to justify them by referring to either European law or to arguments which take the public good – a European *bonum commune* - as a starting point. To be sure, power play is far from non-existent in the EU. But even narrow-minded and selfish preferences, however, must often dress in legal, moral or otherwise politically acceptable clothes if they are to be accepted by their colleagues. In terms of deliberation, therefore, the EU resembles at least some elements of discursive problem solving and conflict resolution, which rejects the notion of pure interstate power politics.

Enforcing compliance: The EU is, above all, a political system that extensively utilizes law to create order and purpose. Law-making and law enforcement takes place within a structure that

combines hierarchical and horizontal procedures. Whereas a central body with superior resources is clearly absent, the system has developed a well established legal hierarchy and consented authority relations. The EU is an authoritative system that works without having to wield the threat of brute force. It does, however, utilize mechanisms of horizontal enforcement which depend in their effectiveness on the nationally established shadows of brute force. If we take the three elements together, the half-hearted rights based integration, the at least partly deliberative mode of interaction and the crucial role of non-coercive law for enforcing compliance, the EU clearly stands out as a political entity *sui generis*. It does not fall in either the box of national politics nor in the box of international politics. This evidence is giving especially normative theorizing a hard time because most it has on offer is badly equipped to deal with political systems which are neither national nor international. Traditional normative theory, from Rousseau to Rawls and Dahl, reflects on the conditions of legitimate governance in a national setting, that is under conditions of a monopoly of force subject to public law. This obviously does not apply to the EU. Likewise, international normative theory, which rests on the principle of national sovereignty, is insufficiently applicable because it does not capture the need for harmonizing the principles of human rights and of popular sovereignty. So far the principle of popular sovereignty has only been made applicable to the rule of particular societies; as yet it is at this level that democracy is institutionalized. Human rights on their part are universal and refer to humanity as such. There is a tension between international law's recognition of sovereign states and the regulative idea of equal rights for all, which is reflected in an actual opposition between democracy and law, and between foreign and domestic policy. Neither does the conventional perspective capture collective problem-solving nor the feedback effects of delegated political competences for the soundness of domestic democratic procedures. It therefore tends to overlook the democratic dilemma, i.e. that too little internationalisation may lead to non-decisions and that internationalisation may lead to de-democratisation.

Against this background, it can hardly surprise that normative theorizing has up to now not found any consensus, when it comes to reflecting about the EU. Whilst some see the EU in a deep crisis, describing a lack of democratic procedures at the European level and demand the establishment of a full blown state with a representative and majoritarian Parliament as the first legislative chamber, others are generally satisfied with the state of affairs and argue for only minor changes towards more accountability or transparency. The underlying problem is indeed intriguing: Where to take a normative standard from if neither nation state oriented

democracy theory nor the minimal normative standards of IR theory are directly applicable? As this discussion underlines, normative reflection and positive empirical or theoretical analyses of the EU are inseparably linked. Without knowing what the EU is we are in trouble if we are to formulate a convincing critique.

### ***The problem***

Unfortunately, mainstream integration theory is not helpful with regard to conceptualising the EU. Intergovernmentalism too easily disregards the dependence of governments on supranational institutions for realising governmental interests (Sandholtz and Stone Sweet, 1997). It tends to overlook that the EU describes a legalised venture in which powers and sovereignties are pooled, legal authorities are established and states are no longer free to pursue whatever policy they deem to be in their interest (Weiler, 1991; Alter, 2001). Mutual regard for the concerns of other member states and respect for the binding character of European law are essential elements of participating in a joint exercise of European governance.

