



Deliberation and the problem of democratic legitimacy in the EU

***Are working agreements the most
that can be expected?***

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Abstract

What kind of democracy does the EU require and what model of deliberative democracy can account for post-national legitimacy? The author contends that democracy can only prevail with egalitarian procedures of law making in place through which the citizens can influence the laws that affect them. A model premised on the presuppositions of an idealized discourse should be confined to some very limited sets of constitutional questions and be supplemented with a variant of democratic discourse modelled on a less demanding concept of democratic legitimacy. The concept of a *working agreement* is introduced in order to establish such concept legitimacy as well as to account for the constitutional developments of the EU.

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Introduction¹

The EU has sustained a rapid expansion of political regulation in Europe and has over a period of 50 years transformed the political landscape in a profound manner. The unbridled sovereigns authorized by the Westphalian order are now brought under the rule of a supra-national polity with an authoritative dispute resolution mechanism in place. The states have managed to constitutionalize international law between themselves. A conflict-ridden continent has domesticated international relations. Now this is a puzzling development for conventional political science as it has taken place within a system that neither has major physical threats nor a distinct identity at its disposal to ensure compliance. How can states come to curtail their own power and pass over some of their sovereignty to a supranational Union?

The deliberative approach presents itself as a very apt tool for addressing such processes. Integration has to do with the building of communities and with the widening of the boundaries of trust and solidarity – with the transformation of a collection of actors into a group with a common mission. It is a process where actors shift their loyalties towards a new centre with the authoritative right to regulate interests and allocate resources. To understand the European integration process the voluntary logic and normative quality of it needs to be brought to the fore. When the collective identity is lacking, when the bargaining chips are few, the actors become dependent on the fragile resources of human language to sort out their differences. The deliberative perspective highlights that the transformation of attitudes and identities hinges on collective learning and trust building processes.

Jürgen Habermas has contributed extensively to the debate on the future of Europe and his thoughts about post-national democracy set the terms for a renewed debate on globalisation and popular control. The question of whether

¹ I am grateful for comments from Anders Molander (in particular), Agustín José Menéndez, Harald Grimen, Thomas Saretzki, Rainer Schmalz-Bruns, Anne Elizabeth Stie, and Hans-Jörg

democracy is possible today increasingly hinges on whether EU could be democratic. What however came as a surprise was his relative modest outline of a constitution for Europe - Europe as *a federation of nation states* as opposed to the suggestion of Joscha Fischer, who in his famous speech at Humboldt Universität 12 May 2000 talked of a federal Europe based on full parliamentarization. Habermas does not foresee a European federal state premised on an empowered Parliament, because of the position and legitimacy of the member states. The second chamber of government representatives - *the chamber of nations* - “would have to hold a stronger position than the directly elected parliament of popular representatives, because the elements of negotiations and multilateral agreements between member states that are decisive today cannot disappear without a trace even for a union under a political constitution”.² The problem with this model pertains to the role it allocates to “the chamber of nations” to the detriment of a directly elected parliament. This outline is weak in democratic terms as the vital concerns of the European citizens are still to be handled through a system of inter-state negotiations.

I would like to inquire into this problem from the vantage point of discourse-theory and relate it to what model of deliberative democracy that can account for post-national democratic legitimacy. The problem has to do with the relationship between an epistemic account of democratic legitimacy revolving on a rational consensus and a participatory variant that turns on substantive morality and institutional practices. The question is whether it is the quality of the debate and that the outcomes are rational and fair that bear the burden of legitimation or if it is the political process based on equal rights including universal suffrage, elections, majority vote, representation etc. that is the main container of

Trenz to an earlier variant.

² J. Habermas, ‘The Postnational Constellation and the Future of Democracy’, in *The Postnational Constellation. Political Essays*, Cambridge: Polity, 2001, p. 99. See further ‘Why Europe Needs a Constitution’, in E.O. Eriksen, J.E. Fossum and A.J. Menéndez, eds, *Developing a Constitution for Europe*, London: Routledge, 2004, p. 32, first published as ‘Warum braucht Europa eine Verfassung?’ in *Die Zeit*, 29 June 2001; and in *Zeit der Übergänge*, Frankfurt/Main: Suhrkamp, 2001.

democratic legitimacy. Furthermore, can the discourse principle based on an epistemic account of democratic procedures hold sway as an operational conception of political legitimacy, or do we have to lower the ambitions in order to be able to make it empirically applicable and can this be done in a manner that preserves its critical bite?

I start by spelling out two variants of this approach to democratic legitimacy - the *participatory* and the *rationalistic* model. Next I make the case for the former and a weaker form of consensus as the criterion of democratic legitimacy. Applying this to the present reform process of the EU I, in the last section, find that this can render comprehensible the Constitutional Treaty (CT) as a *working agreement* resting upon different, but reasonable reasons. I endeavour to open a conceptual space between a communicatively achieved consensus and a strategically bargained compromise to fill in the lacuna left open by the established discourse-theoretical typology.

Deliberation or participation?

The very idea of democratic self government rests on the notion that it is possible to find more or less adequate answers to normative queries but the question is whether this must take the form of a wholly epistemic account of the deliberative procedure.

