

**Legitimate to Whom?
Comparing National Perspectives on the
Legitimacy of the European Union**

By

Fabian Felix Richter

PhD Dissertation
Department of Government
The London School of Economics and Political Science
University of London

May 2000

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Abstract

The thesis compares national perspectives on the legitimacy of the European Union. It develops a definition of legitimacy as a dual concept. Formal legitimacy describes the constitutional nature of a political system, whereas felt legitimacy is defined as the aggregate citizen beliefs about the legitimacy of their political system. Legitimacy is important for the EU because it is a necessary condition for its efficacy and long-term stability. The EU's need for legitimacy also increases in proportion to the degree of integration. The legitimacy of the EU is unusual in that it varies among the member state from whose perspective it is evaluated. That is because the EU's legitimacy is contingent on the constitutional structure and national identity of its member states. An empirical analysis of the legitimacy of the EU from the perspective of Britain and Germany reveals that the EU suffers from a legitimacy deficit relative to the British and German political systems. The nature and severity of the deficit depend on country-specific factors, but the single most significant cause from both countries' perspective is the lack of a European identity. Europeans do not regard themselves as one political community, and they feel limited attachment or trust towards each other. This diagnosis implies that the legitimacy deficit can only be remedied either by creating a European identity or by reducing the need for its creation. The legitimising potential of these two strategies differs between Britain and Germany, reflecting country-specific variations in their perspective on the legitimacy deficit of the EU. While the legitimacy deficit can in principle be resolved, the varying effectiveness of these two strategies, and the reluctance of political decision-makers in the EU to pursue either strategy, make an effective resolution of the legitimacy deficit unlikely to occur in the foreseeable future.

Acknowledgements

In writing this thesis I have received the support and advice of a number of people to whom I owe a particular debt of gratitude.

I am most indebted to my two supervisors. Klaus Goetz and John Barnes were always generous with their time. Their guidance and support provided important intellectual insights and invaluable advice. Robert Worcester (MORI) generously provided me with empirical data and insightful comments. Rodney Barker gave very helpful advice and read a draft of the theoretical chapter on legitimacy. Alan Beattie and Carol Harlow also provided useful comments at various stages. Many stimulating discussions with Robert Jackson, MP have generated additional ideas for writing this thesis.

Many friends helped by reading and commenting on my work as it developed: Roger Doig, Steve John, Martin Lodge, Christian Schuller, Marit Sjøvaag and Kathrin Wurziger. Particular thanks are due to Marc Arnold who read a final draft of the thesis. Most of all, the love and support of my family has made writing this thesis more bearable than it would otherwise have been.

My research was undertaken at the British Library of Political and Economic Science, the University of London Library at Senate House, the Zentralarchiv für Empirische Sozialforschung an der Universität zu Köln and the Technische Universität Darmstadt in Germany. My thanks are due to the staff of these libraries for their kindness and professionalism.

Responsibility for errors of fact or interpretation is mine alone.

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Glossary

| | |
|----------------|--|
| BL: | Basic Law (German Constitution) |
| Bundestag: | Lower House of German Parliament |
| CAP: | Common Agricultural Policy |
| CDU: | German Christian Democratic Party |
| CFSP: | Common Foreign and Security Policy |
| CoR: | Committee of the Regions |
| COREPER: | Committee of Permanent Representatives (at the EU) |
| COSAC: | Conference of European Affairs Committees of National Parliaments |
| CSU: | Bavarian Sister Party of the CDU |
| EB: | Eurobarometer |
| EC: | European Communities |
| ECA: | European Court of Auditors |
| ECB: | European Central Bank |
| ECHR: | European Court of Human Rights |
| ECJ: | European Court of Justice |
| ECOSOC: | Economic and Social Committee |
| EMU: | European Monetary Union |
| EP: | European Parliament |
| ERM: | Exchange Rate Mechanism |
| EU: | European Union |
| EURO: | European Single Currency |
| FCC: | Federal Constitutional Court (of Germany) |
| F.D.P.: | German Liberal Party |
| FRG: | Federal Republic of Germany |
| GDR: | German Democratic Republic |
| HC: | House of Commons (Britain) |
| HL: | House of Lords (Britain) |
| HM Government: | Her Majesty's Government (Britain) |
| IGC: | Intergovernmental Conference |
| IR: | International Relations |

| | |
|---------|--|
| JHA: | Justice and Home Affairs |
| Länder: | Subnational German States |
| MEP: | Member of the European Parliament |
| MP: | Member of Parliament (Britain and Germany) |
| NATO: | North Atlantic Treaty Organisation |
| PDS: | German Socialist Party |
| QMV: | Qualified Majority Voting |
| RAF: | Red Army Faction (German Terrorist Organisation) |
| SEA: | Single European Act |
| SEM: | Single European Market |
| SPD: | German Social Democratic Party |
| TA: | Treaty of Amsterdam |
| TEU: | Treaty on European Union |
| UK: | United Kingdom |
| UN: | United Nations |
| US: | United States (of America) |
| WEU: | West European Union |

Introduction

0.1 The Research Questions

This thesis deals with two central research questions:

Does the European Union suffer from a legitimacy deficit, and if so, what is its nature?

If the European Union suffers from a legitimacy deficit, is it susceptible to a remedy, and what form could a remedy take?

This introductory chapter sets the general context for answering these questions. It defines key terms and concepts and explains the methodology used in the thesis. The introduction explains the general importance of legitimacy to political systems and argues that the EU is itself a political system. That makes legitimacy relevant to the EU, and it makes a potential legitimacy deficit a problem in need of resolution. Finally, the introduction briefly outlines the structure of the following chapters.

0.2 The Importance of Legitimacy

Legitimacy matters. It is a quality of *political systems* which they can possess to varying degrees.¹ According to Easton's widely used definition which is adopted here, a political system is that part of a wider social system through which values are authoritatively allocated for a society and accepted as binding.² In addition, a political system is defined by a stable and clearly defined set of institutions for collective decision-making, their use by citizens and social groups to achieve political aims, and the continuous interaction of political demands and political outputs.³

¹ David Easton: A Systems Analysis of Political Life, (Chicago: University of Chicago Press, 1965), p.286

² Ibid., pp.21-25

³ Simon Hix: The Political System of the European Union, (London: Macmillan, 1999), p.2

The significance of legitimacy as a concept to political science becomes apparent from an investigation of its definition.⁴ In general terms, legitimacy can be defined as a political relationship between a political system and its members.⁵ Legitimacy is concerned with the right of a political system or its designated representatives, to exercise political power. This right to rule is normatively justified with reference to a particular set of reasons and values, or *legitimising principles*.

These historically and socially variable legitimising principles include norms about the valid sources of authority, the qualification of representatives to exercise that authority (election, heredity, etc.) and the ends that authority should serve.⁶ Legitimising principles provide a standard against which the rightfulness of a political system and its exercise of political power can be assessed. The legitimate exercise of power is therefore synonymous with the rightful exercise of power. It follows that legitimacy has two dimensions. It is claimed by political systems as a justification for their powers, but it also manifests itself in public beliefs about the rightfulness of that claim.⁷ *Legitimation* describes the activity of legitimising the powers of a political system. *Legitimacy* is the product of successful legitimation.

By providing the normative underpinning for justifying political systems legitimacy is one of their most important qualities. A legitimate political system commands popular support, and it can rely on public acceptance of the political commands it issues. Such *acceptance* of the right to rule is qualitatively different from mere *obedience* to a political system and *compliance* with its rules and commands. Obedience is merely a minimal condition for a political system to exist.

In absence of a sufficient degree of legitimacy, political systems may secure obedience by relying on public acquiescence and inertia. Ultimately, coercion remains the only instrument for ensuring public obedience and hence the continued existence of a political system. But even coercing citizens into accepting the exercise of power

⁴ A more detailed *theory* of legitimacy is presented in Chapter 2.

⁵ The discussion is therefore confined to *political* legitimacy and excludes application of the term to other forms of social organisation or structure, such as the economic system or instances of religious domination. See: Rodney Barker: Political Legitimacy and the State, (Oxford: Clarendon Press, 1990), p.15, 20

⁶ David Beetham: The Legitimation of Power, (London: Macmillan, 1991), p.21

⁷ These two dimensions of legitimacy are also identified by Weber, see: Barker (90): op. cit., p.59

by their government may in the end be insufficient to prevent a system from collapsing, as the history of many of the world's political dictatorships has demonstrated.⁸ It will at the very least seriously damage the effectiveness with which the powers of the political system are exercised.⁹ In Easton's terminology, the political system will be *stressed* because the operation of its two defining variables, the allocation of values for a society and society's compliance with them, is endangered.¹⁰ The possession of legitimacy helps prevent *system stress*, since it reduces the cost of governing for a political system by maximising public support and minimising public resistance.

*"A member [of a political system] may be willing to obey the authorities and conform to the requirements of the regime for many different reasons. But the most stable support will derive from the conviction on the part of the member that it is right and proper for him to accept and obey the authorities and abide by the requirements of the regime."*¹¹

The terms "support" and "legitimacy" are therefore not equivalent, and legitimacy is not merely inferred from obedience, as some critics maintain.¹² In a legitimate political system, obedience to the system is morally sanctioned and accepted by the public.¹³ Support for the political system arises from the belief that it conforms to personally held moral principles about what is right and proper in the political sphere. In other words, legitimacy constitutes the normative grounds for people's political obedience and support of their political system.¹⁴ Coercion or habitual acquiescence are inadequate substitutes for this function of legitimacy. This is why, historically, nearly all political systems have sought to legitimise themselves. By so doing they have greatly facilitated their efficient operation and long-term stability.¹⁵

⁸ Beetham (91), *op. cit.*, p.26

⁹ Easton (65), *op. cit.*, p.279

¹⁰ *Ibid.*, p.24

¹¹ *Ibid.*, p.278

¹² See: Rodney Barker: "Legitimacy: The Identity of the Accused", *Political Studies*, vol.42, no.1, 1994, p.101

¹³ Barker (90), *op. cit.*, p.33ff

¹⁴ Beetham (91), *op. cit.*, p.26

¹⁵ Barker (90), *op. cit.*, p.14

These considerations suggest that, with regard to the order, stability and effective functioning of political systems, legitimacy is an independent variable.¹⁶ Although other variables, such as organisational resources, coercion and external macro factors (for example wars), also affect the stability of a political system, legitimacy represents a crucial factor.¹⁷ Legitimacy is a necessary, albeit not a sufficient condition, for the long-term viability and effectiveness of political systems. That is no doubt one of the reasons why “the identification of the conditions which justify government and require obedience has always been at the centre of political enquiry.”¹⁸

0.3 The Applicability of Legitimacy to the EU¹⁹

Political legitimacy is conventionally discussed with respect to states, but the EU is not a state in the Weberian sense of having a monopoly over the legitimate use of coercion.²⁰ Some scholars have therefore questioned the relevance and applicability of the notion of legitimacy to the EU. According to some versions of the “new governance” school of EU studies, many of the categories of political theory, such as legitimacy and democracy, are implicitly premised on the model of the state. The EU not only lacks statehood, it constitutes a unique system of non-hierarchical, regulatory and deliberative governance. The EU is, in other words, a political system *sui generis* which cannot be easily compared with other, national political systems.²¹ Does such a claim disable a comparative analysis of the legitimacy of the EU? This thesis argues that it does not.

To begin with, statehood can express itself in different forms. Caporaso, for instance classifies the EU as an “international state”, but there is no need to engage into

¹⁶ Beetham (91), *op. cit.*, p.26. However, for the first five chapters this thesis will focus on legitimacy as a dependent variable, since they are mainly concerned with the various factors causally responsible for different degrees of legitimacy.

¹⁷ *Ibid.*, p.33f

¹⁸ Barker (90), *op. cit.*, p.4

¹⁹ To avoid terminological confusion, the acronym EU is used throughout the thesis, although the discussion concentrates on the first pillar (the EC). The term EC is only used for references which clearly pre-date the creation of the EU in 1992.

²⁰ Simon Hix: “The Study of the European Union II: The “New Governance” Agenda and its Rival”, *Journal of European Public Policy*, vol.5, no.1, 1998, p.41

²¹ For a review, and rejection, of these arguments see: *Ibid.*, pp.38-65

semantic redefinitions of statehood.²² The EU can fulfil many of the traditional functions of government without the classic apparatus of a state.²³ And it need not be a *state* to fit the definition of a *political system* offered above: its political outputs affect the authoritative allocation of values in European society, it has a clearly defined set of institutions and an increasing number of social and political groups make demands on the system and interact with it.²⁴ European integration has produced a full-blown political system not *inherently* different to any other democratic political system.²⁵ The EU exercises executive, legislative and judicial powers which pose questions of freedom, power, democracy and legitimacy just as in other political systems.²⁶ Easton's definition of a political system, by not being premised on statehood, thus opens the possibility of supranational political systems. Indeed, Easton argues that

*"not only is there an international political system, but it may in fact be usefully interpreted as just another type of system, to be analysed, described and compared with all the other systems. [...] The international political system possesses a theoretical status that is equivalent in every respect but one with the political systems of national societies. It differs only in the fact that the component units of the international system consist of large and powerful subsystems that we call national political systems, [...]. To be sure, there are differences in power among the subsystems of the international system. But this is equally true of national systems depending upon the legitimacy of the authorities and upon the looseness or tightness of the coupling among subsystems [...]. This interpretation of the international political system as just another kind of political system cognate with any national system creates no theoretical hardships, at least with the systems conceptualisation developed here."*²⁷

While some of the theoretical and explanatory ambitions of systems theory have been criticised, the core of Easton's theoretical framework and its definitions remain

²² James A. Caporaso: "The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?", *Journal of Common Market Studies*, vol.34, no.1, 1996, pp.29-52

²³ Hix (98), *op. cit.*, p.41

²⁴ *Ibid.*, p.41-43

²⁵ *Ibid.*, p.43

²⁶ *Ibid.*, p.54

²⁷ Easton (65), *op. cit.*, p.485f

widely used, especially in the literature on legitimacy.²⁸ Since the EU undeniably *does* engage in authoritatively allocating values for a society, albeit an international one, it must justify its powers to do so - in short, it must legitimise itself. Indeed, most new governance scholars concede the importance of the *notion* of legitimacy to the EU, while at the same time maintaining that much of its *content* - the old legitimising principles based on popular sovereignty and the national state - needs adapting to the new and unique type of political system the EU represents.²⁹

New governance theorists can therefore acknowledge the need for legitimacy without compromising their claim that the EU is a political system *sui generis*. That leaves the methodological problem about comparability unresolved. The EU may be a political system, but national political systems may differ from international ones. Although the members of an international political system seek to resolve some of their problems through the authoritative allocation of values, that process tends to be based less on strong feelings of legitimacy, less centrally organised, less continuous and less strictly complied with than in many national systems.³⁰ The EU is qualitatively different from its member states. For instance, the EU lacks some of the functions of sovereign states such as the provision of internal and external security or tax raising powers. It also lacks a “demos” on which to build a European democracy.³¹ Can the quality of its legitimacy therefore be validly compared with that of its member states which possess all these features?

The answer to this question is positive if the traditional analytical paradigm for EU studies, the international relations approach, is replaced with a comparative politics approach. While the IR paradigm may be appropriate for the study of European *integration*, the comparative politics approach is more useful for the analysis of the European political system.³² This thesis is concerned with the latter which means that it does not conceptualise the EU as *sui generis*, but compares the EU to other political

²⁸ For instance: , Bettina Westle: *Politische Legitimität - Theorien, Konzepte, empirische Befunde*, (Baden-Baden: Nomos Verlagsgesellschaft, 1989), Hix (99), *op. cit.*, pp.2ff.

²⁹ Markus Jachtenfuchs and Beate Kohler-Koch: “Regieren im dynamischen Mehrebenensystem”, in: Markus Jachtenfuchs and Beate Kohler-Koch: *Europäische Integration*, (Opladen: Leske & Budrich, 1996), p.34ff

³⁰ Easton (65), *op. cit.*, p.487

³¹ See *Chapter 5*, pp.231ff

³² Simon Hix: “The Study of the European Community: The Challenge to Comparative Politics”, *West European Politics*, vol.17, no.1, 1994, pp.22-24

systems. It recognises that the EU is an international political system whose legitimacy is for structural reasons likely to be lower than that of its member states.

However, the EU is constantly evolving, and its need for legitimacy increases in proportion to the degree of European integration.³³ The more the EU is involved in the authoritative allocation of values which affects European citizens directly, the more it requires legitimacy.³⁴ The wide legislative, executive, regulative and judicial powers exercised by the EU are already just as much in need of legitimation as the powers exercised by sovereign states.

Even some new governance scholars have recently come to agree that the EU “could well be compared with other political systems and their solutions to the problem of responsible and responsive governance from an analytic as well as from a normative standpoint.”³⁵ Although the EU is not state in the Weberian sense, it fulfils many of the traditional functions of states and possesses the characteristics of a political system. The legitimacy of the EU is therefore susceptible of analytical comparison with that of its member states.³⁶

0.4 A New Perspective on the Legitimacy of the EU

A considerable body of academic literature has accumulated which debates whether the EU is somehow insufficiently legitimised or even illegitimate. [The original contribution of this thesis lies in exposing and overcoming *three* serious shortcomings in existing academic treatments of the question of the EU’s legitimacy.)

First, the current debate does not draw on a sufficiently differentiated theory of legitimacy which could be applied for empirical legitimacy research of both national and international political systems. There is currently no academic consensus as to whether and to what degree the EU is legitimate. This is because scholars employ different and often incompatible analytical tools and adopt different interpretations of

³³ Helen Wallace: “Deepening and Widening: Problems of Legitimacy for the EC”, in: Soledad Garcia: European Identity and the Search for Legitimacy, (London: Pinter Publishers, 1993), pp.100

³⁴ David Beetham and Christopher Lord: Legitimacy and the European Union, (London: Longman, 1998), p.14

³⁵ Markus Jachtenfuchs: “Democracy and Governance in the European Union”, in: Andreas Follesdal and Peter Koslowski (eds.): Democracy and the European Union, (Berlin: Springer Verlag, 1998), p.41f

the meaning of the word “legitimacy”, none of which is fully able to capture the multiple dimensions of a notion as complex as legitimacy. Without a rigorous grounding in political theory applied research on legitimacy can at best yield partial insights. To remedy this shortcoming, this thesis develops its own theoretical framework, the dual concept of legitimacy, which draws on existing dualistic theories of legitimacy. The dual concept provides the analytical tools for an empirical, falsifiable assessment of the extent to which claims about a legitimacy deficit in Europe are justified.