On the other hand, supranational approaches are also found wanting. The idea of a supranational hierarchy with the Commission and/or the ECJ as de facto governing bodies, however, is equally misleading. The EU lacks a central actor with powers to autonomously legislate and enforce law. Even in issue areas in which the Commission has broad discretionary powers, it still must respect that it has no power to coerce member states and that it must safeguard its decisions to keep them acceptable to its member states and the member states' publics (Neyer and Zürn, 2001). Open cases of non-compliance, such as in the infamous BSE case, or less dramatic cases of silent non-implementation of EU law (Börzel, 2002) underline that the effectiveness of postnational governance rests on the precondition that member states „accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination“ (Weiler, 2000: 13). Although it is true that the legitimacy of courts derives from the application of legal reasoning - deducing decisions from general normative rules in an argumentative manner<sup>1</sup> - it also is hardly imaginable that the political status of the ECJ in the European institutional system would not suffer if its decision were a permanent political affront to the member states (Garrett et al., 1998).

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<sup>1</sup> Cf. Alexy, 1989, Dworkin, 1991; Mattli and Slaughter, 1998.

So what kind of animal is the EU? A state in statu nascendi? An international regime plus X?

### 3. Three Leitbilder of the EU

Our approach to formulating a convincing critique of the EU starts with the elements highlighted above – rights, deliberation and constitutionalization– and integrates them in three theoretical perspectives which each propose different paths of development, including their attendant notions of citizenship. In other words, three *Leitbilder* of the EU:

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

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

The *cosmopolitan* notion which is based on a set of legal and argumentative presuppositions of a cognitive-universalist nature

These are based on three different conceptions of rationality – instrumental, contextual and communicative and their adherent warranting notions: efficiency, identity and justice.

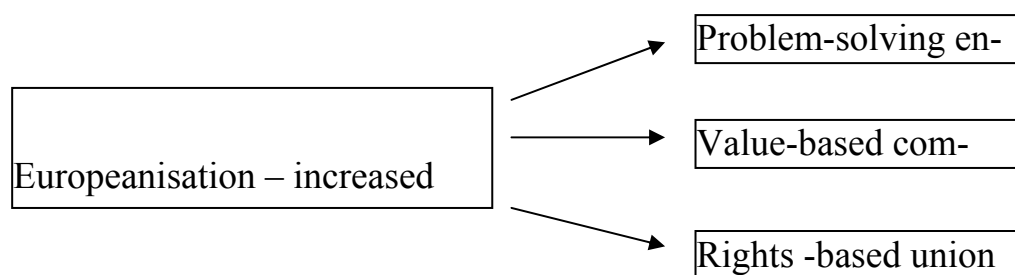
Notion of democracy	Conception of rationality	Mode of legitimation	Type of entity
Economic-aggregative	Instrumental or strategic	Efficiency	Problem-solving entity
Republican-communitarian	Contextual	Collective identity	Value based community
Cosmopolitan- discourse-theoretical	Communicative	Justice and fairness	Rights-based union

The notions of democratic governance we present provide different governance options and hence different answers to the question of the legitimacy deficit of the EU and to the question of efficiency and governing capability. They may also be seen as *different paths of institu-*

*tional development* with distinctive answers for how to handle the EU's legitimacy deficit. That is not to say that they are equally valid from a normative point of view, nor that they are entirely optional, i.e. that they can be adopted entirely without constraints. These options will be applied to the EU in order to take stock of the prospects for a citizens' Europe - including attendant institutional arrangements and ways of remedying the legitimacy deficit. Such knowledge is essential at critical junctions or when faced with a crossroads, as was recognised at the Laeken European Council meeting (enlargement is a particularly important critical choice). This type of principled and strategic knowledge can also serve to open up windows of opportunity in order for the normative potential in the EU and in the integration process to be better harnessed.

The polity options are analytically distinct and *ideal types*, albeit they are not mutually exclusive in an empirical sense. In actual cases, the options often appear together, but different systems exhibit different mixes. They may pertain to particular sectors, segments or periods of European co-operation and between the EU and international organisations. It is therefore important also to explore the particular nature of, the possible combinations of, as well as the actual sequencing of the options across time and space.