Deliberation and democratic legitimacy

Full parliamentarization of the EU is not possible according to many analysts as this exceeds the limits of the democratic resources available in Europe.³ The question is whether discourse theory, that directs us to the deeper basis of

³ "...parliament without a demos is conceptually impossible, practically despotic." J.H.H. Weiler, U. Haltern and F. Mayer, 'European Democracy and its Critique', in J. Hayward, ed., *The Crisis of Representation in Europe*, London: Frank Cass, 1995, p. 4. See further R. Bellamy and D. Castiglione, 'The uses of democracy: reflections on the European democratic deficit', in E.O. Eriksen and J.E. Fossum, eds, *Democracy in the European Union: Integration Through Deliberation?*, London: Routledge, 2000; Bohman, 'Reflexive Constitution-making'; B. Peters, 'Public Discourse, Identity and the Problem of Democratic Legitimacy', in E.O. Eriksen, ed., *Making the European Polity: Reflexive Integration in the EU*, London: Routledge, 2005.

democratic legitimacy, provides an alternative. It digs deeper than conceiving of democracy as institutional manifestations - as e.g., a parliamentary or presidential democracy. It embodies, according to Habermas, the basic principles of self-government as rights are instruments for *ensuring equality and freedom in the realization of the idea of people sovereignty*. Discourse-theory calls attention to democracy as a legitimation principle because only the political process, governed by certain procedures, can lend legitimacy to outcomes. In the proceduralized and decentred version of popular sovereignty legitimacy is seen to depend on the manner in which political decisions can be vindicated and justified in a public debate due to their *epistemic quality*. Deliberation contributes to the rationality of decision making by the pooling of information and by argumentatively testing the reasons presented. According to Habermas the legitimating force of the democratic procedure is not merely to be found in participation and preference aggregation but in the access to processes that are of such quality that rationally acceptable decisions presumably can be reached.⁴ Hence, the thrust of deliberative democracy is to be found in the fact that a free and open discourse brings forth qualitatively better decisions. The laws are legitimate when they can be seen as the outcomes of people's deliberation under free and equal conditions and can discursively meet with the assent of all.⁵ However, because deliberation does not by itself determine the necessary scope of participation in the deliberative process - as democracy cannot decide its own borders - a certain hierarchical or non-procedural element is necessarily presupposed in the deliberative reconstruction of democracy. In line with this, two different readings of deliberative democracy's basic tenet that the laws should be justified to the ones bound by them may be derived.

⁴ Habermas, 'The Postnational Constellation', p. 110.

⁵ J. Habermas, *Between Facts and Norms*, Cambridge, MA: MIT Press, 1996, pp. 107 and 110.

- Version A, the ‘rationalistic’ reading, builds on the *epistemic value* of deliberation. Deliberation is held to lead to improvements in information and judgment conducive to a rational consensus and where the quality of the reasons makes for acceptability. Norms are only legitimate when they can be approved by all potentially affected in a rational debate.
- Version B, the ‘participatory’ reading, conceives of the democratic procedure as a set of basic rights that sets the conditions for justifying the laws. It is based on the *moral value* of deliberation revolving on the equality of the participants. This constitutes the threshold for the legitimacy of a collective will formation process aimed at an outcome that all can agree to as a reasonable.

Habermas subscribes to version A based on the epistemic account of the moral value of democratic procedures as he sees ‘rightness’ as an epistemic notion based on redeeming knowledge claims: Moral judgments and legal decisions have an epistemic status as they can be right or wrong. He offers a procedural account of justice and defines moral rightness as what rational agents could agree to under ideal conditions: “An agreement about norms or actions that has been attained discursively under ideal conditions carries more than merely authorizing force: it warrants the rightness of moral judgements”.⁶ The problem is how to link this in with democracy as an *organizational principle* comprising governmental structures. In particular how do we justify the state form and the principle of majority vote, which are the practical *modus operandi* of modern democracy and which entail subjecting to laws that have not been consented to by all in a free debate.

⁶ And further, “Since the ‘validity’ of a norm consists in that it would be accepted, that is, recognized as valid, under ideal conditions of justification, ‘rightness’ is an epistemic concept.” Habermas, ‘Rightness versus Truth: On the Sense of Normative Validity in Moral Judgments and Norms’, in *Truth and Justification*, Cambridge, MA: MIT Press, 2003., p. 258. See also his ‘Religion in der Öffentlichkeit’ in *Zwischen Naturalismus und Religion*. Suhrkamp 2005, p.126

The epistemic account of deliberative democracy

Discourse theory holds that a practical discourse is a way to improve judgment and reach correct – or just – decisions. Deliberation makes impartiality of judgment possible when the actors adhere to the principles of rational argumentation. In order to find out what is equally good for all it is requested that everyone has a say. Deliberation has cognitive value as it examines whether claims and norms can pass the impartiality test, hence it makes for a rational appraisal of reasons. This proposal is an invaluable contribution to moral and political philosophy but it seems difficult to derive at practical political arrangements on this basis. there is a big jump from such basic principles to the operational principles of modern democracy. Admittedly there is a link between deliberation and the state form as there is no need for actors to comply with obligations unless others comply and there is no way to know what is right unless there is a legal specification of obligations. This can only be accomplished by a system of authoritative norm interpretation and one which also has the capability to sanction norm violations.⁷ The state is the key organizer of politics as it controls most means of coercion and is the main agent capable of making and enforcing laws equally binding on all.

But these are merely functional arguments as are the ones given for justifying the legal form underpinning statehood.⁸ What is lacking is a normative link – or autonomous reasons – because the state has the authority to use its power to enforce legal norms without the consent of the free citizens and the majority principle asks some citizens to obey laws they disagree with. Contrary to this, the discourse principle guarantees the citizens autonomy in a very powerful manner. Those laws that the citizens cannot accept in a rational debate, are not legitimate! Unfortunately, this weakens the realism of the theory, as most laws do not satisfy

⁷ K.-O. Apel, *Auseinandersetzungen in Erprobung des transzendental-pragmatischen Ansatzes*, Frankfurt/Main: Suhrkamp, 1998 at p.754ff.

⁸ “The legal form is in no way a principle one could ‘justify,’ either epistemically or normatively”. Habermas, *Between Facts and Norms*, p. 112.

such a criterion. I return to this problem. For the moment, the question is whether practical discourses at all can yield correct answers in the sense that argumentation makes clear what is just or 'equally good for all' by securing the impartiality of judgment (version A), or whether argumentation rather must be seen as a requirement that makes participation possible (version B)?⁹ In the latter case, deliberation is needed for respecting and integrating the wants and beliefs of the citizens in collective decision-making. On this reading, deliberation is a way to ensure that the reasons of each of the participants count in the forging a common will.