Second, the existing literature does not acknowledge the essential contingency of the legitimacy of the EU on the particular national frame of reference chosen. This thesis argues that the EU is so intertwined institutionally with its member states, and its popular perception is so influenced by factors determined at the level of each member state that the EU’s legitimacy depends on the member state from whose perspective the question is approached. The methodological implication of this contingency is the need to study the legitimacy of the EU against the concrete background of a particular member state.

However, this property of the EU is best illustrated by analysing its legitimacy from the perspective of two member states which will yield contrasting results. Britain and Germany have been selected as particularly interesting case studies because, compared to other large member states, the compatibility of domestic formal and felt legitimacy with EU membership is high in Germany, but very low in the UK. As a consequence, their national perspectives on the legitimacy of the EU differ noticeably, and they deviate from the European average in opposite directions. Other large member states, to which the discussion will occasionally refer, are either closer to the European average (like France) or they distort the analysis because their national political system suffers from a severe legitimacy deficit of its own (like Italy). Because the British and German political system are both well-legitimised, their contrasting perspectives on the legitimacy of the EU illustrate more clearly how research results on this issue vary with the degree to which national political systems are compatible with EU membership.

³⁶ Hix (98), *op. cit.*, p.54f

Third, the strategies to remedy the legitimacy deficit which are proposed in the existing literature offer at best partially effective solutions to the problem. Just as with the diagnosis of the problem, much of the literature on possible solutions has some theoretical shortcomings. It underplays the different dimensions of legitimacy and disregards the country-specific nature of the legitimacy deficit. Some remedial strategies are even counterproductive because they either merely displace the legitimacy deficit from one sphere to another, or they are effective in one member state while aggravating the deficit in another. Based on the diagnosis of the nature of the EU's legitimacy deficit in each of the two member states surveyed, this thesis studies five possible remedial strategies and assesses which factors act as constraints in the search for solutions to the problem of the legitimacy deficit.

0.5 Analytical Structure and Methodology

The thesis falls into four parts: a review of the existing literature, a theoretical discussion of legitimacy, an empirical application of the theoretical framework developed and an evaluation of remedial strategies. The first and the last part are mainly based on the existing secondary theoretical literature in EU studies, supplemented with some primary legal and political sources. These include resolutions of the European Parliament, legal documents and political pamphlets. The dual concept of legitimacy on which the empirical analysis of the legitimacy of the EU is based, combines two different analytical approaches. Formal legitimacy is based on a legal-institutionalist approach, whereas felt legitimacy is based on political culture theory and employs the methods of public opinion research. The second chapter addresses some of the problems associated with the methods employed for the study of formal and felt legitimacy.

The application of formal legitimacy involves the study of constitutional and legal documents as primary sources, but it also draws on secondary sources in the shape of academic interpretations of the constitutional reality and political culture in particular political systems. The application of felt legitimacy is based on quantitative public opinion surveys conducted in Germany and Britain about attitudes to these two national political systems and the one of the EU. Where possible, these will offer cross-temporal and cross-national consistency to enable accurate comparative

analysis. The Eurobarometer series, which quantitatively dominates this thesis, has been often been called “exceptional” in meeting these unusual methodological challenges.³⁷ It analyses public attitudes across member states towards common stimulus objects, the EU as well as the respective member state, employing questions standardised over time and across countries. The analysis of public opinion surveys is supplemented with qualitative indicators of legitimacy. These include analysis and interpretation of national identities, the presence or absence of significant elite cleavages, the presence of any significant anti-system parties, manifestations of open hostility, such as breaches of the law or riots, election turnouts and public participation in political activities.

0.6 Chapter Outline

The last ten years have witnessed a steady rise in the number of scholarly discussions which have explicitly or implicitly dealt with the legitimacy of the EU. The first chapter takes stock of the academic literature analysing the legitimacy deficit of the EU and submits it to a critical scrutiny. It groups this literature into five categories which reflect the principal analytical perspectives from which the question has been approached. Identification and comparison of their key analytical and theoretical features helps to evaluate the strengths and weaknesses of these five categories. The first chapter concludes that each of them reveals partial insights, but none of them is rooted in a satisfactory theory of legitimacy which could then gainfully be applied to the EU. The academic debate also ignores that the EU is closely interwoven with its member states, both with regard to the formal organisational structure as well as with respect to the way it is publicly perceived. It follows that the legitimacy of the EU cannot be studied in isolation - discussions on this issue are necessarily country-specific and involve the member states.

To remedy these theoretical shortcomings, the second chapter opens with a discussion of a number of possible theoretical definitions of the concept of legitimacy from which it develops a new theory, the *dual concept of legitimacy*. The theory is dualistic because all political systems have both *formal* and *felt* legitimacy. *Formal* legitimacy

³⁷ Richard Eichenberg and Russell Dalton: “Europeans and the European Community: The Dynamics of Public Support for European Integration”, International Organization, vol.47, no.4, 1993, p.517

describes the legal validity of the possession and exercise of political power. It is therefore concerned with the legitimising principles political systems use to justify themselves. *Felt* legitimacy denotes the justifiability of a political system in terms of the beliefs and values currently predominant in society. It measures to what extent a political system is considered legitimate by its citizens. By the end of the second chapter the dual concept is fully developed and its methodological and theoretical problems are discussed.

The third, fourth and fifth chapter apply the dual concept of legitimacy to an empirical comparative analysis of the legitimacy deficit of the EU. Since the EU's legitimacy is always perceived through the prism of its member states in which it is structurally embedded, the formal and felt legitimacy of the two case studies, Britain and Germany, must be studied first. The third chapter discusses the formal and felt legitimacy of the United Kingdom, while the fourth chapter applies the dual concept to Germany. The empirical analysis of these two chapters reveals substantial country-specific variations which explain why the British and German political systems have different degrees of compatibility with EU membership. However, at a *basic* level, both countries formally legitimise political power through some version of representative democracy and their political systems enjoy by and large very solid levels of felt legitimacy.

Chapter five builds on these findings to analyse the formal and felt legitimacy of the EU from the British and German perspectives. The fifth chapter concludes that, *relative* to the national political systems of the FRG and the UK, the EU suffers from a legitimacy deficit, but this deficit assumes a different shape and severity from each country's perspective. The lower compatibility of Britain's formal and felt legitimacy with EU membership means that in all the different categories of the dual concept British levels of public support for the EU are almost consistently below those recorded in Germany. However, in both countries the weakest component of felt legitimacy is the lack of a European identity which could create affective attachment to the EU and solidarity amongst its citizens. Since EU institutions are also generally perceived as undemocratic, the EU's legitimacy is over-dependent on support for its policy outputs which tends to be more volatile over time.

By the end of chapter five, the first of the two central research questions is answered. The meaning and importance of legitimacy is clarified, and its application to the EU yields the conclusion that there is a relative legitimacy deficit in Europe, but its extent and nature is contingent on the national perspective from which it is studied. This analysis of the deficit provides a reference point from which a discussion of practical solutions to the legitimacy deficit can take place in chapter six.

Chapter six begins by revisiting the academic debate of chapter one, this time focusing not on the diagnosis of the *legitimacy* deficit, but assessing whether a successful *legitimation* of the EU is possible. The chapter assesses the dynamics and effectiveness of the legitimation strategies that have been advocated by participants in the academic debate. The discussion is structured with the help of the five schools of thought distinguished in the first chapter, each of which offers a distinct strategy for remedying the legitimacy deficit. These five strategies are evaluated against two criteria which any successful remedial strategy must meet.

The *pertinence criterion* assesses whether remedial strategies adequately address the exact nature of the legitimacy deficit. Since chapter five has diagnosed the lack of a European identity as the greatest factor responsible for the legitimacy deficit, any successful remedial strategy must therefore be able generate a sense of European identity. The pertinence criterion also considers whether the various solutions in the academic literature are mutually reinforcing or incompatible with each other and whether they have equal validity for both Germany and Britain. The *feasibility criterion* assesses the political feasibility of proposed remedial strategies in terms of the support they could generate amongst Europe's political leaders. The evaluation of the five possible remedial strategies against the pertinence and the feasibility criterion makes it possible to answer the second research question at the end of chapter six.

Chapter One: Analysing the Legitimacy of the EU - The State of the Debate

1.1 Introduction:

The large body of academic literature which implicitly or explicitly deals with the legitimacy of the EU contains a diverse set of conclusions. They range from the claim that the EU is perfectly well legitimised to assertions of its fundamental illegitimacy. This chapter surveys the different normative premises and analytical approaches in the scholarly debate on whether the EU suffers from a legitimacy deficit. Submitting the existing literature to a critical scrutiny, the chapter concludes that none of the contributions offers a satisfactory theoretical framework which can capture the multifaceted nature of legitimacy. It then identifies the criteria for a more adequate theoretical conceptualisation of legitimacy which can serve as a basis for comparative empirical research on the EU.

Five broad categories can be distinguished, and their names have been chosen to symbolise the major analytical approaches to the debate on the legitimacy of the EU. The first category, neo-functionalism, has raised least questions about the EU's legitimacy, partly because most of its proponents do not consider it deficient. The second category (constitutionalism) questions the degree to which the EU enjoys democratic legitimacy, the third (communitarianism) draws attention to the lack of a communal identity among European citizens and the fourth (new governance) considers conventional conceptions of legitimacy inappropriate for a multi-level entity like the EU. Although each of them use different definitions of legitimacy, they do not call into question the scope of the EU's powers. That sets them apart from the fifth category, containment, which questions the extent to which the very exercise of supranational political power is *itself* legitimate. It is concerned with the legitimacy of the *vertical* balance of powers between the EU and its member states rather than the *horizontal* distribution of powers between EU institutions.

Whereas the first four categories share a broadly integrationist outlook, supporters of containment tend (to different degrees) to be more critical of the aim of *ever closer*

Union. Nonetheless, containment is not simply to be equated with Euroscepticism, defined as opposition to a supranational EU. The term containment was chosen deliberately to reflect the fact that many of its proponents apply a *conditional* caution rather than a *categorical* objection to the EU which is motivated by their concern about its lack of legitimacy. The table below illustrates this relationship between the five categories and provides a convenient reference for the discussion to follow.

| Academic School | Analytical Perspective | Nature of Deficit |
|-------------------|------------------------------------|--|
| Neo-Functionalism | Functionalist | No deficit/ Economic performance |
| Constitutionalism | Institutionalist | Lack of democracy |
| Communitarianism | Sociological | Lack of a demos |
| New Governance | Functionalist/ Institutionalist | Lack of post-modern legitimising principles |
| Containment | Institutionalist/ Sociological | Too much integration/ Lack of a demos |

Table 1.1

1.2 Neo-Functionalism

Neo-functionalism has been the classic and long-dominant approach to the study of European integration, yet neo-functionalists have generally paid little attention to the issue of legitimacy. They are primarily interested in analysing the integration process, and they seek to explain how the transfer of policy responsibility to the EU came about. The traditional neo-functionalist approach to European integration has been patrician, technocratic and corporatist.¹ Insofar as legitimacy and public support feature at all in the literature, they are being discussed from a functionalist analytical perspective which regards legitimacy as a function of socio-economic benefits.

For instance, John Monnet argued that popular consent to European integration would be a *consequence*, not a *precondition* of a technocratic pursuit of common policies.²

¹ Helen Wallace (93), *op. cit.*, p.95

² See: William Wallace and Julie Smith: "Democracy or Technocracy? European Integration and the Problem of Popular Consent", in: *West European Politics*, vol.18, no.3, 1995, p.144

Neo-functionalists like Haas postulated that the creation of efficient European institutions generating maximal economic welfare and prosperity would in the long-run “spill over” into public attachment to the project of “ever closer Union”, thereby endowing it with legitimacy. At least, increasing beneficial interaction among the social and economic élites of the member states would over time create and reinforce a common interest of the wider political community.³ The strong theoretical emphasis on élites meant that at least early neo-functionalism paid very little attention to wider public attitudes.⁴ Later contributions to the debate adopt a more differentiated position. Lindberg and Scheingold’s model of a “permissive consensus” postulates that the level of popular support affects the scope for integration policies pursued by the élites. Public attitudes towards the EU can facilitate or hinder the integration process, but they do not directly determine it.⁵

Even the more sophisticated neo-functionalist theories are premised on a flawed and reductionist account of the motivations *behind* political attitudes and beliefs.⁶ They wrongly predicted a rejection of what they considered outdated political and nationalist ideologies in favour of a de-politicised, technocratic search for wealth maximisation. Apart from Deutsch, one of the few neo-functionalists aware of the importance of a sense of communal identity for the integration process⁷, most scholars assumed that individual loyalties, whether élite or not, are based on utilitarian considerations of interest rather than affective ties of identity.⁸ For instance, Lindberg and Scheingold argued that “...the major problem becomes one of maximising wealth - clearly a question for the experts, the technocrats.”⁹ Contemporary academics agree with near consensus that decades of ever increasing economic and political integration have not “spilled over” into a strong and sustainable common attachment of the wider

³ E. B. Haas: The Uniting of Europe: Political, Social and Economic Forces 1950-1957, (Stanford: Stanford University Press, 1958)

⁴ Oskar Niedermayer: “Bevölkerungsorientierung gegenüber dem politischen System der Europäischen Gemeinschaft”, in: Rudolf Wildenmann (ed.): Staatswerdung Europas? Optionen für eine Europäische Union, (Baden-Baden: Nomos, 1991), p.322

⁵ Leon N. Lindberg and Stuart A. Scheingold: Europe’s Would-Be Polity - Patterns of Change in the European Community, (Hemel Hempstead: Englewood Cliffs, 1970), p.41

⁶ Wallace and Smith, op. cit., p.146

⁷ Deutsch considers the development of a sense of identity a necessary condition for the integration process. See: Karl W. Deutsch et al: Political Community and the North Atlantic Area, (Princeton, New Jersey: Princeton University Press, 1957)

⁸ Wallace and Smith, op. cit., p.146

⁹ Lindberg and Scheingold, op. cit., p.269

political community.¹⁰ Moreover, the end of the Cold War has deprived the EU of its historical functional legitimacy as a defence for its members' liberal democracies against the backdrop of the Soviet threat and autocratic South European regimes.¹¹

It follows that neo-functionalists must deny, or at least play down, the existence of a legitimacy deficit because its acknowledgement would invalidate one of the core assumptions of their own theory. Decades of ever increasing economic and political integration, culminating first in the Single Market and more recently in the Single Currency, should have "spilled over" into a significant transfer of loyalties towards the EU and elimination of any residual legitimacy deficit, yet it has failed to do so.

The prediction is based on flawed assumptions in neo-functionalist theory, according to which loyalty towards the EU is created by means of a "learning process". Individuals are assumed to perceive the EU as the source of their utilitarian interests, become committed to its maintenance and finally develop identitive links with the EU and the broader community it serves.¹² Yet this argument is based on the mistaken premise of EU outputs being highly visible, tangible and intelligible to citizens and that feelings of collective identity are predicated upon strictly functional concerns.¹³ However, Jacques Delors once remarked that "you do not fall in love with the common market"¹⁴, and communal attachments have failed to materialise, thus leaving the EU over-dependent on support for its policy outputs. Even if neo-functionalists acknowledged the persistence of a deficit, constitutionalists as those reviewed in the next category would deny the effectiveness of an output-gearred, functionalist remedy which is all neo-functionalism can offer.¹⁵

It should be noted in passing that a similar charge can be made against neo-functionalism's great intellectual adversary inter-governmentalism.¹⁶ Like neo-

¹⁰ For an overview see: Wallace and Smith, *op. cit.*, p.144ff

¹¹ Helen Wallace (93), *op. cit.*, p.99

¹² Juliet Lodge: "Loyalty and the EEC: The Limitations of the Functionalist Approach", *Political Studies*, vol.26, no.2, 1978, p.238

¹³ *Ibid.*, p.239, 246

¹⁴ Jacques Delors quoted in: Brigid Laffan: "The Politics of Identity and Political Order in Europe", *Journal of Common Market Studies*, vol.34, no.1, 1996, p.95

¹⁵ *Ibid.*, p.100

¹⁶ See for example: Alan S. Milward: *The European Rescue of the Nation State*, (London: Routledge, 1994), or: Andrew Moravcsik: "Preferences and Power in the European Community: A Liberal

functionalism, its analytical focus is on the integration process, political actors and policy outcomes, but its implicit assumptions about the EU's legitimacy are diametrically opposite to those of neo-functionalism. Inter-governmentalists do not raise the legitimacy question because on their account the EU is ultimately firmly controlled by its member states. Being legitimate themselves, national governments merely delegate powers to the EU, thereby lending legitimacy through national channels upwards. However, ever since the EU had outgrown the format of an "ordinary" international organisation, its dependence on legitimation through the member states has come under considerable strain. The over-reliance on indirect legitimacy is now widely believed to be one of the contributing factors to the perceived legitimacy deficit. Just as with neo-functionalism, inter-governmentalists are reluctant to admit to such a deficit because its existence would be tantamount to an admission that the EU no longer conforms to the inter-governmentalist image of a limited, indirectly legitimised international organisation.

The disinterest these two important integration theories show in legitimacy should maybe not come as a surprise. After all, they are primarily interested in explaining the integration process rather than discussing the legitimising problems arising from the current or any future European political system. The literature survey will therefore now turn away from process-centred theories towards the most prominent perspective from which European legitimacy has been discussed: the concern about democracy in the EU.

1.3 Constitutionalism

The traditional approach to the legitimacy debate has been conducted from the perspective of democracy. The approach is analytically rooted in institutionalism, and its main motivation is to increase public acceptance of the EU through institutional engineering. It claims the key to legitimacy problem lies in divergence between the *actual* legitimation of European institutions and widely-held popular beliefs about how they *should* be legitimised. As democracy has become the only acceptable form of legitimising political institutions in the countries of Western Europe, scholars

Intergovernmentalist Approach", in: Simon Bulmer and Andrew Scott (eds.): Economic and Political Integration in Europe, (Oxford: Blackwell, 1994), pp.29-80

began to compare the democratic “quality” of national political systems with that of the EU. A large majority of them have concluded that the process of legislative policy-making in the EU is characterised by what has widely become known as the “democratic deficit”. Representatives of this approach can be found among political scientists¹⁷, (predominantly German) legal scholars¹⁸, and even politicians.¹⁹

The Toussaint Report of the EP offers maybe the best and most concise definition of the democratic deficit which entails

*“the combination of two phenomena: (i) the transfer of powers from the Member States to the EC; (ii) the exercise of these powers at Community level by institutions other than the European Parliament, even though, before the transfer, the national parliaments held power to pass laws in the areas concerned.”*²⁰

As the EU assumes more and more functions hitherto only associated with sovereign states, so the democratic deficit school argued, its institutional structure has to reflect this transformation in order to retain public support.²¹ Given the constitutional ideals prevalent in Western Europe, this means tailoring a liberal democratic constitution for the EU based on the model of a (federal) state.