### **Three options**



The first option amounts to the scaling down or the reducing of the ambitions of the polity-makers in the EU so as to make it into a mere *problem-solving organisation*. Onus is on *efficient regulation*. The second option is based on the need to deepen the collective self-understanding so as to make the EU into a *value-based community*, i.e., one based on shared identities, in order to cope with the legitimacy problems. The project participants share the assumption that, broadly speaking, the third option is the most viable in normative terms, as it involves the institutionalising of procedures for securing both efficiency and legitimacy. However, to embrace this assumption is not to deny that different developments may con-

verge and mutually reinforce each other. For instance, insofar as the EU does move towards a *rights-based, post-national Union*, does this move have to rest on a common cultural value basis? Or can it develop into a full-fledged rights-based Union without relying on a common cultural value basis?

### Option 1: The EU as a Problem-Solving Regime

The first option is premised on an economic notion of legitimation. It depicts an enlarged EU that, instead of clarifying and addressing the question of identity and democracy, opts for a looser organisational form that emphasises regulation and binding economic co-operation. There is little onus on collective tasks and obligations beyond the interests and preferences of the member states. This type of organisation is based on an economic-utilitarian mode of thinking. It comes close to the notion of the EU as a *special purpose association of functional integration* (cf. Ipsen). According to this mode of thinking, the EU is best conceived of as a functional type of organisation whose purpose it is to promote the material interests of the member states. Such promotion may best be ensured by means of intergovernmental rather than supranational institutions. This notion of legitimation is based on performance, hence the concept of the citizens as producers and consumers. *Legitimation is conditional*. It cannot draw on anything but actual *performance* – co-operation depends upon discernible benefits – and is therefore highly unstable. Support is withdrawn whenever expectations are not met, although some will argue that long-ranging strategic-rational calculations and mechanisms of self-binding will yield relative stability.

There is no real onus on redistribution within an enlarged Europe, this option envisions, except as side payments in complex rounds of *bargaining*, or for the sake of stability. Rather, enlargement provides the member states with an expanded market and increased security vis-à-vis former foreign powers. It ensures clearly delimited and stable boundaries to the outside world. Further, when it comes to enlargement and increased co-operation in the area of security and defence there is considerable disagreement as to the merits and applicability of this option. It is difficult to form a collective will and the member states are apt to pursue their own interests in these areas, hence the likelihood of states opting out of co-operation is high. Only states that share common economic or *security interests* are likely to co-operate. On its part, the EU has a strong incentive to include only those states that really matter. Extensive co-operation and a strong sense of obligation towards a common defence and security policy,

within the framework of a loosely structured economic organisation, will likely only be available in situations of crisis and when there are obvious external threats.

There are obvious *advantages* associated with this option. For instance, there is no need to clarify what are common concerns and what are items to be handled separately by each member state. Efficiency in terms of the satisfaction of the members' interests lends legitimacy unto itself and there is at present a sufficient value basis in the EU to ensure this.

The obvious *disadvantage* is that, whilst this strategy might have worked in the EEC or EC, it represents a regression or step backwards from what the EU already has obtained. And it is reasonable to anticipate further losses in legitimacy and motivation as a consequence of frustrated and stymied expectations. This problem is likely to be exacerbated with enlargement, as the weak democratic and market based traditions and institutions of many of the applicant countries will not lend ready support to this value basis. Explicit efforts to ensure a common value basis and/or a set of supportive institutions with sanctioning ability seem required to sustain co-operation over time. Further, in a far more complex, diverse and value pluralist Europe we cannot expect that the current consensus on economic growth as the overarching goal can be sustained or will be accepted, at least not in its present form. Enlargement will exacerbate these problems as the applicant countries still differ from their Western European neighbours in terms of their basic economic structures, composition, level and type of economic performance, as well as in their relative and absolute wealth.