Epistemic and Moral Justification

An epistemic interpretation of deliberative democracy asserts that deliberation is a cognitive process where arguments are assessed in order to find just solutions and form opinions about the common good. According to Habermas the standard for evaluating the quality of the outcomes is given independently of an actually performed deliberation process. It is constituted by an ideal procedure, which specifies the contra-factual conditions for a public discourse in which all limitations on time and resources have been suspended, and where the authority of the better argument prevails.¹⁰ To Habermas the rational consensus is the standard by which the correct outcome can be defined. By observing the ideal conditions for argumentation - the demanding requirements of a rational discourse - one should be able to arrive at the just or correct decision - one that everyone can approve of. The ideal deliberative procedure is constitutive for correctness as long as certain conditions are met. But if correctness is seen as what the actors will support under ideal conditions, it will be difficult to prove the epistemic qualities, i.e., that actual deliberation leads to better and fairer decisions.

⁹ See J. Habermas, 'Discourse Ethics: Notes on a Paradigm of Philosophical Justification', in *Moral Consciousness and Communicative Action*, Cambridge, MA: MIT Press, 1990 [1983]; pp. 68 and 71f; id., 'Rightness versus Truth', p. 241; E. Tugendhat, *Vorlesungen über Ethik*, Frankfurt/Main: Suhrkamp, 1993, p. 170.

Under non-ideal conditions the problem with justifying the epistemic value of deliberation arises. Actual deliberations will not generally meet ideal requirements: they will be marked by, for example, ignorance, asymmetric information, power and strategic action. One may therefore question whether the reasons that can be stated publicly also are good (convincing or correct) reasons.¹¹

In order to defend the epistemic qualities of deliberation, process-independent standards are needed. An epistemic justification of outcomes will in that case become independent of ideal deliberative conditions but dependent on what the deliberation leads to with regard to rational decisions – independently defined. We are therefore faced with the following paradox: if deliberative democracy defends its claims on moral qualities via an ideal process, it cannot justify its claims on epistemic value. On the other hand, if deliberative democracy claims to have epistemic qualities, it can only be defended by standards that not only are process-independent, but also independent of deliberation.¹² How can public deliberation be both moral and epistemic, in the sense that features of the process can justify the outcome at the same time as it has good effects?

This poses a problem for discourse theory, which, as a consequence, cannot totally do away with substantial elements. Procedural-independent standards are needed for securing a fair process.¹³ Substantive morality is reflected in the fact that we do not expect a minority that have lost their case in a fair process to use

¹⁰ “All contents, no matter how fundamental the action norm involved may be, must be made to depend on real discourses (or advocacy discourses conducted as substitutes for them)”, Habermas, ‘Discourse Ethics’, p. 94. Cp. Habermas, ‘Rightness versus Truth’, p. 362.

¹¹ D. Estlund, ‘Making truth safe for democracy’, in D. Copp, J. Hampton and J.R. Roemer, eds, *The Idea of Democracy*, Cambridge: Cambridge University Press, 1993; G.F. Gaus, ‘Reason, Justification and Deliberation: The Epistemic Dimension of Democratic Authority’, in Bohman and Rehg, *Deliberative Democracy*, Cambridge, MA: MIT Press, 1997, p

¹² J. Bohman, ‘Survey Article: The Coming of Age of Deliberative Democracy’, *The Journal of Political Philosophy*, Vol. 6, No. 4, 1998, pp. 400-425; p. 403. Bohman and Rehg, ‘Introduction’, in *Deliberative Democracy*.

¹³ The discourse principle is itself normatively charged – it contains a certain normative content as it ‘explicates the meaning of impartiality in practical judgments’. Habermas, *Between Facts and Norms*, p. 107. It builds on moral premises – on premises of a moral person who possesses certain rights and competences.

only procedural arguments when they complain about the outcome. Procedure-external standards are used when procedures are criticized, justified or reformed. Substantive morality must be brought in to explain that political decisions have a binding power also on those who disagree as well as to explain the deontic commitment that constitutes respect for the law. This commitment hinges on a foundational morality basic to the principle of *equal worth of persons* in modern states, and which forms the background constraints for what can be accepted as a reason within a process of deliberation.¹⁴ According to Charles Larmore *respect for persons* is basic to liberalism as it is that “what impels us to look for a common ground at all”. It is a higher ranking principle as the norm of respect does not have the same sort of validity as the constitutional principles we live by.¹⁵ This I take to be the normative basis for variant B of deliberative democracy as it is on the basis of such a foundational substantive principle that one can account for private freedom as well as for the argument that the reason or will of each participant shall count equally in the political process. The equal worth of persons constitutes the ultimate basis for the justification of force as well as the state form: The coerciveness of the law is intrinsically linked to equal liberties for all – it is to ensure compliance with such that a polity can legitimately use force.

The constituent norm of respect prior to agreement is proceduralized by Rainer Forst who suggests that *the right to justification* is the most basic right of all.¹⁶ In his view this is not a substantive value – a natural right that needs no further justification – but an indication of what justification entails. It reflects the ideals of democracy and the language games that go with it, hence normative standards transcending actual legal procedures. The standard for democratic justification

¹⁴ “...as one cannot accept a reason within that process that some are worth less than others.” J. Cohen, ‘Procedure and Substance in Deliberative Democracy’, in Bohman and Rehg, *Deliberative Democracy*, p. 415.

¹⁵ C. Larmore, ‘The Moral Basis of Political Liberalism’, *Journal of Philosophy*, Vol. 96, No. 12, 1999, pp. 599–625, at p. 608.