It becomes evident from this definition that most discussions of the democratic deficit are analytically restricted to comparative investigations of the shortcomings of

¹⁷ See for instance: Brigitte Boyce: “The Democratic Deficit of the European Community”, in: Parliamentary Affairs, vol.46, no.4, 1993, pp.458-477

Juliet Lodge: “Transparency and Democratic Legitimacy”, in: Journal of Common Market Studies, vol.32, no.3, 1994, pp.343-68

Werner Weidenfeld: Europa 96: Reformprogramm für die Europäische Union - Strategien und Optionen für Europa (Gütersloh: Bertelsmann Stiftung, 1994)

¹⁸ Claus-Dieter Classen: “Europäische Integration und demokratische Legitimation”, Archiv des öffentlichen Rechts, vol.119, no.2, 1994, pp.238-60

Philip Raworth: “A Timid Step Forwards: Maastricht and the Democratisation of the European Community”, in: European Law Review, vol. 19, no.1, 1994, pp.16-33

¹⁹ Michael Heseltine: The Democratic Deficit: The Balance in Europe for Britain to Redress, (London: Centre for Policy Studies, 1989)

Heidmarie Wieczorek-Zeul: “Der Vertrag von Maastricht im Deutschen Bundestag”, in: Europa-Archiv, vol.48, no.13, 1993, pp.405-412

²⁰ European Parliament: Committee on Institutional Affairs, Report by Toussaint, 1/2/88, PE 111.236/fin., p.10f

²¹ Beate Wieland: “Verfassungspolitische Probleme der Staatswerdung Europas”, in: Rudolf Wildenmann (ed.): Staatswerdung Europas? Optionen für eine Europäische Union, (Baden-Baden: Nomos, 1991), p.430

European parliamentary democracy. They usually propose to solve the democratic deficit by means of enhanced scrutiny powers for the national parliaments of the member states, or by giving the EP a greater role in legislation and sustaining the EU's executive, or both.

Only a few scholars disagree with this analysis and dispute the existence of a democratic deficit, but their arguments are based on an unusual reading of legitimacy. For instance, Kluth adopts an extremely restrictive, legalistic definition of democratic legitimacy for assessing whether the EU conforms to the principles of the German Basic Law.²² Banchoff and Smith confusingly equate democratic legitimacy with political participation ("contestation").²³ Contrary to their assertion, the popular recognition of the EU as an arena in which to pursue political objectives may at best signal the absence of any obvious delegitimation. After all, MEPs representing the *UK Independence Party* may participate vigorously in the deliberations of the EP, but they still regard the EU as altogether illegitimate.

The conventional assessment of the legitimacy deficit offered by constitutionalists suffers from at least two theoretical flaws. The first flaw lies in the generally ill-defined and muddled terminology constitutionalists employ for their arguments. Second, constitutionalism is guilty of premising its discussion of the EU on the traditional model of the nation state, although the EU is evidently not a nation state.²⁴

As regards the first flaw, the two central concepts of constitutionalism, *democracy* and *legitimacy*, are rarely defined with sufficient precision, and sometimes they are even used interchangeably. The contested meaning of "democracy" is ignored by conflating the many facets of the term into an often ill-defined and exclusively parliamentary understanding of democracy. The confusion of different political

²² Winfried Kluth: *Die demokratische Legitimation der EU*, (Berlin: Duncker & Humblot, 1995), p.90ff

²³ Thomas Banchoff and Mitchell P. Smith: "Introduction: Conceptualising Legitimacy in a Contested Polity", in: Thomas Banchoff and Mitchell P. Smith (eds.): *Legitimacy and the EU*, (London: Routledge, 1999), p.2f

²⁴ "Nation" is a contested concept. When referring to nation state or nationhood, this thesis follows Smith by defining nation as a named population sharing a historical territory, common myths and memories, a standardised public culture and common legal rights. Nationhood is not ethnically primordial and immutable - it is constructed and susceptible to manipulation, but only in the very long-run. See: Anthony D. Smith: "National Identity and the Idea of European Unity", *International Affairs*, vol.68, no.1, 1992, p.60

conceptions of democracy means both the extent and nature of the democratic deficit, as well as its political significance, remain hotly disputed.²⁵ Ultimately, the agreed meaning of the word “democracy” is “rule by the people”, but beyond this rather general definition little consensus is possible.²⁶

Often, a broad distinction is made between the different procedures advocated for translating democracy into practice, such as direct or indirect, liberal, plebiscitarian or people’s democracy. The choice of any one of them affects the structure as well as the scope of the political system, depending, for instance, on whether democracy is understood as entailing the popular control of the means of production (economic democracy). A similar problem arises with regard to the existence conditions for democracy within a given political system. To which extent do people have to participate in, or at least consent to, major political decisions?²⁷ Even within the field of representative democracy unanimous agreement is rare. For even a mode of government which technically fulfils the basic criteria for representative democracy (having a law-making assembly regularly elected by universal suffrage) might still be considered profoundly undemocratic in every other respect.²⁸

The earliest forms of constitutionalism also suffered from a fallacious equation of democracy with legitimacy, resulting in a reductionist focus on the “democratic deficit.” By empowering the EP constitutionalists believed they could also solve the legitimacy deficit. Such flawed reasoning is based on the frequently implicit assumption that “democracy” is the paramount feature of political systems in Western Europe, if not tantamount to a system of government itself.²⁹ However, political systems employ a whole range of sometimes competing legitimising principles such as rule of law, regulatory expertise, accountability or balance of powers, out of which democracy is but one. These various legitimising principles of a political system must be analysed separately as well as within a concrete comparative political context, since their meaning and the relative value attached to them will vary cross-nationally.

²⁵ Brigitte Boyce, *op. cit.*, p.458

²⁶ Like power or justice, the notion of democracy can be understood as an “essentially contested concept”: it is appraisive, internally complex, open-textured and there are no fixed criteria for its application. See: William Connolly: *The Terms of Political Discourse*, (Lexington, Massachusetts: Heath, 2nd ed. 1983), p.14

²⁷ Roger Scruton (ed.): *A Dictionary of Political Thought*, (London: Macmillan, 2nd ed. 1996), p.130f

²⁸ *Ibid.*, p.131

By narrowly focusing on parliamentary competencies the democratic deficit approach ignores that the exercise of political power is not confined to representative legislative bodies (consider judicial or regulatory powers, for instance).

A good example is the ongoing debate about the legitimisation of the European Central Bank. The legal and institutional framework enshrined in the Maastricht Treaty follows the functionalist legitimising principle favoured in Germany, according to which the Central Bank, like the Bundesbank, is formally legitimised by virtue of its technocratic expertise in pursuit of price stability. Legal independence from any undue influence or operational interference by political actors provides the constitutional means to achieve this objective.

From another perspective, still predominant in France, the conduct of monetary policy is a quintessentially political affair and not simply a question of technocratic expertise. Central banks should be democratically accountable to the electorate, and should be made to pursue the economic objectives of the government of the day. While there is little chance of this notion formally legitimising the ECB short of amending the Treaties, one might speculate about attempts to secure political influence over the central bank in constitutional reality, for instance via the so-called *Euro-X* committee.³⁰ Because of their narrow preoccupation with the EP older versions of constitutionalism have little to contribute to this debate, yet a widely accepted legitimisation for the ECB is essential, given the impact of its monetary powers on the performance of economies in the EURO-zone.³¹

Not all the authors who might be grouped into the constitutionalist category would fully subscribe to the somewhat simplistic tenets of the democratic deficit school, even though the latter has long dominated the debate. In the meantime, the debate has progressed from the rather unimaginative and often self-interested demands to empower the European Parliament.³² Scholars increasingly recognise the complexities

²⁹ Brigitte Boyce, *op.cit.*, p.466

³⁰ "France Plans for Economic Policy Role", *Financial Times*, 27/4/1998, p.2

³¹ Rainer Lepsius: "Nationalstaat oder Nationalitätenstaat als Modell für die Weiterentwicklung der Europäischen Gemeinschaft", in: Rudolf Wildenmann (ed.): *Staatswerdung Europas? Optionen für eine Europäische Union*, (Baden-Baden: Nomos, 1991), p.24

³² One obvious case is the article written by the then EP President, Klaus Hänsch: "Europäische Integration und parlamentarische Demokratie", *Europa Archiv*, vol.41, no.7, 1986, pp.191-200

of European constitutional reform, but the debate has tended to assume a distinct character in Britain and Germany.

Reflecting the centrality of the Basic Law in German political life, the debate became largely dominated by legal and constitutional arguments about the consequences of European integration. Negotiation of the Maastricht Treaty, for example, led to speculation among German academics about the possibility (and desirability) of an incipient statehood of the new EU and the constitutional implications this might entail.³³ Problems such as the role of the European Court of Justice as a constitutional court within the institutional framework³⁴, or the necessary degree of centralisation³⁵ were thrown into sharp relief by the 1993 Maastricht judgement of the Federal Constitutional Court (FCC) which revived the debate amongst lawyers and political scientists about the constitutional status of the EU and the possibilities for its democratisation.³⁶

In Britain, the debate was largely confined to political scientists who sought to identify additional institutional dimensions in which the EU could be said to be insufficiently legitimised. Doubts about openness and accountability within a fragmented institutional framework³⁷ or reflection on the conflict between representation and efficiency³⁸ put the old concern about parliamentary government into a wider context. Others pointed towards the potential dangers increased institutional majoritarianism would pose for centre-periphery relations in the Union and even cautioned *against* an adoption of parliamentary government.³⁹ Often this dilemma is discussed in terms of the balance between territorial and popular

³³ See review in: Heinrich Schneider: "Gesamteuropäische Herausforderungen an eine Europäische Union", in: Rudolf Wildenmann (ed.): Staatswerdung Europas? Optionen für eine Europäische Union, (Baden-Baden: Nomos, 1991), pp.41-144

³⁴ Roland Bieber: "Verfassungsentwicklung und Verfassungsgesetzgebung in der Europäischen Gemeinschaft", in: Rudolf Wildenmann (ed.): Staatswerdung Europas? Optionen für eine Europäische Union, (Baden-Baden: Nomos, 1991), p.403f

³⁵ Wieland, op. cit., p.445

³⁶ See for instance: Classen, op. cit., pp.238-60. Also: Dieter Grimm: Braucht Europa eine Verfassung?, (München: Carl Friedrich von Simens-Stiftung, 1994)

³⁷ John Peterson: "The European Union: Pooled Sovereignty, Divided Accountability", Political Studies, vol.45, no.3, 1997, pp.579-96

³⁸ Vernon Bogdanor and Geoffrey Woodcock: "The European Community and Sovereignty", Parliamentary Affairs, vol.44, no.4, 1991, p.484

³⁹ Renaud Dehousse: "Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?", in: West European Politics, vol. 18, no.3, 1995, p.119

representation.⁴⁰ Bogdanor and Woodcock, on the other hand, have shifted attention towards the accountability of European institutions and the Council in particular⁴¹ - an idea which was developed further in Lodge's article on the transparency (or lack of it) of these bodies.⁴²

Notwithstanding these attempts to broaden the perspective to institutional aspects beyond the EP, even more sophisticated versions of the argument still suffer from a second flaw of constitutionalism. By implicitly adapting the organisational model of the state to the EU, constitutionalists have tended to overlook an elementary defect within their assumptions. The EU *simply is not* a state, and its lack of statehood may curtail the scope for unqualified adaptation of national constitutional paradigms to forms of supranational governance. Beetham and Lord identify four structural requirements of a majoritarian democracy which are still missing in the case of the EU: widespread normative popular endorsement for a European parliamentary democracy, a unidimensional structure of political cleavages, a high level of social homogeneity, and a public opinion that is capable of being organised into coherent and stable majorities.⁴³

These structural limitations are not acknowledged by the democratic/constitutionalist approach. Its institutionalist analysis of the legitimacy deficit suffers from the inherent flaw of ignoring the social premises it is built upon. As a consequence, constitutionalists fail to understand the complex nature of the legitimacy deficit of the EU. The lack of a parliamentary democracy is only *one* important cause for the legitimacy deficit. The creation of a constitutional structure enjoying widespread public support is a necessary, but not a sufficient pre-condition for a legitimate EU.⁴⁴

Legitimacy also depends on the existence of a powerful collective identity amongst its citizens. There can be no democracy without the corresponding *demos* self-consciously exercising its right to govern as the popular sovereign. The legitimacy of

⁴⁰ Werner Weidenfeld: Reform der Europäischen Union - Materialien zur Revision des Maastrichter Vertrages 1996, (Gütersloh: Bertelsmann Stiftung, 1995), p.40

⁴¹ Bogdanor and Woodcock, op. cit., p.482

⁴² Lodge (94), op. cit., pp.343-68

⁴³ Beetham and Lord, op. cit., p.77

⁴⁴ Peter Graf Kielmansegg: "Integration und Demokratie", in: Markus Jachtenfuchs and Beate Kohler-Koch: Europäische Integration, (Opladen: Leske & Budrich, 1996), p.50

democratic institutions in the EU is premised on the peoples of Europe recognising their shared membership of a single political community.⁴⁵ At the moment there is no constitutionally defined single European people which also perceives itself as such. To summarise, the constitutionalist analysis of the legitimacy deficit of the EU is flawed because it ignores the difference between democratic structure and democratic substance, such as a *demos*.⁴⁶ Constitutionalist treat the EU's current institutional design as the root cause of the legitimacy deficit, but widespread public support for EU institutions cannot exist independently of a European collective identity.⁴⁷

1.4 Communitarianism⁴⁸

Communitarians regard the lack of a feeling of shared identity amongst the peoples of Europe as the main factor responsible for the legitimacy deficit of the EU. From the communitarian perspective such a feeling is indispensable because people judge the legitimacy of their political system not just on the grounds of *how* it reaches political decisions, but also on *who* belongs to it. The EU currently suffers from "fragmented identities".⁴⁹ Popular attachment is still mostly directed at the national (or in some member states even sub-national) political and territorial communities which remain the pivotal shapers of most aspects of political life.⁵⁰ National public spheres in the member states are still to some extent culturally isolated from each other, and they remain anchored in national histories that define the parameters of political discourse.⁵¹

Neunreither aptly captured this discrepancy between supranational governance and national political identities with his remark that the democratic deficit is also an

⁴⁵ Wallace and Smith, *op. cit.*, p.152f

⁴⁶ Grimm (94), *op. cit.*, p.38

⁴⁷ Kielmansegg, *op. cit.*, pp.54-58

⁴⁸ In this context, communitarianism not synonymous with communitarianism as a political philosophy, even though one of the leading protagonists in the debate about Europe's "social legitimacy", Joseph Weiler, is a communitarian in both senses of the word.

⁴⁹ Soledad Garcia: "Europe's Fragmented Identities and the Frontiers of Citizenship", in: Soledad Garcia: *European Identity and the Search for Legitimacy*, (London: Pinter Publishers, 1993), pp.1-29

⁵⁰ A. M. Sbragia: "Thinking about the European Future: The Uses of Comparison", in: A. M. Sbragia (ed.): *Europolitics: Institutions and Policy-Making in the "New" European Community*, (Washington DC: The Brookings Institute, 1992), p.274

⁵¹ Jürgen Habermas: "Citizenship and National Identity: Some Reflections on the Future of Europe", in: *Praxis International*, vol.22, no.1, 1992, p.12

identification and transmission deficit.⁵² Neither do Europeans identify themselves sufficiently with the political system of the EU, nor do its institutions possess the “transmission channels” every political system needs to conduct a permanent dialogue with its citizens.⁵³ For instance, more extensive media coverage of EU politics is not to be confused with genuinely pan-European media which have failed to emerge.⁵⁴ Public political debate and widespread democratic participation are vital legitimising elements for modern polities, but they are difficult to Europeanise because of Europe’s linguistic and cultural diversity.⁵⁵ This may bar the way towards representative government within a “European nation state” as envisaged by some constitutionalists because the need for a European identity grows in proportion to the degree of integration.⁵⁶ Under the prevailing conditions, a “nationalities state” where citizens are affiliated to two political communities (national and European) may be all that is structurally attainable in the EU.⁵⁷

There is also a wider concern about a cultural cleavage *across* the EU.⁵⁸ Peel echoes Jacques Delors’s fear that a latent cultural and ideological north-south divide in the Union may well erupt into political crisis in the future.⁵⁹ He claims these fault-lines extend beyond monetary policy into areas such international trade agreements and even attitudes towards the very way the EU is run, as the recent debate about fraud and mismanagement in the Commission has demonstrated.⁶⁰ Peel concludes that it will therefore require exceptionally skilful diplomacy from the dominant Franco-German axis, which cuts across this fault line, in order to contain the north-south divide in the future.