## Option 2: The EU as a Value-based Community

The second option is premised on the need to further clarify the value basis of the European community through a collective process of self-interpretation, based on a republican-communitarian reading of democracy. Who are the peoples of Europe and who do they want to be? One possibility is to revitalise the *Christian and humanist values*, which can serve as the foundation on which to develop a deeper sense of unity and community. In this perspective the EU is a geographically delimited entity but one which has not yet fully discovered a common identity which can serve as the basis for developing stable goals and visions. Further, revitalising traditions, mores and memories of whatever common European values and affiliations there are may provide the EU with a more solid basis for further integration. The ultimate objective of such a strategy is to establish a *we-feeling*, and a sense of brotherhood



and sisterhood required for a European demos. It is this sense of common destiny, a common fate induced by common vulnerabilities, that turns people into compatriots who are willing to take on new collective obligations to provide for each other's well-being. A common identity is needed to ensure trust in order for subjects of collective decision-making to be properly committed, and for redistribution to take place.

Every political order presupposes some kind of *common identity* in order to foster allegiance and respect for laws. Even if the EU is not a state and is less demanding on its citizens - in allegiance terms - than is a state, it makes binding collective decisions and actively seeks to shape people's values and identities so as to foster a deeper sense of European identity and attachment. Such a search for a common European identity can make the EU into a value-based community, which does provide a sound basis for *redistribution*, hence social and cultural citizenship. It is also a means of drawing bounds by defining who are Europeans and who are not. Such a strategy may also contribute to consolidating the member states at the current level of institution building.

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

However, there are obvious disadvantages with this mode of integration. There are normative problems associated with developing a cultural basis for inclusion/exclusion – for which countries that are to be included – because such a distinction may conflict with basic human rights. Further, it is far from clear what values and virtues are “primordial” and uniquely European as opposed to universally shared or shared among smaller, more localised groups and collectives of people. For instance, there is little doubt that in value-terms, as well as in institutional terms, there are significant differences in Western Europe in the amount of support for European integration and supranational structures. Historically, following Rokkan, it is possible to define a *European 'core'*, which roughly corresponds with the six founding members of the EU. This notion of a ‘core’ is also somewhat reflected in the notion of flexible integration, which opens up for a group of member states to pursue the integration process

further than the rest (provided they comply with certain guidelines). Further deepening and widening of the EU will easily exacerbate the tensions between the ‘core’ countries and those outside. Rather than value-based consensus, the more likely prospect of the pursuit of such a strategy is to foster ‘deep diversity’.

If the EU, however, is successful in establishing a community based on common notions of the good society, such a community will have a set of clearly demarcated bounds to the outside world, thus raising the prospect of a *Fortress Europe*, which neglects the legitimate needs of bordering states. There are thus normative problems associated with this option that cannot be solved adequately by bringing *the peoples* of Europe together in communal and public settings.

### Option 3: The EU as a rights-based union

The third option is based on the recognition of the need to continue the process of institution building at the political level. In this perspective, a wider *cosmopolitan* conception of democracy is in operation. The presumption is that a wide spectre of popular opinions – emanating from broad public debate (European as well as non-European), transnational movements (i.e. (I) NGOs) and supranational and international bodies of norm enforcement – sway decision-makers to take actions to ensure legitimacy. Decision-makers will be compelled to pay attention to popular opinion in order to obtain legitimacy, also because they face a set of rights holders who are cognisant of their entitlements (and obligations). This option presupposes ongoing attention to constitution-making to establish a set of principles that provide the entity with legitimacy. Such an approach is also consistent with the integration process, as the constitution of the EU is more in the *gradual ‘constitutionalisation’* of the legal system of the EU than in the treaties.

The relevant type of public support will have as its motivation a *constitutional patriotism*, which emanates from a set of legally entrenched fundamental rights and democratic procedures. Such can be said to be deeply entrenched in the ‘collective psyche’ of Europeans and in the institutional framework of democratic European states. Their furtherance at the European level will serve to channel and focus political allegiance, affect and identification to the European level.