¹⁶ R. Forst, ‘Die Rechtfertigung der Gerechtigkeit. Rawls’ Politischer Liberalismus und Habermas’ Diskursteorie in der Diskussion’, in H. Brunkhorst and P. Niesen, eds, *Das Recht der Republik*, Frankfurt/Main: Suhrkamp, 1999; id., ‘The Basic Right to Justification: Toward a Constructivist Conception of Human Rights’, *Constellations*, Vol. 6, 1999, pp. 35–60.

that is at work here is not objective or independent but rather one that constitutes the legitimation principle of democracy. It refers to an idea of a justly organized process that is used in assessing every actual institutionalization of political deliberation and decision-making.¹⁷ This is an interesting approach to the foundational difficulty, but one stuck with the problem of overcoming the feasibility requirement - that is that solutions should also be applicable to the real world. How can we come from the right to justification which implies the basic requirement of *reciprocal and equal justification*, to democratic institutions able to trans-form goals into practical results? Forst's as well as Habermas' democratic principle implies, as Gosepath remarks, that actors have a veto: when they do not agree, nothing will be done.¹⁸ Hence, there is a missing link between democracy as a legitimation and as an organizational principle in discourse theory.

Deliberation and electoral democracy

In discourse theory we are faced with the problem of knowing the quality of reasons in non-ideal situations. If we cannot know whether norms really are in the equal interest of all because the demanding requirements of a rational discourse cannot be approximated - even under ideal conditions it is impossible to include all affected (or their advocates) - there is a case for the participatory reading of the deliberative ideal - version B. This version allows for equal procedures of decision-making that revolve on the actual preferences of the citizens discounting their normative quality. In this perspective, majority vote can be seen a mechanism that make collective action possible when consensus has not been obtained,¹⁹ and constitutional rights, legal protections etc, as control forms to hinder technocracy and paternalism - to block that rationality shall put aside all other concerns. Constitutional barriers prevent majoritarian tyranny and relapse into ethnocentrism and that political power can be camouflaged as rationality.

¹⁷R. Forst, *Ratio Juris*, Vol. 14, No. 4, 2001, 'The Rule of Reasons', pp. 373-374.

¹⁸S. Gosepath, 'Democracy out of Reason. Comment on Rainer Forst's "The rule of Reasons"', *Ratio Juris*, Vol. 14, No. 4, 2001, pp. 379-389., cp. Th. Christiano *The Rule of the Many*. p.37ff.

Only the possibility to block and to revise on the basis of a popularly enacted government can redeem the claim of moral value of democratic procedures. There can be no democracy without government organized by egalitarian procedures.²⁰ Hence the participatory reading of the deliberative principle renders many institutional and even aggregative arrangements of representative democracy justifiable.²¹

With regard to the majority principle Habermas understands it epistemically. It represents a *conditional agreement* internally related to truth: the relevant decisions claim to be correct in relation to actual circumstances and procedural norms. Minorities give licence to the majority on behalf of their own standpoints, because they have the opportunity to work to gain support for their standpoint and thus become a majority at the next crossroads. Votes therefore represent only *temporary stops* in the continuous discussion about what should be done.²² Such a procedural interpretation of the majority principle makes it consistent with the concept of freedom when not applied to irreversible decisions. In this way discourse theory allows the individual to submit to laws that are not correct.

It can be objected, however, that in most cases it is unclear what is a correct or optimal decision, that the level of conflict is too high for there to be any prospects of consensus. The truth relation is therefore problematic.²³ On this background we may ask whether the majority principle is not in itself a respectable device. According to Rousseau, the majority principle is conditioned by a general right to vote, which is a reason for accepting it.²⁴ Democracy has a

¹⁹ Majority vote is a way to prevent that the unanimity requirement of a rational consensus giving the right of veto to 'quarrellers' as well, shall prevent the reaching of collective decisions.

²⁰ H. Brunkhorst, 'A polity without a state? European constitutionalism between evolution and revolution', in E.O. Eriksen, J.E. Fossum and A.J. Menéndez, eds, *Developing a Constitution for Europe*, London: Routledge, 2004, p. 97

²¹ Nino, *The Constitution of Deliberative Democracy*, p. 128.

²² Habermas, *Between Facts and Norms*, p. 179.

²³ T. McCarthy, 'Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue', *Ethics*, Vol. 105, No. 1, 1994, pp. 44-63; id., 'Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions', *Cardozo Law Review*, Vol. 17, 1996, pp. 1083-1126; cf. G. Warnke, 'Legitimacy and Consensus', *Philosophy and Social Criticism*, Vol. 22, No. 2, 1996, pp. 67-83, at p. 75ff.

²⁴ J.-J. Rousseau, *The Social Contract*, Oxford: Oxford University Press, 1994 [1762].

numeric dimension because it consists of individuals that can be counted, which gives the majority's opinion a certain weight in itself. The interests of the majority must not simply be preferred to those of the minority, as Tocqueville contended,²⁵ because when more votes support a particular solution, "we can assume that interests of more people are satisfied".²⁶ Another point here is that the demand for unanimity in reality upset the principle of equality, because it pays undue attention to special interests and idiosyncratic arguments. Majority decisions are regarded as more legitimate, because they treat everyone in the same way.²⁷ The majority principle respects the formal equality of the citizens, and thus has value in itself reflecting the moral respect for persons.²⁸

Furthermore, as laws are not merely decided, but are sought validated through public deliberation, the legitimacy of majority decisions rests on the substantial arguments put forward in their favour. This is why the opposition does not take to the streets.²⁹ As Dewey reminded us, majority vote is never merely majority vote: it is preceded by argumentation and is justified with reasons that are found convincing for at least a section of the citizenry.³⁰ A reason is only convincing as long as it is somebody's reason but it is the democratic process of law making that provide us with a basis for believing that there are reasons for

²⁵ A. de Tocqueville, *Democracy in America*, New York: Harper & Row, 1969 [1835-40].