In short, the communitarian school substitutes the institutionalist analytical perspective of constitutionalism with a sociological one, studying the social preconditions of legitimate government. It argues that every political system must

⁵² Karlheinz Neunreither: “The Syndrome of Democratic Deficit in the European Community”, in: Geraint Parry (ed.): Politics in an Interdependent World, (Aldershot: Edward Elgar, 1994), p.97

⁵³ Ibid., p.101ff, 106ff

⁵⁴ Grimm (94), op. cit., pp.41-43

⁵⁵ Lepsius, op. cit., pp.27-29

⁵⁶ William Wallace: The Transformation of Western Europe, (London: Pinter, 1990), pp.103-06

⁵⁷ Ibid., p.36

⁵⁸ Garcia, op. cit., pp.19-21

⁵⁹ Quentin Peel: “The EU’s Real Split”, Financial Times, 25/2/1999, p.26

⁶⁰ EU Trade Commissioner Pascal Lamy, a Frenchman, ridiculed the EP’s fight against corruption as “rather Nordic” and “a little bit protestant”. See: “No chicken”, Financial Times, 17/9/1999, p.19

develop a strong sense of mutual political identification on which it can draw in times of economic or military crisis and severe internal differences of interest. Citizens must broadly accept both the decision-making procedure of their political system, as well as its definition for membership of it, for the organisation to enjoy legitimacy in the eyes of the public. Living under a particular political system, in most cases a state, requires a certain degree of mutual trust and solidarity amongst its citizens which arise from at least a basic set of shared values and interests as well as a widespread feeling of belonging.⁶¹ In their absence, public reluctance towards democratic majority decisions will prevail in each member state of the EU for fear of “national interests” being outvoted by the other European states.⁶²

Weiler illustrates this point with the rather drastic but very apt example of asking his readers to

*“...imagine an Anschluss between Germany and Denmark. Try and tell the Danes that they should not worry since they will have full representation in the Bundestag. Their screams of grief will be shrill not simply because they will be condemned, as Danes, to permanent minorityship (that may be true for the German Greens too), but because the way nationality, in this way of thinking, enmeshes with democracy is that even majority rule is only legitimate with a demos, when Danes rule Danes.”*⁶³

Weiler, of course, draws this analogy when discussing the so-called “no-demos thesis” which can trace its intellectual parentage to the Maastricht decision of the German Constitutional Court.⁶⁴ Linking the idea of *demos* necessarily to nation and peoplehood, this argument leads to the conclusion that the EU does not have the authority or legitimacy of a “demos-cratic” state because institutions such as the EP are not the representative of *a single people*.⁶⁵ In most of its different versions, the no-demos thesis rests crucially on the premise borrowed from German constitutional law

⁶¹ Helen Wallace: “Pan-European Integration: A Real or Imagined Community?”, Government and Opposition, vol.32, no.2, 1997, pp.225ff

⁶² Wallace and Smith, op. cit., p.152

⁶³ Joseph Weiler: “The Reformation of European Constitutionalism”, Journal of Common Market Studies, vol.35, no.1, 1997, p.116

⁶⁴ BVerfGE 93, 155

⁶⁵ Weiler (97a), op. cit., p.117

that only nationhood or even peoplehood can constitute a valid basis for a modern democratic state.

One might object to Weiler's argument by pointing out that British constitutional law does not share the same normative belief in the inextricable link between statehood and peoplehood, partly because Britain has never adopted the *ius sanguinis* definition of nationality. Still, the argument would retain much of its validity even if these two concepts were analytically decoupled. In fact, Weiler goes on to criticise the German court for continuing to rely on an outdated and offensive ethnic definition of peoplehood, and his own proposed definition of citizenship offers a more tolerant modern alternative.⁶⁶

Kielmansegg has been similarly keen to avoid an organic-national concept of identity based on ethnicity. Instead, he believes that identity is the product of closely-knit "communication-communities", "experience-communities" and "memory-communities". He regards this triangular conception of shared communities as one of the existence conditions for a stable democracy because it provides sufficient stability for a polity to function effectively and relatively uncontestedly.⁶⁷

Communitarians argue that such feelings of shared identity are not simply a by-product of economic co-operation in Europe, nor can they be created by mere institutional design.⁶⁸ They must be complemented by active identity-building. Even if effective *in tandem with* social and cultural policies, institutional engineering will only contribute incrementally towards the creation of a European political community with a strong sense of its own identity.⁶⁹ A widespread and stable feeling of identity takes a very long time to develop, and this process is not easily susceptible to outside influence. That does not mean identities are eternal or immutable (unless the term identity is rather crudely equated with ethnic or even racial homogeneity), it only cautions against a simplified view of the legitimacy deficit resulting from a far too narrow analytical base.

⁶⁶ See Chapter 6, pp.276ff

⁶⁷ Kielmansegg, op. cit., p.55

⁶⁸ Neunreither, op. cit., p.109

There is no doubt about the importance of a socio-cultural dimension to the EU or its need for the development of some degree of collective consciousness. Communitarians have rightly criticised the existing debate for ignoring this dimension of legitimacy. But whichever version of the communitarian school is adopted, there always remains a more fundamental problem. Communitarian arguments can be turned on their head when it comes to the conclusions drawn from their analysis. They claim the EU lacks legitimacy *because* it has failed so far to underpin its considerable supranational powers with a sufficiently strong communal identity of the peoples of Europe. At the same time, communitarians stress the fact that such political identities are hard to create and only evolve over long periods of time. That suggests another possible conclusion to be drawn from the communitarian analysis, this time yielding the opposite result: the EU lacks legitimacy *because* it has failed to decelerate the extension of its strong supranational powers to a speed compatible with the gradual emergence of its communal identity.

In conclusion, the communitarian school rightly maintains that the success of democratic reform of the EU is contingent upon a strong feelings of popular attachment and belonging to it. But in the absence of such feelings, one is left to wonder whether the current degree of integration is susceptible to successful legitimation at all, other than in the very long-run. Such considerations have given rise to scepticism about the more conventional approaches towards the legitimacy deficit.

1.5 Containment

This heading comprises a broad spectrum of views ranging from caution about further integration to calls for secession from the EU. Containment does not really exist as a unified self-conscious school of thought within the European debate. But the label provides a useful tool for categorising a group of people who base their arguments on similar premises.

⁶⁹ Wallace and Smith, *op. cit.*, p.148 f

Analytically, the containment school combines an institutionalist with a sociological perspective, except for debates on EMU where functional and institutional arguments tend to be interlinked.⁷⁰ Its frequent concern about the compatibility of the EU with national constitutional orders means that, academically, constitutional lawyers outnumber political scientists in the containment school. Its widespread scepticism about the possibility or desirability of “ever closer Union” has made arguments in favour of containment more widespread in Britain than in Germany. They are also rarely advanced by the community of (mostly integrationist) political scientists in both countries who tend to reject the strategy of reducing the need for legitimacy on normative grounds.

On the one hand, proponents of containment share the communitarian line of attack on constitutionalism. They agree that the current insufficiently developed collective identity among Europeans renders the legitimacy of European institutions unstable, or makes them even illegitimate. However, they draw different conclusions from this analysis. Many proponents of containment consider nationhood an essential ingredient of political identity. Successful and stable states must be able to draw on the loyalty of their people which derives from a feeling of belonging and nationhood.⁷¹

The argument can be decoupled from the contentious notion of (civic or ethnic) nationalism, however. Regardless of whether a sufficient degree of belonging and identity can ever be attained in non-national polities, supporters of containment merely need to argue that the EU has neither nationhood nor any adequate *substitute* (such as notions of European citizenship) from which to derive the necessary loyalty and support. Whereas communitarians react to this analysis by proposing ways in which loyalties to the EU might be fostered, the containment school argues that such attempts will have little tangible effects for a long time to come.

Rather than fostering the kind of transnational collective identities necessary for current and future European integration, supporters of containment prefer the inverse solution. They want to adapt the degree of integration to the existing levels of

⁷⁰ For example: John Redwood: Our Currency, Our Country - The Dangers of European Monetary Union, (London: Penguin, 1997)

⁷¹ Ibid., p.14

communal feelings amongst Europeans. Since existing levels of identification with the EU tend to be low, but emotive attachment to member states remains resilient to developments towards supranational governance, the EU can only be legitimised as an extension of the nation state.⁷² This reasoning leads to calls for a containment of the integration process⁷³, if not its reversal towards a *Europe des patries* where member states co-operate intergovernmentally through the Council.⁷⁴

On the other hand, containment advances a second, altogether different line of argument against the constitutionalist school. Most constitutional proposals have concentrated on a better congruence between the political regime of the EU and the sort of institutional structure considered legitimate by the population at large (in the terminology developed in chapter two: between formal and felt legitimacy). But scholars have neglected to consider the effect of the reformed EU on the constitutional structure of the member states. Especially (German) lawyers have become alarmed at the decreasing constitutional compatibility of the national and the European level. This could render efforts towards constitutional reform at the European level self-defeating.

For instance, a fully parliamentary system would fall foul of the German constitutional doctrine that links democracy to the existence of a people (*Staatsvolk*).⁷⁵ From the German constitutional perspective, the EU is still mainly legitimised indirectly through its member states. In institutional terms this means that legitimacy is conferred foremost through the national parliaments via the Council of Ministers. In the absence of a European people, a strengthening of the EP vis à vis the Council of Ministers, for example, would thus exacerbate the legitimacy deficit rather than offer a remedy. Huber, for instance, believes that granting “positive democratic competencies” (full law-making powers) to the EP, thus enabling it to legislate against the Council’s will, would sever the national legitimising chain and hence breach art.79 III of the German Basic Law.⁷⁶ Moreover, the current degree of integration has the potential to undermine, or even revolutionise, the existing German

⁷² *Ibid.*, p.15f

⁷³ Ralf Dahrendorf: *Why Europe? Observations by a Liberal Sceptic*, Text of Lecture delivered at the London School of Economics on the 23/2/1998

⁷⁴ Redwood, *op. cit.*, p.193

⁷⁵ See arguments of the Federal Constitutional Court: *BVerfGE 93, 155 at 184f*

constitutional order.⁷⁷ Given the high degree of legitimacy the Basic Law enjoys amongst the citizens of the Federal Republic, its emasculation by the EU might in itself be perceived as illegitimate.

The same, only for different reasons, applies for the British constitution. As long as the constitutional doctrine of parliamentary sovereignty remains valid, the EU must in legal terms be regarded as an international treaty organisation whose legitimacy is institutionally conferred through Parliament alone.⁷⁸ The issue of democratic accountability should therefore be discussed with respect to the Council of Ministers rather than the EP.⁷⁹ Some constitutional lawyers have already warned about the growing incompatibility between European jurisprudence and British constitutional doctrine and the danger this poses to the latter.⁸⁰ Increased institutional integration, for instance by installing a full-blown system of representative government in Brussels, will only contribute to undermine the domestic constitutional framework and, given its strong public support, any legitimising function it may have played for the EU.⁸¹

Those who consider Britain's long-standing opposition to deeper institutional integration paradoxical in view of the country's ancient democratic traditions⁸² perhaps underplay the extent to which the constitutional framework and national identity have contributed to associating democracy with *self*-government in a sovereign Parliament.⁸³ Interestingly, British proponents of the view that the core of the national constitutional order needs to be protected in order to retain its legitimacy have sometimes backed up their argument by referring to the Maastricht judgement of the German Constitutional Court.⁸⁴

⁷⁶ Peter M. Huber: *Maastricht - ein Staatsstreich?* (Stuttgart: Richard Boorberg Verlag, 1993), p.16, 32f

⁷⁷ Karl Albrecht Schachtschneider, Angelika Emmerich-Fritsche and Thomas Beyer: "Der Vertrag über die Europäische Union und das Grundgesetz", *Juristen Zeitung*, 1993, pp.751ff

⁷⁸ Alan Sked: *A Proposal for European Union*, Occasional Paper 9, (London: The Bruges Group, 1990), p. 19

⁷⁹ Norman Lamont: "Selsdon Group Speech, 11 October 1994", in: Martin Holmes (ed.): *The Eurosceptical Reader*, (London: Macmillan, 1996), p.102

⁸⁰ H. W. R. Wade: "What Has Happened to the Sovereignty of Parliament?", *The Law Quarterly Review*, vol.107, no.1, 1991, pp.1-4

⁸¹ Tony Benn: "The Common Market: Loss of Self-Government", in: Martin Holmes (ed.): *The Eurosceptical Reader*, (London: Macmillan, 1996), pp.38-41, also: Redwood (97), *op. cit.*, p.202

⁸² Helen Wallace (93), *op. cit.*, p.98f

⁸³ See: Chapter 3, pp.120ff

⁸⁴ Redwood (97), *op. cit.*, p.203

By containing the process of European integration the EU will be under less pressure to legitimise its institutions and create a sense of European identity. As an additional benefit, the EU will also be rendered less incompatible with the constitutional orders of its member states. However, these arguments neglect the negative impact of containment on the EU's ability to deliver supranational policies. Depending on how radically the EU's powers would be cut back under the containment strategy, there is a real danger of undermining EU policies, like the Single Market, which enjoy widespread public support. After all, even Single Market legislation now comprises an ever-widening number of policy areas, but many supporters of containment wish to see some of them returned to national responsibility.⁸⁵

In this respect, the strategy to reduce the need for EU legitimisation may well be self-defeating. The continued transfer of political powers to Brussels from the SEA onwards has occurred in response to a declining ability to exert national political influence over many areas of economic policy. Member states also consented to a growing pooling of sovereignty in order to reap the economic growth arising from closer integration. A reversal of the integration process may therefore endanger some of the economic benefits for which the EU enjoys popular legitimacy in the first place.

To conclude, the containment approach challenges constitutionalism on the grounds that introducing representative government to the EU risks reducing its legitimacy because it undermines the existing constitutional structures in Britain and Germany. The majority of constitutionalists who fully support the goal of "ever closer Union" could respond by describing such legal incompatibilities as a temporary consequence of the EU's incipient statehood. They might argue that, over time, the integration process will dissolve these incompatibilities into a harmonious federal legal structure. But this line of thought falls foul of the second containment argument. A federalist system would not only emasculate national political regimes enjoying solid legitimacy, it would also lack the stable underpinning of a strong European collective identity on which the viability of a European government would depend.

⁸⁵ Competition policy may serve as an example for a rapidly growing and often contentious field of Single Market-related EU activity.

Just as any other of the four schools of thought, containment can offer new insights by focusing on a different perspective from which the legitimacy deficit can be defined. However, by abandoning the normative commitment to European integration, advocates of containment endanger the functionalist legitimacy of the EU as a provider of economic growth. The question remains, however, whether the containment approach as a whole, or any of the other two categories surveyed so far, operates within analytical and theoretical mindsets that leave them incapable of understanding the true nature of the legitimacy deficit. Increasingly, contributors to the academic debate reply to this question in the affirmative.

1.6 New Governance

Unimpressed by the discussion about the relative merits of the democratic, communitarian or containment perspective on the debate, an increasing number of scholars has urged a fundamental revision of the theoretical framework within which questions about the legitimacy of the EU are formulated. Despite individual variations in their theoretical approaches, one can identify two core arguments which lie at the heart of what has become known as the *new governance* school.⁸⁶ This classification encompasses a variety of perspectives, including multi-level governance and policy-network theories, but their core assumptions with regard to legitimacy are sufficiently similar to warrant the unified label *new governance*.⁸⁷

The first argument is premised on an analytical shift away from the institutionalist parameters that had dominated the democratic and the containment viewpoint towards a new version of functionalism. A state is defined by its ability to function as the guarantor of external and internal security and provider of public goods (“governance”) rather using the institutionalist definition of states as autonomous politico-administrative systems (“government”).⁸⁸

⁸⁶ Hix (98), *op. cit.*, p.38

⁸⁷ *Ibid.*, p.39ff. Beetham and Lord use the phrase “technocratic version of legitimacy” instead. See: Beetham and Lord, *op. cit.*, p.16-22

⁸⁸ Michael Zürn: “Über den Staat und die Demokratie in europäischen Mehrebenensystemen”, in: *Politische Vierteljahresschrift*, vol.37, no.1, 1996, p.29

Empirically, new governance theory makes use of the globalisation argument about the increasing internationalisation of human, especially economic, activity.⁸⁹ National economic systems become increasingly interwoven as important economic actors gradually sever their hitherto strong territorial links. The growth in the number of multi-national corporations and the emergence of global capital markets severely undermines the economic autonomy of the state. Economic systems become more interdependent and societal actors occupy an increasingly important place beside the states. At the same time, many of the most pressing political problems, such as environmental pollution or nuclear disarmament, cannot be solved from within the boundaries of individual states, but require international co-operation instead. As a result, globalisation weakens the steering capacity of individual states.⁹⁰

Analytically, this means that the institutional and the functional definitions of statehood cease to be synonymous, as they had been in the past.⁹¹ This has serious consequences for the legitimacy of modern states. The prevailing understanding of legitimacy is analytically linked to the continued congruence between governance and government. The institutions of a state (*government*) enjoy (democratic) legitimacy because they represent the political will of the nation *and* they possess the means to translate that will into effective policies (*governance*). This legitimising link is challenged, however, when political problems collectively recognised by society can no longer be translated into effective policy-solutions by the political representatives to which they have been transferred.⁹² The old congruence between those who govern and those who are being governed gradually disappears. To put it differently, the people as the legal sovereign may still formally reign, but they have lost their ability to govern effectively.⁹³

In order to recapture some of that steering capacity states have started to co-operate trans-nationally.⁹⁴ This leads to the second argument advanced by the New Governance school, which considers the institutional implications of the functionalist

⁸⁹ Jachtenfuchs and Kohler-Koch, *op. cit.*, p.21f. See also: James N. Rosenau and Ernst-Otto Czempiel (eds.): *Governance without Government - Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992)

⁹⁰ Zürn, *op. cit.*, p.27

⁹¹ *Ibid.*, p.30

⁹² Jachtenfuchs and Kohler-Koch, *op. cit.*, p.32

⁹³ Zürn, *op. cit.*, p.36

argument above. While supranational organisations such as the EU can help states to regain some of the steering capacity lost as a result of the globalisation process, such organisations are characteristically dominated by national executives. The autonomy of national governments is strengthened at the expense of those they are meant to govern because governments function as gatekeepers between the national and the supranational arena.⁹⁵ As a consequence, the possibility of supranational governance does not diminish the gap between functional and institutional statehood since governance occurs on an organisational level separated from the (legitimised) national institutions of government.⁹⁶ While European integration might fulfil the functional conditions for democracy, it does not meet the institutional ones because government and governance no longer occur within the same political arena.

These discrepancies are reinforced by the particular nature of the EU as multi-level governance. One of the means by which the EU can hope to increase its scope for effective governance is by co-opting non-state actors into the policy-making process which are directly affected by its policies. This makes the relationship between state and non-state actors polycentric and non-hierarchical because they are mutually dependent on each other.⁹⁷ The Union lacks a single central agenda-setting and co-ordinating actor, and its policy-making process is characterised by highly complex co-operation between a wide variety of state and non-state officials operating at different organisational levels. National and European institutions are thus intrinsically interwoven. The joint involvement of political, social and administrative actors and the peculiar organisational structure have given rise to a description of the EU in terms of *policy-networks*⁹⁸ or *governance without government*.⁹⁹

These structural conditions are characterised by a low level of institutionalisation, informal arrangements and a relatively high degree of membership fluctuation. The

⁹⁴ *Ibid.*, p.32

⁹⁵ *Ibid.*, p.35

⁹⁶ *Ibid.*, p.36

⁹⁷ Markus Jachtenfuchs: "Theoretical Perspectives on European Governance", *European Law Journal*, vol.1, no.2, 1995, p.124f

⁹⁸ For an overview, see: R. A. W. Rhodes, Jan Bache and Stephen George: "Policy Networks and Policy-Making in the EU: A Critical Appraisal", in: Liesbet Hooghe (ed.): *Cohesion Policy and European Integration: Building Multi-Level Governance*, (Oxford: Oxford University Press, 1995), pp.367-387

⁹⁹ Rosenau and Czempel, *op. cit.*, esp. pp.219-94

EU also distinguishes itself by permanent institutional change which even transforms some areas in the institutional framework of the member states.¹⁰⁰ Lastly, in comparison to national politics, European governance is disproportionately concerned with regulation rather than resource allocation or redistributive policies - the EU develops towards a “regulatory state”.¹⁰¹ Regulating the Single Market requires more of an administrative and problem-solving rather than a politicised bargaining style of policy-making and gives high prominence to scientific expertise.¹⁰² This in turn reinforces the Commission’s dependence on a wide network of advisory expert committees staffed mostly by the non-state representatives of functional interests.