This option presupposes that constitution-making is further carried on to establish an EU citizenship based on entrenched political rights, reformed decision-making procedures and clearer divisions of competencies along vertical and horizontal lines, i.e., between the institutions at the EU-level and the member states (vertical) and among the institutions at the EU-level (horizontal). Such a federalisation process will likely proceed along a parliamentarisation track, with the Council as a “second” chamber or co-legislator with the EP. Such processes may be given added impetus through the proclaimed Charter of Fundamental Rights and the newly appointed Convention to prepare for the IGC 2004. Other possible institutional measures include the use of optional referenda and institutional measures aimed at amplifying the role and sphere of public deliberation and critical scrutiny of decision makers as the most prominent means to ensure that the ‘common will’ prevails in the EU system. (cf the White Paper on Governance (2001) with the onus on flexibility, openness and participation.) The legitimacy deficit can thus be ‘mended’ through involving the citizens of Europe directly or via their representatives in the EU system of deliberation and decision-making. In this manner a European demos is also shaped, although the approach is quite different from that envisioned in the second option presented above. What is more, this option envisages that the EU’s foundation and its boundaries be justified within a cosmopolitan framework. The development of the EU is thus connected to the support and further development of similar regional associations in the rest of the world and on a democratised and rights-enforcing UN.

This is an advantage as the EU is seen to build on the very principles and rights that are uniquely European and normatively uncontroversial, as every member state subscribes to them and also because these very norms are increasingly spread world-wide. This may also be seen as a way to reduce the normative problem of limiting the EU or defining a set of acceptable bounds. Its bounds are set by the constraints embedded in the functionality of popular representative democracy in Europe as well as the viability of such in other similar regions. In this way both the problem of legitimacy and the problem of establishing a set of normatively acceptable borders are solved in a universalistic manner, i.e., based on the principles of *popular sovereignty and human rights*.

The challenge to this way of solving the legitimacy problems pertains to the sheer heterogeneity as well as the weakly developed common understanding of the European project, both of which are likely to become further exacerbated through enlargement. This is so because different developments, experiences, histories, traditions and languages put the political discourse – the communicative community - under strain. It may be difficult to obtain the kind of

civic understanding, tolerance and respect for pluralism that are necessary for integration through democratic deliberation to take place.

#### **4. Our Arguments**

The three options do have both an empirical and a normative dimension. The empirical dimension refers to the actual prevalence and viability of each of the options across different policy fields and levels of government. The normative dimension relates to the validity of the three options for governance. Correspondingly, the project is centred around two major arguments:

##### ***The normative argument:***

*Democratic legitimacy* does not stem from the aggregation of the preferences of all, but from “.. the deliberation of all” (Manin 1987:357). This perspective may be applied to international democracy as it does not base democratic accountability solely on the existence of formal aggregative procedures. While aggregation may reflect only base preferences, and bargaining may only reflect actual resources and may yield suboptimal solutions, deliberation transforms preferences and compels actors to give reasons for why they seek a particular outcome, regardless of their resources. Deliberation is based on arguing which rests on reason giving and is considered superior to bargaining and voting. Among other things, deliberation improves decision making while it pays attention to side effects, reveals private information, legitimizes the ultimate choice, contributes to Pareto-superior decisions, makes for a larger agreement, fosters mutual respect and is seen as good unto itself (Elster 1998a, Estlund 1997, Cohen 1991).

The discourse theoretical variant of deliberative democracy disconnects collective will formation in modern politics from the notion of a preexisting system of common values and affiliations. In this perspective, there is a separation of politics and culture, of citizenship and nationality. Discourse theory departs from a substantive, or ethical conception of citizen autonomy, which emanates from the convergence of traditions and family-type bonds on the basis of which it is possible to reach an agreement. The republican or communitarian tradition of political theory presupposes an ascriptive membership in a common life form where it is possible to identify common goals, interests and affiliations. The people making up the state takes the shape of a political subject - a nation. “But this distinctive cultural identity does not

designate it *as* a political community of citizens. For the democratic process is governed by *universal* principles of justice that are equally constitutive for every body of citizens. In short, the ideal procedure of deliberation and decision making presupposes as its bearer an association that agrees to regulate the conditions of its common life impartially” (Habermas, 1996a:306).