²⁶ Carlos S. Nino, *The Constitution of Deliberative Democracy*, pp. 127-8. He draws on Condorcet's theorem saying that if each member of a decision making body is prone to adopt the right decision, the probability that the decision is right also increases as the number of members increases. See also S. Feld and B. Grofman 'Rousseau's General Will: A Condorcetian Perspective'. *American Political Science Review* 82 (1988), pp. 567-576.

²⁷ D. Ingram, 'The Limits and Possibilities of Communicative Ethics for Democratic Theory', *Political Theory*, Vol. 21, No. 2, 1993, pp. 294-321, at p. 302, Th. Christiano *The Rule of the Many*. p. 88

²⁸ But if the majority principle can be justified in itself, if it is found to have independent legitimizing power, the freedom of the individual is threatened. In that case, the right to have a say is no guarantee against unjust encroachments on the freedom sphere of the citizens. A. Engländer, 'Grundrechte als Kompensation diskursethischer Defizite?', *Archiv für Rechts- und Sozialphilosophie Sonderdruck*, Vol. 81, 1995, pp. 482-495, at p. 494.

²⁹ And this is why the inertia which often results, and which public choice theory predicts, when unanimity is required can be avoided. Discourse theory envisages a shift in blocking standpoints due to the force of the better argument.

³⁰ J. Dewey, *The Public and its Problems*, Chicago: Gateways Books, 1927, pp. 53 and 207.

them.³¹ Hence there are agreements short of consensus that claim to be legitimate as they rest on reasons that have considerably weight.

Working agreement

Rational consensuses rest on mutual convictions, according to Habermas. Due to the impar-tiality constraint of practical discourses participants will converge in their recognition of the same validity claim and have *identical reasons* for observing an agreement. Conversely, *a compromise* can be seen as an outcome of strategic bargaining processes and which is indirectly legitimated through the procedures that set the terms of a fair contest.³² Bargaining may be depicted as the employment of credible threats and warnings in order to achieve given ends. In this case the parties will have *different reasons* for complying and will find the solution sub-optimal with regard to their initial preferences.

The consensus requirement of discourse theory is very demanding and one that does not necessarily follow from compliance with the proper rules of argumentation. Actors may remain at odds with each other even after a rational discourse. According to Rawls, there are un-avoidable limits to a qualified agreement because of “the burden of judgment”, viz., obstacles to agreement that arise even when the actors reason as rationally as possible.³³ Such obstacles may be that relevant data are contradictory, that the actors weigh different views differently, that many concepts are approximate, that experience and personal biography affect the per-ception of what is seen as correct or good, and that there may be different but equally strong normative arguments in the same case; and even when people agree on the notion of justice they may “still be at odds, since they affirm different principles and standards for deciding those matters”.³⁴

Consequently, in addition to the problems caused by weakness of will, the indeterminacy of norms, myopia and bias, different rules for deliberation, and

³¹ J. Bohman, *Public Deliberation. Pluralism, Complexity, and Democracy*, Cambridge, MA: MIT Press, 1996, p. 197; and Nino, *The Constitution of Deliberative Democracy*, p.135.

³² Habermas, *Between Facts and Norms*, p. 399.

³³ J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, p. 54.

complex moral standards, there are inherent cognitive limits to rational consensus. Even under ideal conditions a consensus may not occur. Because of this, one should not be epistemically optimistic when it comes to the prospects for political consensus in modern complex and pluralist societies.³⁵ Nevertheless the basic procedure through which conflicts and ambiguities are handled and pluralism accommodated must in itself be seen to rest on some principles – be them the rules of communication, the liberal principle of toleration or the minimal deontological core of constitutions – that command moral respect and that all could, in principle, agree to with identical reasons. Only conclusions that are based on the same premises can claim validity and establish the requisite stability of political orders.

However, in a context *practico-politico* there are various degrees of agreement even when the appropriate rules of deliberation are respected. A rational debate may not lead to a shift in opinions and beliefs but may help to clarify arguments and challenge the reasons provided. Higher degrees of understanding may be reached when the deeper convictions and reasons are being spelled out. The parties may recognize that they have different evaluations and that there is no easy way out if they are to continue living peacefully together. In such cases the parties make concessions and opt for a solution that is, after all, sensible and reasonable – it reflects notions of justice in a pluralistic context.

My point is that an outcome might fall short of a rational consensus but still be the result of a deliberative process based on inter-subjectively justifiable reasons. In line with this, one may think of the possibility of reaching an in-between consensus, an agreement which testifies to some movements of positions

³⁴ Ibid., p. 14.

³⁵ “The precise characterization of the acceptable reasons, and their appropriate weight will vary across views. For that reason, even an ideal deliberative procedure will not, in general produce consensus.” Cohen, ‘Procedure and Substance’, p. 414. Consequently, there are various degrees of agreement including discursive disagreement and reasonable disagreement as well as moral compromises and deliberative majorities. See Gutmann and Thompson, *Democracy and Disagreement*; H. Grimen, ‘Consensus and Normative Validity’, *Inquiry*, Vol. 40, 1997, pp. 47–62; Bohman, *Public Deliberation*; J. Valadez, *Deliberative democracy, Political Legitimacy and Self-determination in Multicultural Societies*, Boulder, CO: Westview, 2001.

and normative learning, which does not result in a rational consensus, but in a *working agreement*. Such a conclusion rests on different, but reasonable and mutually acceptable grounds. It is achievable among reasonable persons, who acts on the basis of in-sight in the burden of judgment and justice.