According to the new governance school, it is these three features of the European political system - the relationship between state and private actors, the multi-level character and the dominance of regulation - which warrant the terminology of *post-modern statehood*¹⁰³ or *governance beyond the state*.¹⁰⁴ Its proponents stress that such governance beyond the state is not to be equated with governance *above* the state. Rather, they suggest that it partly replaces the state with a “post-sovereign, poly-centric, incongruent, neo-medieval arrangement of authority.”¹⁰⁵

It follows that solutions to the legitimacy deficit will have to take account of the *sui generis*, post-modern nature of the EU, for new governance theorists do not deny the proposition that the multi-level system is insufficiently legitimised.¹⁰⁶ They only contest the usefulness of the old institutionalist remedies developed in the national context and propose instead functionalist remedies for what they by and large consider a functionalist problem. Since policy-making in a regulatory state like the EU is by nature de-politicised, legitimacy deficits cannot arise from the absence of a parliamentary democracy in the EU.¹⁰⁷ These considerations call for new forms of

¹⁰⁰ Jachtenfuchs (98), *op. cit.*, p.45ff

¹⁰¹ Giandomenico Majone: “The Regulatory State and its Legitimacy Problems”, *West European Politics*, vol.22, no.1, 1999, p.1-3

¹⁰² Giandomenico Majone: “Regulatory Legitimacy”, in: Giandomenico Majone (ed.): *Regulating Europe*, (London: Routledge, 1996), p.299

¹⁰³ Caporaso, *op. cit.*, pp.29-52

¹⁰⁴ Jachtenfuchs (95), *op. cit.*, p.124

¹⁰⁵ Philippe C. Schmitter: “Representation and the Future Euro-Polity”, *Staatswissenschaften und Staatspraxis*, vol.3, no.3, 1992, p.56

¹⁰⁶ Jachtenfuchs and Kohler-Koch, *op. cit.*, p.33

¹⁰⁷ Majone (99), *op. cit.*, p.21

legitimacy, which are not conceptually based on the image of the state, to be devised to fit the properties of post-modern statehood.¹⁰⁸

At first sight, new governance theory appears to bear a resemblance to the neo-functionalist school of thought, not least in their common roots in a functionalist analytical perspective. A closer comparison reveals two crucial differences. As discussed above, neo-functionalists tend to play down the existence of a legitimacy deficit, whereas new governance scholars acknowledge the legitimization problem. The second dissimilarity between neo-functionalism and the new governance approach is the former's neglect of the multi-level structure of the EU.¹⁰⁹ New governance theorists can therefore agree with scholars in the other three categories on the existence of a legitimacy deficit, while at the same time pointing to the functional and structural constraints which limit the scope for institutional solutions to it.

A critical assessment of the new governance analysis of the legitimacy deficit has to deal with each of the two fundamental arguments its proponents advance. Turning to the functionalist argument about the internationalisation of governance first, any critique will centre more on questions of degree rather than principle. "Globalisation" certainly is not just a fashionable catch-phrase, and many of the developments listed under that heading, such as the weakening of the steering-capacity of individual states, do take place. Three points ought to be considered, however. First, the impact and degree of globalisation have often been exaggerated. After all, the ability to borrow on global rather than local capital markets suggests that greater capital mobility increases government's freedom of manoeuvre in fiscal policy, even though running a country's Treasury may become more complicated and risky as a result.¹¹⁰

Second, the trend towards globalisation is not the inescapable fate of humanity. Rather, it is deliberately encouraged and positively embraced by most Western governments - witness the successful and unanimous conclusion of the Uruguay round of multilateral trade negotiations in 1993.

¹⁰⁸ Jachtenfuchs (98), *op. cit.*, p.50

¹⁰⁹ *Ibid.*, p.39f

Third, the globalisation process needs to be placed into historical context. O'Rourke and Williamson have compared the current world economy with that of the late nineteenth century only to find that in many respects national economies were more integrated one hundred years ago than they are now. The most important factor may have been migration, but even international capital flows have only recently achieved the level, relative to the size of the world economy, which they occupied in the decades before the Great War.¹¹¹ Crucially, however, O'Rourke and Williamson argue that, just as back then, the current globalisation process is not irreversible and a "globalisation backlash" may still occur at some point in the future.¹¹² Such arguments undermine the new governance claim that unavoidable and uninfluenceable processes of globalisation destroy the old principle of territorially organised representative politics and transform the nature of governance.¹¹³

The second fundamental argument, the claim about the unique multi-level nature of European governance, is largely a matter for empirical investigation. New governance theory can provide valuable insights into the way political power is organised and exercised at the European level. It also deserves credit for emphasising the fundamental structural differences which should caution against a simple adaptation of traditional definitions of legitimacy embedded in the context of the nation state to the supranational, but "non-statal" EU. Nevertheless, the approach is not free from criticism.

First, the functionalist framework and the almost exclusive emphasis on policy-outcomes are partly attributable to the academic background of the major new governance scholars in national public policy studies. They are generally less interested in the broader question of the legitimacy of the European political system as a whole. New governance scholars raise an important analytical problem, but unfortunately they rarely develop their arguments further by demonstrating how to adapt the definition of legitimacy to become applicable beyond the limits of the traditional state. Moreover, one can agree with the first, *empirical* argument about the

¹¹⁰ "Schools Brief: Bearing the Weight of the Market", *The Economist*, vol.345, no.8046, 6/12/1997, p.124-25

¹¹¹ Kevin O'Rourke and Jeffrey Williamson: *Globalisation and History*, (Cambridge (MA): The MIT Press, 1999), pp.207-19, 225-34

¹¹² *Ibid.*, chs.6+10, p.286f

new governance nature of the EU, while disagreeing with the second, *normative* argument that technocratic forms of legitimation are in fact appropriate.¹¹⁴

Second, the EU does not constitute a political system *sui generis* which is not susceptible of comparison with traditional states. The mere fact that new governance often draws on the concepts of comparative public policy demonstrates that the emergence of regulatory governance is a national as well as a European phenomenon.¹¹⁵ Even more importantly, European politics is not exclusively concerned with regulatory policy and technical, and hence remote, public policy decisions.¹¹⁶ Many of the EU's legislative initiatives, such as directives under the so-called "Social Chapter", are highly controversial politically, and they directly affect the population in the member states as well as their economies at large.

While policy networks and regulation may play a more prominent role in Europe than in national polities, large areas of political activity of the EU would have been conducted through national parliamentary bodies before power over these areas had been delegated to the European level. Politics always involves value choice between competing priorities which cannot be reduced to technical matters.¹¹⁷

By overemphasising the post-modern regulatory character of the EU, new governance scholars tend to neglect the point that nowadays political institutions with wide-ranging decision-making powers need democratic legitimacy. Technocracy is rarely perceived as legitimate. And with the force of the globalisation argument somewhat punctured, they cannot always retort by dismissing the call for European parliamentary structures as almost *intrinsically* counter-productive. In other words, while the new governance paradigm has stimulated a much-needed discussion about the possible legitimisation of regulatory and policy networks, it is misleading to present the European legitimacy deficit as being confined to these areas alone and requiring a *sui generis* remedy.

¹¹³ Jachtenfuchs and Kohler-Koch, *op. cit.*, p.23

¹¹⁴ Beetham and Lord, *op. cit.*, p17

¹¹⁵ Hix (98), *op. cit.*, p.45f

¹¹⁶ *Ibid.*, p.41-43

¹¹⁷ Beetham and Lord, *op. cit.*, p.20

1.7 Conclusion

This survey of the academic literature has identified five analytical approaches to the question about the legitimacy deficit of the EU. It concludes that none of them offers a satisfactory analysis of whether and to which extent the legitimacy of the EU is deficient. There are two principal reasons for this conclusion.

First, each of the five analytical perspectives relies on a partial and incomplete account of legitimacy. The EU's undemocratic institutional design, the lack of a European identity, its increasing incompatibility with national constitutional orders, the need for effective governance and popular policy outputs - all these factors have a bearing on, and play a role in, a comprehensive diagnosis of the legitimacy deficit of the EU. But none of these factors *on their own* capture the all these different dimensions of the term legitimacy. Most contributions to the debate operate with an underdeveloped theory of legitimacy, leaving them with a far too narrow analytical framework.¹¹⁸ The peripheral location of legitimacy studies relative to the main research interests of the authors surveyed, such as public policy or European integration studies, contributes to the problem of "undertheorising" the concept of legitimacy. Very often the task of defining legitimacy is only paid slender attention, or what it signifies is quite simply taken for granted.¹¹⁹ That leaves the term with an imprecise meaning, sometimes to be used inconsistently even within the same contribution to the debate.

One consequence is the common failure to distinguish between the *second-order* theory and the *first-order* normative content of legitimacy. Normative preferences about how the EU should be legitimised must be separated analytically from a theoretical framework for empirical legitimacy research. The "democratic deficit" debate provides a good example of how this distinction can be muddled. By collapsing normative models of legitimation (in this case parliamentary democracy) into the *meaning* of the term legitimacy, they automatically create a value-laden account of legitimacy itself. While other approaches to the question of legitimacy in

¹¹⁸ Although Beetham and Lord's book is based on multiple dimension of legitimacy, their approach remains vulnerable to the second criticism of the existing literature discussed in the paragraphs below. See: *Ibid.*, p.23ff

Europe are not as obviously prone to the same fallacy, they nevertheless fail to draw this analytic distinction between first- and second-order discourse about legitimacy. Such a distinction is not only necessary for a clear-cut separation of personal normative preferences about how the EU should be legitimised from an abstract discussion about the concept of legitimacy. It is also indispensable in the context of the EU, as the next paragraphs demonstrate.

Second, most analyses of the legitimacy deficit ignore a unique characteristic of the EU. Unlike most states, the EU is not a self-contained political system, but it is in many ways interlocked with its member states, both with regard to its formal organisational structure as well as with respect to the way its legitimacy is perceived publicly.¹²⁰ Particularly with regard to EU policy-making a gradual “institutional fusion” has made the distinction between national and European institutions less clear-cut and blurred their division of competencies.¹²¹ However, the slow erosion of “discrete constitutional spaces”¹²² does not preclude the analytical separation of the European and national political systems. While there has been a degree of “fusion” of national and European political institutions, the EU remains embedded in very different constitutional structures and national identities which shape very country-specific perceptions of its legitimacy, both formal and felt.¹²³

As regards formal legitimacy, the EU constitutes a major challenge to the national forms of legitimation. But since the EU interacts with distinct national constitutional constellations and policy-making styles, the nature of that challenge differs among member states.¹²⁴ As regards felt legitimacy, public attitudes towards the EU are strongly influenced by country-specific factors, such as domestic political culture, national identity or historic experiences.¹²⁵ The felt legitimacy of the EU is therefore perceived from distinct national perspectives in each member state. It follows that the

¹¹⁹ Witness the cursory definition of “legitimacy” in: Jachtenfuchs (98), *op. cit.*, p.47

¹²⁰ Wolfgang Wessels and Dietrich Rometsch: “Conclusion: European Union and National Institutions”, in: Dietrich Rometsch and Wolfgang Wessels: The European Union and Member States - Towards Institutional Fusion?, (Manchester: Manchester University Press, 1996), pp.328-65

¹²¹ *Ibid.*, p.329

¹²² Klaus H. Goetz and Peter J. Cullen: “The Basic Law after Unification: Continued Centrality or Declining Force?”, in: Klaus H. Goetz and Peter J. Cullen (eds.): Constitutional Policy in Unified Germany, (London: Frank Cass, 1995), p.18

¹²³ Wessels and Rometsch, *op. cit.*, pp.358-60

¹²⁴ *Ibid.*, p.360

¹²⁵ Niedermayer (91), *op. cit.*, pp.344ff

legitimacy of the EU cannot be studied in isolation - discussions on the issue are necessarily contingent upon the country from whose perspective the EU is discussed. This has already become apparent in the above survey of the academic debate whose contributions have often been conceived from a distinctive German or British perspective. Definitions of the legitimacy deficit have invariably been influenced by the domestic constitutional and cultural context of the authors' member state.

Only a comparative study of the legitimacy deficit can fully demonstrate the contingency of the findings on the particular member state from whose perspective the EU's legitimacy is being evaluated. Comparing the perspectives of two member states with very different domestic patterns of formal and felt legitimacy, in this case Britain and Germany, will help to highlight the extent to which the issue is indeed country-specific. Comparative research, however, requires a second-order theory of legitimacy which enables an empirical comparison of different national first-order beliefs about what makes the EU illegitimate.

To summarise, none of the five categories which helped to structure the survey of the literature is based on a theoretical account of legitimacy which fulfils the two requirements identified above: recognition of the multi-faceted and complex nature of legitimacy itself and an acknowledgement that the EU's legitimacy deficit is contingent on the context of an individual member states. The next chapter will devise a theoretical framework which meets these two requirements.

Chapter Two: Towards The Dual Concept of Legitimacy

2.1 Introduction

The first part of this chapter briefly explores the principal theoretical interpretations of the term legitimacy that have been used by political scientists, sociologists, philosophers and lawyers. The second part is devoted to the introduction of the theoretical framework employed in the subsequent chapters: the dual concept of legitimacy. The chapter will close with a discussion of a number of methodological and theoretical objections that could be raised against the dual concept of legitimacy.

2.2 Different Theories of Legitimacy

The introductory chapter has defined legitimacy as a quality of political systems which concerns the right of the representatives of a political system to exercise political power. Legitimacy affects the long-term stability and effective functioning of political systems. Two dimensions of legitimacy were distinguished. On the one hand, political systems claim legitimacy to justify their right to rule by referring to a particular set of legitimising principles, such as popular sovereignty or divine authority. These legitimising principles provide a standard against which the rightfulness of a political system can be assessed. On the other hand, the legitimacy of a political system can also be measured in terms of the level of public support it receives. In a legitimate political system such support is not based on coercion or apathy, but is normatively sanctioned and accepted by the public.

Such a general definition is compatible with a great number of different theoretical elaborations of this contested and multi-faceted concept.¹ Broadly, one can distinguish between empirical and normative theories of legitimacy which are concerned with distinct issues.² The former merely seeks to explain support for political systems by asking whether and how, as a matter of fact, legitimacy has been secured in a particular political system at a particular point in time. The latter is

¹ Like power, justice and democracy, the notion of legitimacy can be understood as an “essentially contested concept”: it is appraisive, internally complex, open textured and there are no fixed criteria for its application. See: Connolly (83), *op. cit.*, p.14

² Barker (90), *op. cit.*, p.7f

concerned with justifying particular forms of legitimation by propagating their underlying political and moral values. That makes the evaluation of normative theories of legitimacy controversial because people judge them against their own values and political beliefs. Empirical theories of legitimacy, on the other hand, are in principle open to proof or falsification because they seek to measure rather than judge the political values of, and public attitudes towards, a particular political system.³

Just as much as in their treatment of legitimacy, the theories discussed differ in having been conceived from the perspective of different academic disciplines such as philosophy, sociology, jurisprudence or political science. It is important, therefore, to add the disclaimer that the next section does not aim to provide a comprehensive survey of the academic literature on legitimacy, nor to do justice to the detailed arguments of the scholars it mentions. It is rather intended to locate the dual concept of legitimacy within the major conceptual ways of thinking about legitimacy. In doing so, it also demonstrates the importance of transgressing the somewhat rigid and artificial boundaries between the above-mentioned academic disciplines that discuss legitimacy, while remaining aware of their analytical or conceptual differences.

2.2.1 Normative Philosophy

In response to a certain degree of popular discontent with the political systems in many countries in the late 1960s, a number of theories have postulated a crisis of legitimacy by focusing on the erosion of popular belief in the legitimacy of political systems. Rather than adopting an empirical, quantitative perspective by using the emergent techniques of public opinion surveying, many scholars preferred to approach the topic from a philosophical and explicitly normative standpoint.⁴ Jürgen Habermas, for instance, regards the state as legitimate only when it fulfils the normatively justifiable expectations of its citizens which the capitalist state, by his account, cannot achieve.⁵ Yet Habermas believes that a rational, objectively true basis for submission to authority can be discovered. Only when norms are based on what he terms “discursive will-formation”, or rational consensus, can legitimate authority be derived from them. Crucially, such will-formation can only occur under conditions

³ *Ibid.*, p.11

⁴ See: Westle (89), *op. cit.*, p.44

⁵ Jürgen Habermas: *Legitimation Crisis*, (London: Heinemann, 1976)

where all members of society have “adequate knowledge of the limiting conditions and functional imperatives of their society.”⁶

Similarly, Held believes that an “ideal normative agreement” is required to satisfy the conditions for “legitimacy as rightness” where the principle of autonomy is fully entrenched in social life.⁷ Only then are rules and laws being followed because people consider them to be right rather than merely instrumentally expedient. Hence his equation of the principle of autonomy, on the basis of which public power is justified, with the principle of political legitimacy.⁸ However, the autonomy necessary for ideal normative agreement is again premised upon people being in the (hypothetical) position to make fully informed and unconstrained decisions.⁹

If only fully informed and fully rational consent really counts, then a political system which receives popular consent based, for instance, on a feeling of traditional attachment to the ruler would not qualify as legitimate.¹⁰ This has given rise to the criticism that, on Habermas’s and Held’s criteria, legitimate authority can only emerge among citizens with the knowledge of Plato’s philosopher kings.¹¹ The criticism seems fair as far as Held and Habermas seek to offer an applicable guide to political reform, but it is misdirected to the extent that they conduct an abstract philosophical search for morally ideal, forms of legitimacy, irrespective of their attainability in practice.