Democracy is conceived of at a more abstract level: it is not seen only as an organization principle – e.g. representative or parliamentary democracy – but as a legitimation principle which ensures the conditions necessary for justification. In other words, it is not identical with a particular organizational form, but is rather a principle which sets down the conditions that are necessary for how to get things right in politics. Democracy is a way to find out what is fair or just. In a deliberative perspective, arguing is required for a norm to be seen as impartial.

From a conceptual point of view, then, deliberative supranationalism is a possible option, as cooperation in constitutional democracies is facilitated by procedures that do not require particular virtues or commonalities. They only require adherence to the rules of the game and a sense of fairness and justice, which can be seen essentially as a cognitive undertaking. People can reach agreement on what is fair or just when they proceed according to standards of communicative rationality (Habermas 1996).<sup>2</sup> It is possible to reach agreement on norms without presupposing common values and interests. The process itself is the guide to find out what is and what is not common, and how to treat equal and unequal cases.

Discourse theory understands democracy in political and not cultural terms, and shifts the focus on constitutions from seeing them as expressions of ethical substance (common life) to morality in the Kantian sense, i.e. as arrangements for respecting the integrity and freedom of the individual. Citizenship, then, requires membership and participation in the very structures that affect individual interests. State and world citizenship, then, form a continuum. The EU can usefully be conceived of as an intermediate institution for grappling with transnational exigencies, and as such is an interesting experiment in post-national governance.

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<sup>2</sup> Contractualists hold that this is obtained when parties proceed according to the principles of the original situation - behind a veil of ignorance (Rawls 1971, 1993).

However, the present constitutionalizing process of the EU, the post-Nice debate (2000) given momentum by the Laeken decision (2001) to establish a Convention on the Future of Europe, reflect will and interest in bringing the EU closer to a firm political entity with a legal personality. The Convention is to prepare for the next intergovernmental conference 2004 the agenda of which includes:

- the inclusion of the Charter of Fundamental Rights into the EU Treaties;
- the simplification of the EU Treaties;
- the ordering of competencies between vertical and horizontal layers of governance;
- the weighting of power relations between Member States and the EU institutions, and between the Council, the Commission, and the EP;
- the future role of national parliaments in the governmental system of Europe.

### ***The positive argument:***

The second argument we raise holds that a political strategy that is centred around increasing participation, deliberation and constitutionalization, and which points towards a rights-based political union, is not only normatively viable in terms of its procedures but also very much in line with conducting effective and efficient governance. Claims to legitimacy and to efficiency are intertwined. Even an optimal decision may be opposed if it has not been made in a correct manner, and inefficient decisions are useless no matter how democratic the process. It is three arguments which militate in favour of the functional strength of inclusionary, deliberative and legalized interactions:

Deliberation: Non-hierarchical structures like the EU can only to a limited extent rely on majoritarian decision-making. The more such procedures are applied, the less can the EU trust that those member states who have been outvoted will voluntarily comply with the outcome. Enforcing compliance however, is a time- and resource-consuming business. Both the member states and the Commission are therefore well advised to avoid voting and to give convincing reasons for proposals as much as possible. As opposed to voting or bargaining, deliberation, when properly conducted, ensures communicative processes where the force of the better argument will sway people to harmonise their action plans. Participation in co-operative processes is supposed to contribute to such a shift, as actors have to argue in relation to common standards in order to obtain agreement. Hence, they will have to override narrow self-interest in order to forge collective agreements that are binding. Such interaction modes are not solely

based on experience or scientific evidence, but on arguments of a certain moral or ethical quality.