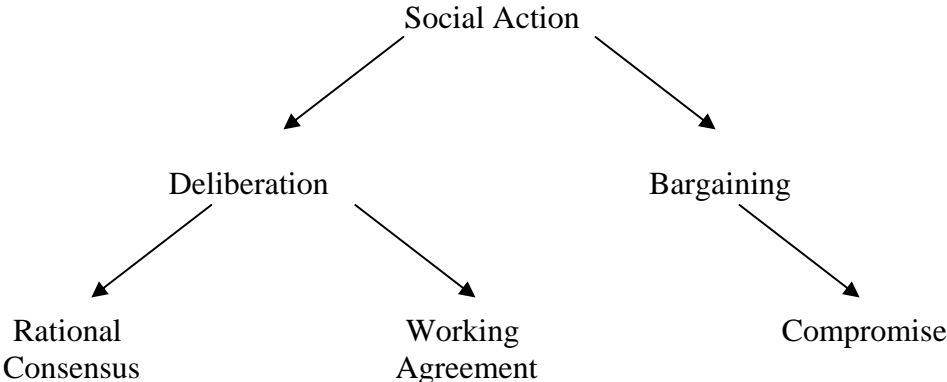
Deliberation may, short of fulfilling the demanding requirements of a rational consensus, function, due to its epistemic merit, to increase the level of knowledge and judgment in such a way that different reasons become understandable and mutually acceptable; hence establishing a working agreement, which denotes an agreement that is based on *reasonable reasons*. Such agreements are, so to say, incompletely theorized³⁶ as they depict agreements at a certain level leaving the deeper, principled questions un-clarified. They are not as stable as rational consensuses, as they reveal different legitimating reasons based on different world views, descriptions of the situation and concepts of justice or correctness. With regard to justice-pluralism, we may think of the situations where actors have to deal with disagreement about rights and disagree about which distributive principle – such as merit, desert, equality, needs – should be applied. A working agreement, thus, differs from a pure convergence of interests and also from a *modus vivendi* resting on mutual respect for conflicting interests, as it is stabilized with normative arguments – with non-egoistic justifications. Besides it is more than an overlapping consensus based on the method of avoidance – the exclusion of unreasonable comprehensive world views – and the convergence of different though convergent *non-public reasons*.³⁷ Working agreements builds on the public use of reason which, on the basis of existent plural value systems, manages to establish a cooperative scheme that compels compliance and support. Actors are

³⁶ C.R. Sunstein, 'Incompletely Theorized Agreements', *Harvard Law Review*, Vol. 108, 1995, pp. 17-33.

³⁷ Rawls, *Political Liberalism*, p. 151. J. Habermas, 'Reasonable versus "true," or the morality of world views', in *The Inclusion of the Other: Studies in Political Theory*, Cambridge, MA: MIT PRESS, pp. 85-86; cp. Habermas 'Reconciliation Through the Public use of Reason', *Journal of Philosophy*, Vol. 92, No. 3, 1995, pp. 109-131; J. Rawls, 'Reply to Habermas', *Journal of Philosophy*, Vol. 92, No. 3, 1995, pp 132-180. Rainer Forst argues that Rawls rather conceives of the private use of public reason in public affairs than of the public use of reason. Forst, *Kontexte der Gerechtigkeit*. Frankfurt/Main: Suhrkamp, 1994, p. 156.

swayed through the idealizing presuppositions of communication and the role of conversational constraints to agree without being entirely convinced. The result may be seen as *a regime, a doctrine, a policy* based on common norms and entrenched rules, and as something that does not merely protect us but also represent a Pareto improvement. It reflects a binding structure of common commitments, and one that may be negotiated and overrun in the future, but for the moment it requests respect.

Figure 1: Typology of agreements



Such a category is needed not only for normative but also for explanatory purposes, viz. in order to fill in the lacuna between stricken compromises based on strategic bargaining - modelled by game theory - and communicatively achieved rational consensuses. This concept-ualization concedes too much to rational choice in analyzing political behaviour and does not take heed of the way political action is intrinsically linked to justification - in whatever form. Habermas has contributed to filling in this lacuna, (meeting the criticism of Schnädelbach) by introducing the concept of *weak communicative action* based on the decoupling of under-standing and agreement,³⁸ contending that one should distinguish between understanding (*Verständigung*) and rational consensus (*Einverständnis*). The

³⁸ J. Habermas, 'Some Further Clarifications of the Concept of Communicative Rationality', in *On the Pragmatics of Communication*, Cambridge, MA: MIT Press, 1998.

latter depicts a consensus, as mentioned, which arises when actors can accept a validity claim for *the same* reasons. *Understanding*, in a more narrow sense, is what we have when one actor is able to see that another actor, *on the basis of her specific preferences* and under given circumstances, may have good reasons to act in a particular way, without the former actor, on the basis of *his* own preferences, being willing to make those reasons his own. We may, thus, distinguish between actor-independent and actor-relative justifications of action, where the former category provides a basis for a stronger form of co-understanding than the latter does. There is a distinction as to what types of validity claims are activated in the two cases. The only requirements for *understanding* – for weak communicative action – to come about are that a hearer believes that the speaker

- a) has an adequate understanding of the world, and
- b) actually expresses his true beliefs and opinions.

In other words, the speaker must meet the validity claims of *truth* and *truthfulness* but not of *rightness* (which is basic to the strong version of communicative action). The justificatory element is lacking, hence this is an unstable solution.³⁹ Working agreements, in contrast, are based on normative notions of rightness – on reasons that are inter-subjectively justifiable and hence respectable. Working agreements rather than rational consensuses are what can be expected from deliberation according to variant B of the deliberative theory. How can the reform process of the EU be accounted for in this perspective.

³⁹ See E.O. Eriksen and J. Weigård, *Understanding Habermas*, London, New York: Continuum, 2003, p. 42.

The EU in motion

The EU has increasingly taken measures to rectify the democratic deficiencies through a decades-long process in which EU institutions have moved the EU into a post-national polity aspiring to *direct legitimacy*.