These brief summaries of Held’s and Habermas’s theories suffice to show that both provide a normative set of existence conditions for legitimacy against which existing political systems may be evaluated. Current Western political systems suffer from a legitimacy crisis because they do not conform to the Held’s and Habermas’s demanding standard for legitimate governance. Importantly, this standard is not whether a political system is actually *accepted* as legitimate by its citizens, but whether it is morally *acceptable* according to the normative criteria of Held’s and Habermas’s moral philosophy. In short, empirical and the normative theories of

⁶ *Ibid.*, p.113

⁷ David Held: *Democracy and the Global Order*, (Cambridge: Polity Press, 1995), pp.161-62

⁸ *Ibid.*, p.153

⁹ *Ibid.*, p.161f

¹⁰ Barker (90), *op. cit.*, p.36

¹¹ *Ibid.*, p.89

legitimacy pursue two different questions: Held and Habermas are less interested in measurable, existing levels of legitimacy, they rather want to investigate abstract, ideal forms of legitimacy.¹² Prescriptive approaches like these are therefore largely immune to the charge sometimes levelled against them that their claims about a crisis of legitimacy are not empirically falsifiable.¹³

However, the purpose of this chapter is to find an empiricist theoretical framework capable of comparing *existing* political systems for their *actual*, observable level of legitimacy rather than prescribing any particular form of legitimacy.¹⁴ The aim is not to pronounce upon the “truth” or “falsity” of public legitimacy beliefs in terms of their moral value, but merely to ascertain what these beliefs are. Any empirical legitimacy study must adopt the perspective of an external observer who, without judging these values himself merely discusses the manner and degree to which the members of a particular political system accept them. While normative philosophy represents an important and valuable branch of the study of legitimacy, it pursues research questions and employs analytical perspectives which differ from the empirical political science framework within which most of the *applied* research on legitimacy, including this thesis, is conducted.¹⁵

2.2.2 Empirical Political Science and Sociology

Many political scientists and sociologists have chosen a less overtly normative definition of legitimacy than the one adopted by prescriptive political philosophy. Liberal pluralism as represented by Lipset, for instance, accepts that legitimacy “may be associated with many forms of political systems, including oppressive ones.”¹⁶ However, since legitimacy involves the capacity of a political system to maintain

¹² *Ibid.*, p.69

¹³ Max Kaase: “Legitimitätskrise in westlichen demokratischen Industriegesellschaften: Mythos oder Realität?” in: Helmut Klages and Peter Kmiecik (eds.): *Wertewandel und gesellschaftlicher Wandel*, (Frankfurt: Campus, 1979), pp.328-350

¹⁴ As becomes apparent from the definition of dual legitimacy below, the quality of legitimacy of a particular political system (e.g. EU) has to be measured against potential competing forms of formal legitimacy (e.g. national) and the normative content of felt legitimacy prevailing within the society of that political system. It follows that in the less normative framework pursued below, an “ideal” form of legitimacy (insofar as the theory admits of such abstract ideals) would be one in which *formal* legitimacy is internally consistent and non-contradictory as well as completely congruent with the concept of legitimacy prevailing at the *felt* level.

¹⁵ See: Westle (89), *op. cit.*, pp.43-49

¹⁶ Seymour Martin Lipset: *Political Man*, (London: Heineman, 1960), p.64

popular belief in itself, Lipset considers democracy best placed as it allows social conflicts to be expressed openly. By providing formal procedures with which to legitimise their resolution, democracy also helps to moderate these conflicts and facilitates political decision-making. That suggests that the efficiency of state structures may be contributing to its legitimacy, and Lipset does indeed draw that conclusion.¹⁷ Lipset consequently defines legitimate democracy as “the moderate state of conflict” in which an unspoken consensus on core values exists as the basis for a more limited consensus on policies.¹⁸ While he relates legitimacy to popular beliefs about the appropriateness of political institutions rather than commending or condemning these beliefs, Lipset still betrays a certain normative preference towards a fairly balanced, traditionally ordered liberal democratic political society.

Max Weber, on the other hand, does not condone any particular form of legitimation, but is concerned with the sociological examination of the different existing, observable forms of legitimation. In fact, Weber was probably the first scholar to turn his attention to the subject in any detail. His approach develops from his discussion on domination and obedience, having defined domination “as the probability that certain specific commands (or all commands) will be obeyed by a given group of persons.”¹⁹ According to Weber, the two elements of domination are inner justifications such as the appeal to legitimacy and external means such as coercion, fear or rewards. Weber then identifies three types of inner justification: traditional, charismatic and legal/rational authority.²⁰ All states lay claim to any combination of these three types of authority to legitimise their monopoly of coercion by which they are characterised.

Interestingly, *democracy* is not among the different possible forms of legitimacy he identifies, although Max Weber has pointed out the need for a certain minimal degree of consent to domination, at least from the social élite of the state.²¹ For instance, no social group with the power to overthrow the state must believe the state to be illegitimate. Weber does not treat democracy as a form of legitimacy because it can take many different forms. Democratic states may be legitimate because democracy is

¹⁷ *Ibid.*, p.64ff

¹⁸ *Ibid.*, p.71

¹⁹ Max Weber: *Economy and Society: An Outline of Interpretative Sociology*, (Berkeley: University of California Press, ed. Günther Roth and Claus Wintrich 1978), p.53

²⁰ *Ibid.*, p.215ff

²¹ *Ibid.*, pp.1407-8

the traditional way of conducting public affairs, because they are being led by a charismatic leader (plebiscitarian democracy) or because they operate according to reasonable and fair procedures.

Although the theories of legitimacy advanced by Lipset and Weber represent the kind of empiricist approach this chapter is looking for, they exhibit a tendency to treat the legitimacy of a political system as synonymous with popular support for it.²² However, legitimacy has two dimensions, since it refers both to the formal legitimising principles (such as popular sovereignty) and to the popular support for them.²³ These two dimensions must analytically be carefully separated because they can diverge under certain circumstances. For example, a political revolution will often be triggered by a rapidly declining *belief* in the legitimacy of a political system (for instance Russian Tsarism), even though from a legal standpoint the *constitutional principle* (heredity) remains formally legitimate. In fact, “discussions of legitimacy have been most vigorous at just those times when the order and justice which a normative theory of legitimacy appears to offer seem, by the fragility of such a theory, to be most endangered.”²⁴ Barker also reminds us of the extreme case of Northern Ireland where a considerable minority of the population does not *believe* the United Kingdom to be the legitimate exerciser of state power over their territory, although it no doubt *formally* is.²⁵

2.2.3 Positive Jurisprudence

Particular care must therefore be taken not to appear to reduce the meaning of legitimacy to the mere public belief in it. It would drain the term of some of its explanatory value and would also underplay the fact that legitimacy is first of all a legal term, and as such, independent of public attitudes. It follows that any comprehensive understanding of the term legitimacy should incorporate its jurisprudential meaning to which the discussion will now turn. Like legality, legitimacy has its etymological roots in the Latin word *lex*, but the two expressions are not synonymous.

²² William Connolly: “Legitimacy and Modernity”, in: William Connolly (ed.): Legitimacy and the State, (Oxford: Blackwell, 1984), p.10f

²³ See: Introduction, p.13

²⁴ Barker (90), op. cit., p.4

²⁵ Ibid., p.113

Legality is a procedural standard for testing the correct application of positive law. Thus, if an exercise of power is found *ultra vires*, it is by this criterion illegal, since the power has not been exercised in conformity with the legal standards set for its use. Legality does not deal with the *appropriateness* of the legal standards themselves. Such evaluative issues of political morality are the realm of legitimacy which, according to the definition above, deals with the normative question about the rightfulness of the rules of a political order.²⁶ Positive law itself is usually legitimised with reference to certain underlying principles of legal and political philosophy. For instance, constitutional theory in most countries relies on certain normative philosophical premises to provide the legitimising basis for the formal constitutional distributions of state powers.

This relationship between positive law and its legitimising principles has its parallel in Hart's distinction between primary and secondary rules.²⁷ Defining primary rules as the content of the legal system (e.g. criminal law), secondary rules are some sort of meta-rules governing the former by establishing rules for legislative and judicial behaviour and providing the standards for identifying primary rules. The most important of the secondary rules is the so-called "rule of recognition" from reference to which all other rules derive their validity. The rule of recognition has to be understood as representing the supreme constitutional principle, for instance parliamentary sovereignty.²⁸

Rules of recognition are not fully synonymous with the legitimising principles of a political system, however. Hart is primarily concerned with describing legal systems and their existence conditions. Although he acknowledges the normative nature of the rule of recognition, he hardly elaborates on the implications of this fact.²⁹ He never discusses questions of legitimacy directly, in other words, questions about the philosophical origins or the rightfulness of the rule of recognition. Quite to the contrary, he correctly believes that disputes about the supreme legal criteria

²⁶ Hence Joerges's observation that the problem of legitimacy unites law and political science, see: Christian Joerges: "Das Recht im Prozeß der europäischen Integration", in: Markus Jachtenfuchs and Beate Kohler-Koch: *Europäische Integration*, (Opladen: Leske & Budrich, 1996), p.76

²⁷ H. L. A. Hart: *The Concept of Law*, (Oxford: Clarendon Press, 2nd ed. 1994), p.79ff

²⁸ *Ibid.*, p.94ff

²⁹ *Ibid.*, p.107. The rule of recognition may also entail moral criteria for what counts as law.

themselves are extra-legal value-judgements which lie outside the positivist scope of his book.

Although “legitimacy” and “rule of recognition” share many properties, legitimacy has a wider meaning: legitimising principles of a political system will always *entail* a rule of recognition, but this statement cannot be inverted. Legitimacy connects the rule of recognition with its justification in prescriptive political philosophy, and weighs its application against other, subordinate but possibly conflicting, constitutional principles. To illustrate this point with an example which will be discussed below in far greater detail: even though parliamentary sovereignty is the *rule of recognition* in Britain, political power is exercised with reference to many different *legitimising principles*. These are, for instance, legal or hereditary in nature, and their validity and position within the hierarchy of norms is in turn justified with reference to the particular set of prescriptive philosophical values which underlie the British constitution.

But legitimacy also needs a social dimension, since the rightfulness of the exercise of political power has to be publicly acknowledged for the system to be efficacious. Hart’s jurisprudence contains such a sociological component. His existence conditions for a legal system require non-violent acquiescence and obedience from the bulk of society, but officials must adopt an “internal viewpoint” towards the rule of recognition.³⁰ In other words, they must accept the rule of recognition not just out of habit, but as the “correct” norm for conduct, and they must do so because they take it as providing authoritative reason for identifying valid law. Hart stresses the importance of general *social belief* in, and the acceptance of, the rule of recognition, but to require such beliefs only of the official class seems to be misguided.

Hart’s requirement for élite support merely ensures that a legal system remains stable and efficacious, but stability and efficacy alone do not make such a system legitimate. As discussed above, normative *acceptance* of the right to rule is qualitatively different from mere *obedience*, which is all Hart requires from the bulk of society. Indeed, political systems could maintain their own stability by resorting to coercion of their citizens, whose compliance with political orders would then be based on endurance

³⁰ *Ibid.*, p.116f

rather than normative acceptance. In such cases the term “legitimacy” is simply no longer applicable. This restriction should not come as a surprise, since Hart only deals with the *efficacy* of legal systems rather than the *legitimacy* of political systems. Consequently, his theoretical discussion of the social conditions of a legal system is rather brief and too little developed in order to be adaptable to a discussion on legitimacy.

2.2.4 Dualistic Theories of Legitimacy

The above survey of different theoretical approaches concludes that empirical political science and positive jurisprudence each contribute important insights to the understanding of legitimacy. They illustrate, respectively, how the term legitimacy refers to the formal structure of a political system and to the public support it receives. Both are essential components of legitimacy, and the meaning of the term cannot be reduced to just one of them. The insights from empirical political science and positive jurisprudence should therefore be combined in a dualistic theory of legitimacy. It must separate analytically the formal content of the political system, both positive and normative, from public beliefs about it, and it must be able to illuminate the conceptual relationship between these two elements. Some theories of legitimacy, like those of Weiler and Beetham, acknowledge its dualistic character.

Beetham’s account even goes beyond a dualistic theory by introducing consent as a *third* dimension to legitimacy (his other two dimensions of legitimacy are the legal validity of power and the social justifiability of the rules governing power).³¹ In Beetham’s view, a political system is delegitimised when at least its most significant or most powerful members withdraw their consent and cease to co-operate with the state.³² While this analysis is undoubtedly correct, there are two reasons for suggesting there is little need for the notion of consent to become a third dimension in a definition of legitimacy. First, withdrawal of active consent must be treated as dependent on, or a function of, a deficiency in *felt legitimacy*. If a sufficiently large number of people withdraw from co-operation with a political system or even actively oppose it (Beetham has former Eastern Europe in mind), then they will have done so on the basis of a shift in public beliefs and norms about the sort of political power

³¹ Beetham (91), *op. cit.*, pp.12f

deemed legitimate. Hence, the causes for the erosion of legitimacy are logically *prior* to the visible delegitimisation in the form of withdrawn consent. All by itself the level of consent is unlikely to vary a great deal, but it is very responsive to felt legitimacy.

Second, this relationship between consent and felt legitimacy cannot be inverted. Felt legitimacy is *not* a function of consent. A political system may be faced with an erosion of felt legitimacy to the extent that the population considers it outright illegitimate, but an outside observer may not detect any evidence of consent to the regime being withdrawn.³³ That may be because the widespread use of coercion by the regime has induced a fearful population to engage in regime-sponsored “mass mobilisation”, which Beetham considers a possible sign of active consent to a political regime.³⁴

Alternatively, a population may exhibit some kind of satisfied apathy which results in low levels of active consent. Beetham counts turnout in democratic elections as another sign of consent.³⁵ One could therefore invoke the United States as an example where, due to satisfied apathy, levels of consent as measured by election turnouts are much lower than the level of popular support for America’s political institutions (felt legitimacy).³⁶ Although it may be as difficult to measure *beliefs* as it is to observe popular *behaviour* in these cases, these two examples have also shown that, apart from being dispensable, introducing consent into a concept of legitimacy is more misleading than revelatory for empirical research into the legitimacy of political systems. In short, the inclusion of consent into Beetham’s account of legitimacy does not yield any theoretical insights that could not be gained from the dualistic theory of legitimacy.

The constitutional lawyer Joseph Weiler offers such a dualistic theory. He draws a distinction between formal and social legitimacy.³⁷ On Weiler’s account, formal legitimacy is achieved when the requirements of the law are observed - in other

³² *Ibid.*, p.20

³³ Rosemary H. T. O’Kane: “Against Legitimacy”, *Political Studies*, vol.41, no.3, 1993, p.476ff

³⁴ Beetham (91), *op. cit.*, p.93f Beetham does at the same time acknowledge the potential of mass mobilisation being abused for such purposes.

³⁵ *Ibid.*, p.92

³⁶ G. Bingham Powell: “American Voter Turnout in Comparative Perspective”, *American Political Science Review*, vol.80, no.1, 1986, pp.17-44

³⁷ Joseph Weiler: *The Constitution of Europe*, (Cambridge: Cambridge University Press, 1999), pp.80ff

words, when legality is ensured. He also argues that in Western Europe formal legitimacy is inextricably linked to democracy.³⁸ Social legitimacy is achieved when the political system enjoys “a broad, empirically determined societal acceptance”, and when the system is committed to, and actively guarantees, “values that are part of the general political culture, such as justice, freedom and general welfare.”³⁹ Weiler’s principal distinction is very helpful because it is empiricist and distinguishes analytically between the two dimensions of legitimacy identified above.

However, Weiler’s definition of formal and social legitimacy is in some respects problematic and potentially inconsistent. For instance, he rightly criticises the frequent confusion of the concepts of legitimacy and democracy.⁴⁰ To illustrate this point with a stark example, he contrasts Weimar Germany, where democratic institutions enjoyed little legitimacy, with the Third Reich whose undemocratic structure initially received widespread legitimacy. While non-democratic forms of government would be unlikely to command *social* legitimacy in today’s Europe, the reverse case, whereby a democratic political system loses social legitimacy, is not inconceivable.⁴¹ On Weiler’s own criteria, an abstract political science definition of *formal* legitimacy should therefore not be analytically tied to the concept of democracy. Rather than arguing that a political system “satisfies formal legitimacy if its power structure was created through democratic processes”⁴², it would be more appropriate to say that democracy is the only form of *formal* legitimacy that enjoys *social* legitimacy in today’s Europe.

Second, according to Weiler’s definition, the EU does not suffer from a deficit in formal legitimacy because its Treaties have been democratically approved by national parliaments.⁴³ This assessment neglects the country-specific nature of the EU’s legitimacy. While the Union meets the legality criterion and has been created by democratic institutions (thus meeting Weiler’s conditions for formal legitimacy), its constitutional structure interacts with, and sometimes challenges, the constitutional structures of its member states. This gives rise to varying degrees of incompatibilities

³⁸ *Ibid.*, p.80

³⁹ *Ibid.*, p.80

⁴⁰ *Ibid.*, p.79

⁴¹ *Ibid.*, p.79f

⁴² *Ibid.*, p.80

⁴³ *Ibid.*, p.84

between the European and national level of formal legitimacy which contribute to, and form part of, the overall legitimacy deficit of the EU.⁴⁴

Third, Weiler's definition of social legitimacy is not unproblematic either. His definition combines two different criteria ("societal acceptance" and the active guarantee of "justice, freedom and general welfare"). Again, one can point to examples where these two criteria yield different verdicts about the social legitimacy of a political system. For example, the EU Treaties contain a legal commitment to the values of justice, freedom and welfare, but the EU enjoys comparatively little societal acceptance. Conversely, Hitler's Germany did enjoy popular support despite its disregard for justice and freedom. There is also a more general problem with making the *guarantee of substantial values* a criterion for social legitimacy. Who is to judge how these abstract values ("justice, freedom and general welfare") should be realised in practice, and hence, whether they are adequately protected in any given political system? Weiler's explanatory footnote refers, amongst others, to Habermas which suggests that the social legitimacy of political systems might be judged according to external, normative criteria which may differ from the "empirically determined"⁴⁵ citizens' beliefs.

Finally, Weiler's "brief excursus"⁴⁶ into the subject of legitimacy must be developed further in order to become operational for *applied* comparative research on the legitimacy of the EU. Although he indicates some of the factors contributing to social legitimacy (identity, welfare, democracy), these do not find their way into his analytical framework - his concept of social legitimacy remains largely unidimensional.⁴⁷ The different components that make up social and formal legitimacy need to be clearly identified and their dynamic interaction analysed in order to be able to explain the complex processes that determine social attitudes towards political systems. Weiler's dualistic understanding of legitimacy provides a useful starting point on which to build such a more detailed theoretical framework for empirical legitimacy research.