**Inclusion:** The basically same argument applies to the functional need for the inclusion of not only the addressees of rules (the member states) but also the affected parties of rules (non-governmental actors) in the process of rule-making. In situations in which governments find themselves torn between the European demand to take legal obligations seriously and the domestic demand to respect citizens preferences, they will hesitate to follow only the former and reject the latter. Rather often they will try to satisfy both sides with the effect that the integrity of European law gets compromised. For avoiding such situations, the first best way is to integrate affected parties in the process of rule-making and to take their values and interests seriously.

**Constitutionalization:** Inclusionary and non-majoritarian modes of decision-making, however, are often a very time-consuming business which exhausts all actors without producing any results. The flip side of inclusion and argumentation is the need to discipline discourses. It seems fair to assume that a high degree of inclusion and arguing only translates into successful deliberation if it is accompanied by provisions which structure the discourse. By establishing needs of justification, distinguishing between good and bad reasons for justifying actions and thereby forcing actors to enter a discourse about the appropriateness of behaviour, modern law can do so (cf. Habermas 1992: 78). Its effect on discourses, however, will very much depend on its normative status. As opposed to intergovernmental legal norms that are merely the outcome of diplomacy, constitutionalized law will be attributed greater legitimacy and hence elicit an stronger compliance pull on its addressees.

## **5. The research agenda**

The claims we raise are bold and straightforward. We claim that a rights-based post-national union that is based upon inclusionary and legalised deliberations is a normatively attractive perspective for the EU that is more viable than its major competitors, i.e. a value-based community and a market-based problem-solving entity; is functionally more adequate for conducting effective, efficient and high quality policy in a non-hierarchical structure.

What we are lacking, however, is first of all a thorough reflection of the institutional implications and the ethical preconditions of a rights-based postnational union. The procedures for securing a broad public debate and well-conducted institutionalised deliberations are fundamental to democratic legitimacy. How robust is such a perspective? What are its preconditions? While civic values and liberal virtues may be necessary in order to bring about trust and deliberative democracy, modern law based on individual right entitlements may be seen as equally important. Law is a medium for stabilising behavioural expectations and constraining defection or free riding, because it connects non-compliance with sanctions. It is a way to solve the problem of collective action. As far as supranational law is made binding on nation-state behaviour, integration based on arguments of fairness may come about. In this project we seek to flesh out the interconnections between civic values and legal constraints in order to understand post-national integration. This is a theoretical contribution both to the study of the Europeanisation of the nation-state and to the overall debate on the preconditions for post-national democracy.

Secondly, as yet we do not have more than anecdotal evidence concerning the relevance of deliberation, and its effect on effective and efficient policy making in the EU. What we are in need of is sound empirical proof for our claims. Important empirical questions therefore refer to at least four issues:

Does the promise of deliberative supranationalism hold true if confronted with reality? Is it the case that those policy areas in which inclusionary deliberations are conducted are also convincing in terms of effective, efficient and high quality output? Can the hypothesis be supported that deliberative and participatory forms of governance enhance effective and efficient governance?

In a non-hierarchical polity such as the EU, compliance with the outcome of a decision-making procedure is largely dependent on the good-will of rule addressees. Convinced actors will most probably show more good-will than those who only agree hesitantly, because they are outvoted, bribed or blackmailed. What kind of outcomes can be distinguished? And in how far can different outcomes be attributed to different decision-making procedures?

In how far are deliberative and participatory elements already part of the EU? Can a trend of increasing emphasis on deliberation and participation be observed? If so, does this trend cover



all issue areas equally or is it focused on specific policies? And what are the scope conditions for inclusionary deliberations?

What role does the public discourse play? Is a broad public discourse only an asset in normative terms or also helpful for motivating political actors to take arguments seriously and, by implication, lead to better reasoned and more sound policies?

What this workshop sets out to do is to elaborate on the theoretical arguments, to collect first empirical evidence that supports our theoretical claims, and to introduce a methodology for analysing the deliberative content in different policy arenas. This, so we hope, will lay a theoretical and conceptual framework for conducting more systematical empirical research and a deeper assessment of the democratic quality of the EU.