Democratization as Parliamentarization

The direction of the reform process as well as the outcome subscribes to the standard notion of democracy entrenched in the nation states and the pan European democratic culture. This is seen first of all in the Charter of Fundamental Rights (of 2000) which is the most explicit commitment as of yet to a full blown political union founded on democracy, rule of law and human rights – a rights-based citizens' Union.⁴⁰ It was made by a political body – a convention – set up to codify the fundamental rights to be protected by the EU and it managed to work without major difficulties and produce a consensual result. The *Convention method* is based on broad participation – a majority of parliamentarians acting on an open mandate – on public debate, on arguing rather than bargaining. This method adopted in 1999 by the Union for establishing the Charter offered a blueprint for an alternative mode of Treaty change which, after the Nice fiasco, became the role model for the so-called Laeken Convention of 2002–2003. Also this Convention had a distinctive deliberative mark, as opposed to the hitherto closed, secretive and executive-driven intergovernmental mode of treaty change. It succeeded in establishing a *draft Constitutional Treaty* (CT) which was signed by the Council 29 October 2004. The CT has been ratified by 13 states, but were rejected in two referenda – in France and Netherlands June 2005 – and the European leaders resolved that there should be a 'reflection break' and postponed the time for the final ratification.

The CT contains measures aimed at mending the EU's legitimacy gap. This includes the weakening of the pillars, the incorporation of the Charter of

Fundamental Rights, the strengthening of the EP and of the national parliaments, the right to petition, the generalization of co-decision and qualified majority voting as decision-making procedures. Unanimity among member states has been turned into a special rule only applicable to certain policy-fields such as social, tax, foreign and security policy. Further, the CT adopts a constitutional language for legislation as it changes from the terminology of regulations and directives to *laws and frameworks law* corresponding to national practice (Article I-33).

Protection of individual rights and constraints on state autonomy are central features of the European constitutional development. This is reflected in the early decisions of the ECJ on direct effect and supremacy, in the conditionality clause, in gender-equality and citizenship-rights policies, and in particular the Charter which adds to the fundamental rights of Union citizens by expressing the principles of humanism and democracy. The individual is liberated from the confines of the nation state - respect for the individual forms the normative basis of the European integration process.

The ECJ has been a driving force in the political development of the EU and has independently strengthened the role of the European Parliament (EP). It has subjected the EP's decisions to substantive judicial review and thus has strengthened and authorized the view of it as an autonomous political body within the Union. Initially the EP was a consultative body - a talk shop - with very limited powers and made up foremost of representatives of national parliaments. Over time, and in particular after the introduction of direct election of MEPs in 1979, its decision-making powers have grown. The EP increased its status and power with the Single European Act, which marked a watershed as the cooperation procedure was introduced, then reinforced by the Maastricht and Amsterdam Treaty from a secondary institution to an important actor in law making.⁴¹ It changed from being a Parliament in the name to act like one. It has

⁴⁰ E.O. Eriksen, J.E. Fossum and A.J. Menéndez, eds, *The Chartering of Europe: The Charter of Fundamental Rights and its Constitutional Implications*, Baden Baden: Nomos, 2003.

⁴¹ B. Rittberger, *Building Europe's Parliament*, Oxford: Oxford University Press, 2005, p. 177.

achieved co-decision making power with the Council in many areas and is increasingly curtailing the power of the Commission.

The Convention to a large degree embraced the parliamentary model of democratic legitimacy - the parliament is mentioned first of the EU institutions in the CT. Even though the EP is not an agenda setter and its power is severely restricted compared to the powers of national parliaments, the move towards an ordinary model of representative democracy based on the division of powers is striking. It is the parliamentarian form of democracy - at the national and European level - that has carried the day in the reform process. To put it bluntly, democratizing the Union means its parliamentarization.

By adopting the Convention Method and the constitutional language, the EU irrevocably has entered the constitutional terrain - hence based its legitimacy on the democratic principle, on direct links to the citizens of Europe. Parliamentarians were in majority in the Convention and the people are called upon in the ratification process. This testifies to the model power of the democratic Rechtsstaat and the parliamentary principle. They represent the codes and categories for proponents as well as opponents, for critique as well as justification, of the European integration process and the structure in place. They so to say establish the conditions for comprehension and acceptability, and hence for deliberative politics.

A working agreement?

Deliberative theory is brought to the fore because of its aptitude to explain integration - the ability of concerted action - when there are no European demos, no European collective identity and no common language - when the EU was a very 'incomplete' constitutional arrangement. making. Deliberation compels actors to verbalize and justify their plans of action in cooperative settings and to provide *reasons* for their actions. It may result in a consensus, in a working agreement, in a conflict or prepare for bargaining and voting. The Constitutional Treaty represents an instructive example of a deliberative process shaping a

working agreement: The quality of the Convention method in terms of openness, broad participation, lengthy discussions, critical opposition etc., was conducive to an agreement that was more than a compromise but less than a rational consensus. The participants have managed to reach an agreement about the EU's 'constitutional' structure *without* making it into a unified political order.

The members of the Convention clearly had different reasons for complying with the end result but they did not see it merely as the best possible outcome given present constraints. Some saw it as a move towards a more democratic Europe, as did the federalists. Realists and 'technocrats' saw it as a necessary instrument for handling cumbersome decision-making processes better. A third group - neo-liberals and many of the 'euro-sceptics' - saw it as the best alternative to the status quo. Federalists, realists, and Euro-sceptics, thus, had different reasons for accepting the Draft. Accordingly, conservatives, socialists, greens and liberals in the EP could all find reasons to defend the Draft in their respective constituencies, but the agreement is not a simple compromise, viz., a stricken bargain between the contracting parties. This is so because the parties 'learned' and established a new basis for handling European affairs through the *Convention process*. Deliberation had not only epistemic merit and value as a constraining factor, but in addition, served as a shaper and transformer of opinions. Some actors changed opinions during the process - some members that were reluctant and even hostile to the 'constitutional project' at the outset became active supporters.⁴² In the Convention there were 'interest maximizers', 'radicals', and 'dialecticians': "The big interests presented their positions (usually in terms of 'public interest') without, in most cases, underlining their agreement or disagreement with other opinions; the dialecticians emphasized these lines of agreement or conflict; while the radicals denounced - and maybe thereby paradoxically strengthened - the pro-European consensus; the facilitators then