⁴⁴ See Chapter 5, pp.236ff

⁴⁵ Weiler (99), *op. cit.*, p.80

⁴⁶ *Ibid.*, p.80

⁴⁷ *Ibid.*, p.83-85

To summarise, the two dimensions of legitimacy need to be reflected in a dualistic theory like the one offered by Weiler. But Weiler's basic distinction needs to be refined and his theory to be elaborated before it can be applied for empirical legitimacy research. In particular, it must adopt a "bottom up" perspective to take account of the contingency of the EU's legitimacy on the member states from whose national context it is evaluated. It must also offer a more detailed analysis of the different components of legitimacy, how they interact with each other and how these dynamics affect the overall legitimacy of political systems. It is therefore time to introduce a new "dual concept of legitimacy" in the next section which builds on, and goes beyond, the existing theoretical work on the subject.

2.3.1 The Dual Concept of Legitimacy - The Basic Structure

Building on the preceding discussion, an analytical distinction is made between *formal* and *felt* legitimacy. Formal legitimacy is concerned with the claim of a political system to legitimacy and the justification given for it. This justification consists of normative legitimising principles (popular sovereignty, heredity, divine law, etc.) which are normally codified in a system of positive legal rules (constitution). In other words, formal legitimacy describes the constitutional nature of a political system. It describes the legal principles which justify the right of a political system's representatives to exercise political power.

While dealing with the justification for political power, formal legitimacy is therefore equally concerned with the question about its legal validity. Legitimate political power must conform to the constitutional rules for its legally correct allocation and exercise. Legitimate power must also adhere to the philosophical foundation of the constitution itself. There are then three elements to formal legitimacy: the normative, extra-legal basis of *constitutional philosophy*, the legally codified *constitutional order* and the empirical *constitutional reality* describing how, and by whom, political power is actually being exercised. In their application to a political system, these three elements have to be logically coherent and consistent with each other.

Before proceeding to a definition of felt legitimacy, one more comment has to be made concerning the relationship between the constitutional order and constitutional

reality. Since law is open-textured, these two can hardly ever be synonymous.⁴⁸ Even extensively codified constitutions cannot capture every aspect of political reality, nor are they designed for that purpose.⁴⁹ Through its application in daily political life, every formal legal system has developed an evolving set of practices only some of which are legal in nature such as parliamentary rules of procedure. Historically, important developments of constitutional reality in European democracies have been the emergence of tightly organised political parties and, more recently, professional interest groups. This constitutional reality is very often described in terms of influence or power relationships and thus belongs to the realm of political science rather than law or jurisprudence.

A discussion of constitutional reality becomes particularly important when the actual exercise of political power significantly deviates from, or even violates, the formal legitimising principles of a regime. For instance, criticism of a political system sometimes centres around a perceived incongruence between the formal constitutional order and constitutional reality.⁵⁰ The problem remains, however, that concepts like “influence” or “power” admit of less determinacy and precision than the discussion of legal principles so that claims about a subtle, non-legal shift in the balance of power of a political system are more contestable and less easily identified.⁵¹ The open texture of law and the mutable nature of political reality ensure that formal legitimacy itself is never fully static but subject to perpetual evolution.⁵² An empirical application of formal legitimacy, while describing the *current* constitutional reality, must therefore highlight areas of constitutional evolution over the recent past.

Felt legitimacy concerns the justifiability or rightfulness of a political system in terms of the beliefs and values currently predominating in society. Unlike the institutional-

⁴⁸ Hart, *op. cit.*, p.124ff

⁴⁹ E. C. S. Wade and A. W. Bradley: *Constitutional and Administrative Law*, (London: Longman, 11th ed. 1993), p.5, in the context of the kind of theory of legitimacy developed here see: Westle (89), *op. cit.*, p.171

⁵⁰ A classic example would be: Richard Crossman: “Introduction to Walter Bagehot”, in: Walter Bagehot: *The English Constitution*, (Glasgow: Fontana, ed. Crossman 1963), pp.1-57

⁵¹ Dieter Fuchs, Giovanna Guidorossi and Pelle Svensson: “Support for the Democratic System”, in: Hans-Dieter Klingemann and Dieter Fuchs: *Citizens and the State*, (Oxford: Oxford University Press, 1995), p.329

⁵² This applies in particular to emerging political systems such as the EU. See for example: Helen Wallace: “The Institutions of the EU: Experience and Experiments”, in: Helen Wallace and William Wallace (eds.): *Policy-Making in the European Union*, (Oxford: Oxford University Press, 1996), pp.37-70

legal approach for formal legitimacy, felt legitimacy borrows conceptual elements from political culture theory with its emphasis on sociological and cultural factors. It investigates the relationship between formal legitimacy and what the political society in general considers to be a legitimate political order. In other words, felt legitimacy is conceived here as an aggregative concept which concerns the sum of individual beliefs about the macro features of a political system. A significant discrepancy between the formal distribution of political power and this historically and socially variable set of normative beliefs has a serious impact on the overall legitimacy of a political system, even if formally legitimate. Ultimately, such a scenario may lead to the demise of the delegitimised political system and its replacement with a new one.

2.3.2 Political Culture Theories

Being concerned with the public beliefs and attitudes reflected in a particular political culture, the notion of felt legitimacy will now need some further theoretical elaboration based on political culture theory. One of the first fully operationalised account of political culture theory, Almond and Verba's "Civic Culture"⁵³, defined political culture as the *citizen attitudes* towards politics and the political system. They studied their formation with the help of the emerging methodological tool of empirical survey research. On the premise that beliefs, feelings and values significantly influence individual political behaviour, Almond and Verba argued that a country's political culture constituted an important constraint upon its political structure, while at the same time also being shaped by it.⁵⁴ They analysed this mutual influence using cognitive, affective and evaluative modes of orientation towards the system culture, the process culture and the policy culture of a polity. Almond and Verba concluded that affective feelings towards political systems (*system affect*) could ensure their long-term legitimacy.

Easton's elaboration on Almond and Verba's basic framework distinguishes between three different *objects* of political support, namely political authorities, the *political regime* and the *political community*. The political community consists of the members

⁵³ Gabriel A. Almond and Sidney Verba: The Civic Culture: Political Attitudes and Democracy in Five Nations, (Princeton: Princeton University Press, 1963)

⁵⁴ Gabriel A. Almond: "The Intellectual History of the Civic Culture Concept", in: Gabriel A. Almond and Sidney Verba: The Civic Culture Revisited, (Toronto: Little, Brown & Company, 1980), p.27

of a political system “seen as a group of persons bound together by a political division of labour”⁵⁵, and support for it is expressed in terms of a *sense of community*. Political authorities refers to the incumbents of political roles or offices. In most political systems the political authorities would be the government, but Easton has deliberately chosen the term *political authorities* because of its broader conceptual scope.⁵⁶ The political regime is subdivided into three hierarchical components, namely the *values*, the *norms* and the *structures* of authority. Easton defines these in a similar fashion to the components of formal legitimacy introduced above.⁵⁷ *Values* are broad guiding principles which can be taken for granted, such as for example freedom, equality or political responsibility.

*“Norms specify the kinds of procedures that are expected and acceptable in the processing and implementation of demands. The structures of authority designate the formal and informal patterns in which power is distributed and organised with regard to the authoritative making and implementing of decisions - the roles and their relationships through which authority is distributed and exercised.”*⁵⁸

Easton also distinguishes between two *levels* or *modes* of political support, specific and diffuse support.⁵⁹ Political support as a whole is defined as the evaluative individual orientation towards political objects through either attitude or behaviour, and this orientation can be positive, negative or neutral.⁶⁰ *Specific* support is positively related to the satisfaction obtained from the perceived outputs and performances of the political authorities. *Diffuse* support “refers to evaluations of what an object is or represents, not of what it does.”⁶¹ It is characterised by fundamentality and durability and has two components, trust and legitimacy.⁶² Being thus less utilitarian, diffuse support is impervious to rapid change and constitutes “a reservoir of favourable attitudes.”⁶³

⁵⁵ Easton (65), *op. cit.*, p.177

⁵⁶ *Ibid.*, p.212

⁵⁷ *Constitutional Philosophy, Constitutional Order, Constitutional Reality*.

⁵⁸ Easton (65), *op. cit.*, p.193

⁵⁹ David Easton: “A Re-Assessment of the Concept of Political Support”, *British Journal of Political Science*, vol.5, no.4, 1975, pp.435-58

⁶⁰ *Ibid.*, p.436

⁶¹ *Ibid.*, p.444

⁶² *Ibid.*, p.445

⁶³ Easton (65), *op. cit.*, p.273

While there is a clear “feedback loop” between specific support and output, diffuse support is independent of the specific rewards members obtain from a political system *in the short-run*.⁶⁴ For example, diffuse support allows citizens to respect the political office whose incumbent they might oppose. Over time, however, the orientations derived from particular outputs become dissociated from performance and are transformed into generalised attitudes towards the political system (diffuse support).⁶⁵

This definition already indicates that the two *modes* (specific and diffuse) of support have different degrees of relevance for the three different *objects* of support, *community*, *regime* and *authorities*. Indeed, the sources of specific support are the identifiable outputs (legislation, policies, judicial decisions etc.) and perceived general performances of political authorities.⁶⁶ In other words, specific support is not directly applicable to either the political regime or the political community. Diffuse support, on the other hand, is applicable to all three objects of support.

*“Whereas specific support is extended only to the incumbent authorities, diffuse support is directed towards offices themselves as well as towards their individual occupants. More than that, diffuse support is support that underlies the regime as a whole and the political community.”*⁶⁷

The sources of diffuse support are childhood and continuing adult socialisation and direct experience on whose basis members adjudge the moral value of supporting a political regime or community for their own sake (rather than for any outputs from the political system).⁶⁸

Despite its age, Easton’s dichotomy of specific and diffuse support is still widely used⁶⁹ and has the advantage over Almond and Verba’s “Civic Culture” approach of

⁶⁴ *Ibid.*, p.363-81

⁶⁵ Easton (75), *op. cit.*, p.446

⁶⁶ *Ibid.*, p.441f

⁶⁷ *Ibid.*, p.445

⁶⁸ *Ibid.*, p.446

⁶⁹ See for instance: Oscar W. Gabriel (ed.): Politische Orientierungen und Verhaltensweisen im vereinigten Deutschland, (Opladen: Leske & Budrich, 1997b); Fuchs, Guidorossi and Svensson, *op. cit.*, p.324; Westle (89), *op. cit.*, pp.48-49; Samuel H. Barnes, Max Kaase et al.: Political Action: Mass Participation in Five Western Democracies, (Beverly Hills: Sage, 1979); Dennis Kavanagh: “Political

being able to account for the dynamic aspects of legitimacy in terms of spill-overs and “overflows” between different political modes and objects. For instance, over the long-run output-related specific support for the political authorities may feed into diffuse support for the political regime.⁷⁰ Also, Easton needs to rely less on emotional commitment than Almond and Verba’s *system affect* in explaining the legitimacy of a polity.⁷¹ Instead of having to explain low levels of legitimacy for a particular political system with reference to some opaque notion of *affective feelings*, Easton can trace its causes to an analytically separable range of (often rationally founded) evaluative beliefs. The emphasis on political support in Easton’s systems theory and its adaptability to supranational political systems make it better suited than any rival theories for the research agenda of this thesis.⁷²

Nevertheless, Easton’s approach has not remained uncontested, both at a fundamental level and with regard to the details of his argument.⁷³ The next few paragraphs will consider some of the criticism directed against the classification of his categories, while more general objections to political culture theories will be considered together with the methodological problems surrounding both formal and felt legitimacy towards the end of the chapter. Amongst those critics who wish to retain Easton’s basic structure, a large number have criticised the imprecision in his treatment of the two *modes* of support (diffuse and specific).⁷⁴

First of all, it seems questionable whether diffuse support can be extended to the incumbents of political offices (political authorities) without contradicting Easton’s characterisation of diffuse support as fundamental and durable.⁷⁵ By their very nature, incumbents of political offices tend to change frequently, and the (more permanent) political offices are not normally tied to particular occupants. The only exception may be a case of Weber’s *charismatic authority* where the political office and its occupant are conceptually united.⁷⁶ However, the union of office and occupant in the case of

Culture in Great Britain: The Decline of the Civic Culture”, in: Gabriel A. Almond and Sidney Verba: *The Civic Culture Revisited*, (Toronto: Little Brown & Company, 1980), p.152

⁷⁰ Easton (65), *op. cit.*, chapters 23-28

⁷¹ David P. Conradt: “Changing German Political Culture”, in: Gabriel A. Almond and Sidney Verba: *The Civic Culture Revisited*, (Toronto: Little, Brown & Company, 1980), pp.221-22

⁷² See: *Introduction*, p.16

⁷³ For a comprehensive critique from *within* systems theory see: Westle (89), *op. cit.*, pp.73-90

⁷⁴ *Ibid.*, pp.78-90

⁷⁵ *Ibid.*, p.86f

⁷⁶ Weber, *op. cit.*, p.215ff

charismatic authority would be categorised as a feature of the formal political regime. A similar problem arises from Easton's definition of legitimacy which he subdivides into *ideological*, *structural* or *personal*. Legitimacy, by virtue of being a component of diffuse support, must be fundamental and durable, so that its application to the temporary incumbents of political offices (*personal* legitimacy) seems misguided. Incumbents may be able to lend their office higher legitimacy in the long-run⁷⁷, but this will come about because of the high moral or material *output* they have achieved which is measured in terms of specific support.⁷⁸

Second, the notion of *trust* shifts uneasily between its source in specific support in terms of generalised output performance and its classification as diffuse support.⁷⁹ Although Easton sometimes speaks of trust in the *regime*,⁸⁰ in the long-run levels of trust are created or lost through the long-term actions of *authorities* (incumbents), either in terms of their performance or personal qualities.⁸¹ Elsewhere, Easton defines trust as the "probability of getting preferred outcomes without the group doing anything to bring them about."⁸² Levels of trust in the political regime depend on the extent to which its values, norms and structures are geared towards the common interest, whereas the political authorities gain trust by pursuing the common interest in their output and performances.⁸³ This definition raises doubts about the independent explanatory value of the concept of trust. Trust in the political regime might equally be measured in terms of diffuse regime support whereas trust in the political authorities seems to be identical to specific output support.⁸⁴ Despite Easton's attempts to reconcile these inconsistencies⁸⁵, the notion of *trust* further muddles his concept of diffuse support to the extent that "diffuse support is literally diffuse in the sense of having uncertain contents."⁸⁶

The next few paragraphs will suggest a number of modifications of the Eastonian paradigm with the intention of rendering it more consistent and simplifying it to make

⁷⁷ One might consider President de Gaulle or Commission President Delors as examples here.

⁷⁸ Westle (89), *op. cit.*, p.87ff

⁷⁹ Dieter Fuchs: "Trends of Political Support", in: Dirk Berg-Schlosser and Ralf Rytlewski (eds.): *Political Culture in Germany*, (London: Macmillan, 1993), pp.235-36

⁸⁰ Easton (75), *op. cit.*, pp.448-49

⁸¹ *Ibid.*, p.449

⁸² Easton (75), *op. cit.*, p.447

⁸³ Easton (65), *op. cit.*, p.311ff

⁸⁴ Westle (89), *op. cit.*, p.70f

⁸⁵ Easton (75), *op. cit.*, pp.446-8

it operational for empirical research. This will result in a theory of political support compatible with the dual concept of legitimacy developed above. The diagram below illustrates how these modifications contribute to the detailed structure of the dual concept of legitimacy.

First, political authorities can only be the object of specific, not diffuse, support.⁸⁷ Conversely, specific support does not apply to the political regime and the political community.⁸⁸ Easton's classification for measuring specific support as *instrumental*, *expressive* or *extraneous* is not adopted. It is too complex and detailed for empirical application, and suffers from internal inconsistencies.⁸⁹ Instead, sources of specific support are the outputs and performances from the political authorities and the perceived personal abilities of incumbents of political offices. *Trust* in political authorities is also treated as a source of specific support, since it contributes to the legitimacy of a political system only in the long-run.

Second, being theoretically inadequate and conceptually tied to political authorities, trust therefore disappears as a component from diffuse support.⁹⁰ It follows that diffuse support is now unidimensional, and its only remaining component, legitimacy, has two objects, the political regime and the political community.⁹¹ Support for both objects is characterised by its fundamentality and durability.⁹² Since the legitimacy of a political community usually expresses itself through affective communal ties such as national identities, it seems to make sense to follow Easton by saying that diffuse support for the political community is reflected as a *sense of political community*.⁹³ While legitimacy can thus be associated with two objects of support (community and regime), the term *felt legitimacy*, given its above definition as part of the dual concept of legitimacy, will for reasons of consistency henceforth exclusively refer to support for the political system as a whole.

⁸⁶ Fuchs (93), *op. cit.*, p.236

⁸⁷ Most empirical applications of Easton's theory have taken this view, see: Westle (89), *op. cit.*, pp.165-66, 186

⁸⁸ Russell J. Dalton: *Citizen Politics in Western Europe*, (New Jersey: Chatham, 1988), p.228

⁸⁹ Westle (89), *op. cit.*, p.184f

⁹⁰ *Ibid.*, pp.84-85, 167, 187-88

⁹¹ *Ibid.*, p.188

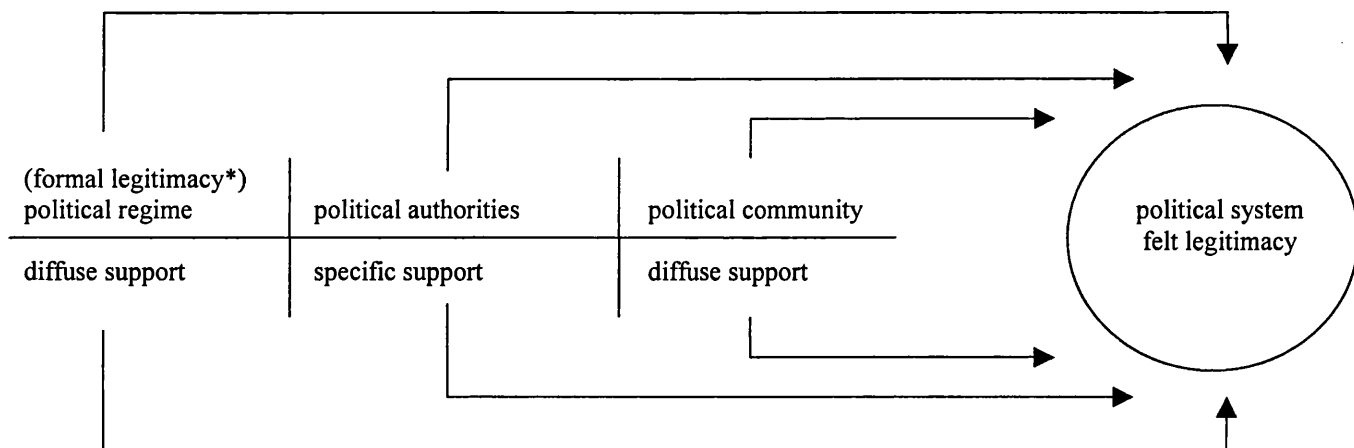
⁹² Easton, (75), *op. cit.*, p.445

⁹³ Easton (65), *op. cit.*, pp.187-88

Third, Easton's classification of legitimacy into ideological, structural and personal legitimacy contributes to the confusion about the meaning and status of political authorities (see discussion of personal legitimacy above). It unnecessarily complicates the discussion and does not offer any significant theoretical insights. It is therefore abandoned in favour of the definition of legitimacy developed for the dual concept.