⁴² Cp. J.E. Fossum, 'Contemporary European Constitution-making: Constrained or Reflexive?', in Eriksen, *Making the European Polity*. J.P. Olsen, 'Survey Article: Unity, Diversity and Democratic Institutions: Lessons from the European Union', *Journal of Political Philosophy*, Vol. 12, No. 4, 2004, pp. 461-495.

tried to reduce the ‘cognitive dissonance’ through explanations”.⁴³ The process of making the Constitutional Treaty, then, was not a simple tug of war of interstate bargaining designating that parties failed to get what they wanted and then struck a deal that was better than no deal at all. Rather, this was a process where deliberation constrained the power-play of the great powers and, as has been revealed from participants’ own accounts, from interviews with participants and from numerous analyses, this was a process that improved members’ information on and judgments of the issues under debate. The final product represents Pareto improvements in the sense that the competences and capabilities of the Union were extended.

Denoting the Draft as a working agreement helps explain why the EU has come out with a partial agreement only - the Constitutional Treaty is contested as it embodies widely different conceptions of the Union. But why did the actors at all manage to agree - on what terms did they at all manage to handle their differences? The core principles that animate the actors’ deliberations are the well-known deontological principles of democracy, rule of law, and human rights as is reflected in the consensus over the Charter of Fundamental Rights – now Part II of the CT. The process clearly revealed that all the actors share these core codes of legitimate rule but they *disagree* on how they are to be specified and entrenched in institutional form. In other words the EU reflects the still ongoing search for the most appropriate entrenchment of such consensual principles in organizational and constitutional form.

⁴³ P. Magnette, ‘Deliberation or bargaining? Coping with the constitutional conflicts in the Convention on the Future of Europe’, in Eriksen et al. *Developing a Constitution for Europe*, p. 220.

Democratic legitimacy

According to variant B of deliberative democracy there is no democracy without egalitarian procedures of law making, because only then can the citizens effectively influence the laws that affect them, determine whether the reasons provided are good enough, and possess the power to sanction the power holders. Even though deliberation increases the likelihood that losers comply with majoritarian decisions thanks to its epistemic merits, it cannot replace institutionalized forms of control, including majority vote and veto-positions, and participation, that are equally open to all. From the vantage point of this model, the most that can be expected with regard to collective will-formation are decisions based on reasonable - mutually justifiable - reasons. The principle of democracy in this reading, then, does not assert that the laws should meet with the rational assent of all, but rather that they are legitimate when they are the outcome of an open and fair (legally institutionalized) process and can be defended against criticism and accepted with reasonable reasons.⁴⁴ However, as the ultimate test of the legitimacy of the law-making procedure, the rational consensus unavoidably provides the standard, because the reasons must be convincing in the same manner for the order to be stable, and this can only be accomplished by establishing what is in the equal interest of all. It is such that can test the substantive moral standards constitutive of B. It is a rather thin normative basis for this as it must be based only on what human beings have in common, viz., their right to freedom, equality, dignity, democracy and the like.⁴⁵

Version A of the deliberative principle should therefore be reserved for the procedure of testing the core basic norms of the political order. That is, in a discourse on the constitutional essentials under idealized conditions, actors would be able to reach a rational consensus on what is in the equal interest of all the affected parties. By abstracting from pressing con-straints, by discussing typical

⁴⁴ See Habermas, *Between Facts and Norms*, p. 110, fn. 14; cp. Bohman, *Public Deliberation*, p. 183.

⁴⁵ In this sense the discourse principle expresses the moral individualism of modernity that is constitutive of the participatory model – version B.

situations and anticipate future states of norm application actors would be able to test the legitimacy of a norm in a coherent manner and come to a rational agreement. This does not imply infallibility, according to Habermas, as both moral justification discourses and pragmatist application discourses are subject to a *dual fallibilist proviso*: In retrospect we can see that we were mistaken about the ‘presuppositions of argumentation’ as well as have failed to anticipate relevant empirical circumstances.⁴⁶ As far as such makes up the modern form of self-reflexivity the citizens would be able to think in worst-case scenarios and institutionalize safety mechanisms, constitutional barriers, against the putative hubris of communicative rationality.

Conclusion

According to variant B of deliberative democracy the prospects for a parliamentary-based democracy in Europe need not be bleak as it is the trust in the procedures of representative democracy and will-formation processes that bears the burden of legitimation, not demos premised on an established collective identity. It is the codes and categories of the democratic Rechtsstaat that makes possible the contestation over the proper institutionalization of government beyond the nation state and it is the parliamentarian form of democracy that has carried the day. On this background one may question the minimal democratic constitution suggested by Habermas, where the states retain the law-making power through the Council - ‘the Chamber of Nations’, and where indirect legitimacy is what continues to be the case.

The unity of law is (still) missing but the protracted constitutionalization processes, that can be seen to have been going on since the very inception of European integration - from the Paris Treaty of 1952 and onwards culminating with the Constitutional Convention 2002-2003 - direct us to the fact that the reform process of the Union becomes comprehensible only when seen in light of a variant of standard representational democracy. The normative basis of the

⁴⁶ Habermas, ‘Rightness versus Truth’, p. 258.

integration project is respect for human rights and democracy with the parliamentary principle as a vital institutional component. Thus, the question regarding whether it is the quality of the debate and the presumption that the outcomes are rational or fair that bears the burden of justification, or whether it is the accountable and popularly enacted form of government that we know from the state level that is the main container of democratic legitimacy at the European level, we may conclude that the EU has been moving towards meeting the latter claim.