Fourth, Easton's three hierarchical components of a political regime (the *values*, *norms* and *structures* of authority) are themselves a source of considerable confusion and conceptual complication.⁹⁴ In order to tie Easton's system theory closer to the dual concept of legitimacy, they are therefore replaced with the equivalent three components of formal legitimacy, namely *constitutional philosophy*, *constitutional order* and *constitutional reality*. This makes particular sense if it is remembered that the political regime was defined above as the formal political order - it is therefore conceptually synonymous with formal legitimacy.

2.4 The Dual Concept of Legitimacy - The Detailed Structure



* (Consisting of: Constitutional Philosophy, Constitutional Order, Constitutional Reality)

Figure 2.1

The detailed structure of the dual concept of legitimacy has thus adapted Easton's systems theory to the needs of the discussion of felt legitimacy. To summarise, the dual concept comprises the formal and felt legitimacy of political systems. The *formal legitimacy* of a political system is tantamount to the *political regime*. The *felt*

⁹⁴ Westle (89), *op. cit.*, p.74f

legitimacy of a political system is determined by and dependent on the three objects of political support, in other words (diffuse) support for the political regime, (diffuse) support for the political community and (specific) support for the political authorities. It follows that felt legitimacy, has three sources, two of which are diffuse. The diagram above should help to illuminate these relationships. The next three sections deal with the contribution, or spill-over, to felt legitimacy from each of the objects of support in turn.

2.4.1 The Components of Felt Legitimacy: The Political Community and the Question of Collective Identities

Diffuse support for the political community can have a significant impact on the legitimacy of a political system.⁹⁵ However, members of a political community may belong to different nationalities, live in different cultures and traditions or believe in different religions. They may share the same *political* community while at the same time belonging to different *social* communities.⁹⁶ Notwithstanding potential social differences, a *sense of political community* (which measures the strength of support) expresses itself through

*“feeling of belonging together as a group which, because it shares a political structure, also shares a political fate. Regardless of the dissimilarities of customs, religion, socio-economic status, nationality, and the like, to the extent that there is a feeling of political community, the members will possess mutual sympathy and loyalty with respect to their participation in a common political unit.”*⁹⁷

Communal ideologies can be employed to stimulate a *sense of political community* which measures the community's cohesiveness as a group.⁹⁸ Easton defines communal ideologies as “convictions that express, as well as reinforce, the sense of political unity among the members as a group of persons sharing a common set of structures, norms and values for political purposes.”⁹⁹ Every political system must develop a broad and deep reservoir of such independent community support based on

⁹⁵ Beetham (91), *op.cit.*, p.451

⁹⁶ Easton (65), *op. cit.*, p.183

⁹⁷ *Ibid.*, p.185

⁹⁸ *Ibid.*, p.325, 333ff

⁹⁹ *Ibid.*, p.334

a strong sense of mutual political identification on which it can draw in times of economic or military crisis, severe internal differences of interest or other forms of *system stress*. Even in the absence of such a *sense of political community* or affective political bonds, there may still be (for example) instrumental support for the community, such as the benefits from political co-operation. “But if a sense of community fails to emerge and deepen over time, as a source of support, it may leave the system extremely vulnerable to stress.”¹⁰⁰

While the concept of political community is not synonymous with the concept of the nationhood, a securely and long-established sense of national autonomy and identity can be a powerful provider of additional political legitimacy, as Beetham reminds us.¹⁰¹ Breuilly even regards the political identity nationalism supplies as essential to meet the requirements of effective modern political action, such as co-ordination, mobilisation and legitimacy.¹⁰²

The literature on nationalism and national identity is vast and there is little scholarly agreement on the definition of key concepts and research questions to be addressed.¹⁰³ As a result, the major paradigms in the debate on nationalism make different assumptions about the nature of collective identities and about whether the dynamics of identity (trans-)formation can be influenced. Since the options for legitimising the EU by means of identity-building is discussed in detail in chapter six, it will suffice at this point to indicate briefly how the different theories of nationalism approach the dynamic aspects of collective identities.

Primordialists tend to conceive of the nation as an organically rooted, ancestrally based immemorial community which is based on social and cultural phenomena such as language, religion, territory and kinship.¹⁰⁴ Such organic theories of nationalism were first advanced by the German Romantic movement. It argued that the world consists of culturally (or even biologically) differentiated “natural” nations which

¹⁰⁰ *Ibid.*, p.187

¹⁰¹ Beetham (91), *op. cit.*, p.133

¹⁰² John Breuilly: *Nationalism and the State*, (Manchester: Manchester University Press, 1993) p.381

¹⁰³ The next few paragraphs will loosely follow Smith’s classification of the major paradigms in the debate on nationalism. Anthony Smith: *Nationalism and Modernism*, (London: Routledge, 1998), 221ff

¹⁰⁴ For instance: Pierre van den Berghe: *The Ethnic Phenomenon*, (New York: Elsevier, 1979), Clifford Geertz (ed.): *Old Societies and New States*, (New York: Free Press, 2nd ed. 1972)

form the bedrock of history.¹⁰⁵ Primordialists would therefore deny that national identity can be created artificially, and they may point to the enduring predominance of organic national identities in the member states of the EU.¹⁰⁶

Modernists, on the other hand, generally regard nations as modern cultural artefacts and “imagined political communities”.¹⁰⁷ Nations are products of modernity rather than deeply rooted in history, and they are the constructs of national political élites who engage in deliberate and rational nation-building.¹⁰⁸ In contrast to pre-modern group identities, the modern nation was formed through processes of state centralisation, administrative expansion and territorial demarcation, characterised in the *nation state* as a “bordered power container”.¹⁰⁹ Widespread loyalty is ensured by means of the mass education system which communicates a standardised and centrally sustained national (high) culture.¹¹⁰ These assumptions make some modernists argue that a European identity can be “invented” and made to resonate widely by means of deliberate nation-building¹¹¹ or through “spill-overs” from the integration process. Indeed, Easton explicitly refers to European integration. He suggests that increasing co-operation might be one way of breeding the degree of mutual identification and affective political bonds (diffuse support) necessary for the long-term stability of any political community.¹¹²

Post-modernists argue that in the age of globalisation nationalism has lost its state-making and economy-forming functions.¹¹³ National identity and ethnicity are gradually being replaced by supranational or even global identities fostered by mass communication, economic interdependence and cultural homogenisation. Post-modernists also tend to reject nationalism as normatively undesirable. Some have therefore suggested that constitutional patriotism should replace nationalism as the

¹⁰⁵ Anthony Smith (98) *op. cit.*, p.146

¹⁰⁶ Daniela Obradovic: “Policy Legitimacy and the European Union”, *Journal of Common Market Studies*, vol.34, no.2, 1996, pp.213ff

¹⁰⁷ Benedict Anderson: *Imagined Communities - Reflections on the Origin and Spread of Nationalism*, (London: Verso, 2nd ed., 1991), p.6

¹⁰⁸ Breuilly, *op. cit.*, p.2-15, Karl Deutsch and William Foltz (eds.): *Nation-Building*, (New York: Atherton Press, 1963)

¹⁰⁹ Anthony Giddens: *The Nation State and Violence*, (Cambridge: Polity Press, 1985), p.120

¹¹⁰ Ernest Gellner: *Nations and Nationalism*, (Oxford: Blackwell, 1983), p.55-57

¹¹¹ For example: Deutsch et al, *op. cit.*

¹¹² Easton (65), *op. cit.*, p.186f

¹¹³ Eric Hobsbawm: *Nations and Nationalism Since 1780*, (Cambridge: Cambridge University Press, 1990), p.175f

focus of collective identities.¹¹⁴ Alternatively, a new plural nationalism with an emphasis on ethnic diversity and multiculturalism might assume that function. Consequently, post-modernists tend to reject the relevance of nationalisms in current-day Western Europe and propagate the notions of “thin identity” and citizenship as a more appropriate communal ideology for the EU.¹¹⁵

Some recent contributions have attempted to bridge the gap between modernism and primordialism, such as the “*ethno-symbolism*” of Smith and Armstrong. Smith defines ethnic communities as constituted not by lines of physical descent, but by the sense of continuity, shared cultural memory and collective destiny embodied ancestral myths and a sense of social solidarity.¹¹⁶ While stressing the historic legacy of *ethnic* identities, ethno-symbolists acknowledge that in modernity nationalism reinterprets these myths, symbols and memories to generate *national* identities.¹¹⁷ Successful national identities are therefore often based on older, pre-modern ethnic and cultural ties.¹¹⁸ As regards the dynamics of identity-formation in the EU, ethno-symbolists adopt an intermediate position by conceding the possibility of European nationhood, while consigning its feasibility to the very long-run (decades rather than years).¹¹⁹

Whichever interpretation of nationalism and national identity is adopted, one must bear in mind that a future European identity will probably always co-exist with other layers of identity. While the twin structure of the nation state and democracy that emerged from the French revolution often led to the conceptual (con-) fusion between *ethnos* and *demos* as the politically organised people, there are sometimes multinational realities behind individual states, the obvious example being Switzerland.¹²⁰ Consequently, Llobera distinguishes between the exception of the ethnically homogenous *nation state* and the norm of the culturally much more heterogeneous *national state*.¹²¹ Such a distinction makes the dual concept of legitimacy applicable not only to multi-national states, but also to supra-national

¹¹⁴ Jürgen Habermas: “The European Nation State - Its Achievements and its Limits”, *Ratio Juris*, vol.9, no.2, 1996, pp.285ff

¹¹⁵ Garcia, *op. cit.*, pp.10-15, 21-27, Beetham and Lord, *op. cit.*, pp.43-47

¹¹⁶ Anthony Smith: *National Identity*, (Harmsworth: Penguin, 1991)

¹¹⁷ John Armstrong: *Nations before Nationalism*, (Chapel Hill NC: University of North Carolina Press, 1982), pp.8ff

¹¹⁸ Anthony Smith (98), *op. cit.*, p.195

¹¹⁹ Anthony Smith (91), *op. cit.*, pp.174ff

¹²⁰ Garcia, *op. cit.*, p.10

organisations like the EU. A supra-national political community can be viable without having to *replace* its component national communities to become the *exclusive* source of collective identification.

*"It follows that just as the scope of a political system will vary with the system level, so will the scope of the political community. It is just an aspect of the system to which we may be referring. We may range from the local to the broad international community. For a person to say that he is a Parisian, a Frenchman, and a European indicates three different levels of political community to which he simultaneously adheres."*¹²²

2.4.2 The Political Regime

The political regime is the second important object of diffuse support which affects the legitimacy of a political system. Understood in a legitimising, rather than partisan sense, *ideology* will provide a normative framework of political principles and values against which regimes can be assessed. As Easton puts it,

*"...the power of the authorities and of the regime both depend upon continuing validation through some set of values, a legitimating ideology. We may describe these as ethical principles that justify the way power is organised, used, and limited and that define the broad responsibilities expected of the participants in the particular political relationships. [...] In descriptive terms, we may identify them as the felt bases or grounds of obligation, the standards by which basic political arrangements and practices are tested and validated. Belief in the rightness of these values or principles and in the compatibility of a regime and its authorities with them constitute a major source of motivation for support of these objects."*¹²³

Since this chapter treats political regime as synonymous with formal legitimacy, Easton's legitimating ideology is the equivalent of the *normative content of formal legitimacy*. A legitimating ideology is concerned with the question about the moral

¹²¹ Joseph R. Llobera: "The Role of the State and the Nation in Europe", in: Soledad Garcia: European Identity and the Search for Legitimacy, (London: Pinter Publishers, 1993), p.71

¹²² Easton (65), op. cit., p.181

¹²³ Ibid., p.292

right to rule, and a legitimate regime can enjoy a considerable civic commitment to its maintenance and defence based on the moral conviction of its members.¹²⁴ Even authoritarian regimes seek to create some degree of legitimacy for themselves because by doing so they can reduce the cost of governing and shore up the stability of their political system. Any legitimating ideology will also contain values as to the appropriate degree of individual civic involvement in the decision-making process of the regime.¹²⁵

While such ideological commitments emerge from the educative socialisation process during childhood, personal experiences with the political regime may make the continuing adult socialisation assume a life of its own.¹²⁶ This creates some scope for the political authorities of the regime to influence the legitimating ideology in its favour by reinforcing the political culture both through the socialisation process and by acting in accordance with it.¹²⁷ However, people will judge a political regime not only according to its formal constitutional order, but they will also take constitutional reality into account. The political regime may enjoy lower support than the formal legitimising principles on which it is based if the translation of the latter into constitutional reality is considered to be flawed.¹²⁸ But a lack of compatibility between the regime's normative values and the conduct of political authorities (or an incompatibility between the legitimating ideology represented in the regime as opposed to those espoused by its citizens) will have little impact on felt legitimacy in the absence of a credible alternative system of formal legitimacy.¹²⁹

2.4.3 The Political Authorities

The third source of felt legitimacy is support for the political authorities. This support is specific rather than diffuse in nature because it is influenced by utilitarian factors and has a merely indirect and long-term connection to legitimacy. The creation of specific support for the political authorities is the easiest and most direct response to

¹²⁴ Easton (75), *op. cit.*, p.451f

¹²⁵ This provided the theoretical basis for the argument about a crisis of *representative* democracy, see: Fuchs (93), *op. cit.*, p.233

¹²⁶ Easton (75), *op. cit.*, p.445-46

¹²⁷ See below, pp.82ff. The causation from the regime to political culture is particularly important for regime transitions, see: Richard Rose and Edward C. Page: "German Responses to Regime Change: Culture, Class, Economy or Context?", *West European Politics*, vol.19, no.1, 1996, p.6

¹²⁸ Westle (89), *op. cit.*, pp.171-4

system stress.¹³⁰ Specific support is generated by satisfying public demands for positive policy outputs from the political authorities. If this demand satisfaction can be maintained over the longer term, specific support will spill over into felt legitimacy for the political system.¹³¹ Having as its object the actions and performance of the government or political élites rather than the structure of the regime, levels of specific support fluctuate with the actual policies and the governing style of the political authorities.¹³² In other words, specific support is object-specific in that it is related to people's perception of the output from political authorities.¹³³

It is here that we can usefully incorporate notions such as confidence or trust (in political authorities). If specific support is low because citizens are dissatisfied with either the output and performances or the personal merit of the political authorities, then the perpetuation of low specific support over the medium term will respectively affect either public confidence or trust in these political authorities.¹³⁴ Only when the low levels of specific support persist *in the long run* will dissatisfaction with the political authorities spill over into lower felt legitimacy of the regime as a whole. While post-war Italy might serve as an example of such a process¹³⁵, poor economic performance in Britain in the 1960s and 70s has only led to a decline in trust and confidence in the country's political élite without translating into a significant erosion of felt legitimacy.¹³⁶

Conversely, regimes with a low level of felt legitimacy, as for instance some newly founded regimes or regimes in a ideologically or ethnically divided country, will seek to accumulate diffuse political support through the provision of beneficial output and benevolent performance of the authorities. Indeed, Easton makes a specific reference to European integration when he argues that the economic benefits from supranational

¹²⁹ Fuchs, Guidorossi and Svensson, *op. cit.*, p.329

¹³⁰ Easton (65), *op. cit.*, p.275

¹³¹ *Ibid.*, p.273

¹³² Easton (75), *op. cit.*, pp.437-39

¹³³ *Ibid.*, pp.437-39

¹³⁴ Gabriel A. Almond: "The Study of Political Culture", in: Dirk Berg-Schlosser and Ralf Rytlewski (eds.): *Political Culture in Germany*, (London: Macmillan, 1993), p.21

¹³⁵ Ola Listhaug and Matti Wiberg: "Confidence in Political and Private Institutions", in: Hans-Dieter Klingemann and Dieter Fuchs: *Citizens and the State*, (Oxford: Oxford University Press, 1995), pp.309-10

¹³⁶ Almond (80), *op. cit.*, p.21

co-operation may in time spill over into diffuse regime and community support for an emerging international political system like the EU.¹³⁷

2.5 Legitimation of Political Systems

The previous sections have provided the theoretical framework for analysing existing levels of *legitimacy* in a political system, but have touched only indirectly on the potential for its *legitimation* through political leadership. This raises questions about the nature of the dynamic relationship between legitimation policies and mass support for political systems. The interdependence between public support and system output by means of a dynamic feedback loop constitutes an integral part of Easton's systems theory. If a political system suffers from a legitimacy deficit, its political leaders can resort to *omnibus legitimating responses* which aim to increase support for all three components of felt legitimacy.¹³⁸

Deutsch's cascade model of élite-mass linkage offers a more detailed explanation of how political leadership can influence citizens' attitudes towards the political system. His model comprises five levels of political stratification which form interconnected opinion pools: they reach from the socio-economic and political élites, via the mass media and opinion leaders down to the politically relevant strata of society. Communication and information flows more easily from the higher status level to the lower ones than it does the other way. While political élites can exercise national opinion leadership and management, the lower status levels have their own measure of autonomy and are capable of innovation and initiative in these matters.¹³⁹

Hoffmann agrees that the prevalence of pro-European political leaders, and their effect on political culture and public opinion, is one of the conditions conducive to integration (and to the obsolescence of the nation state).¹⁴⁰ Deutsch's assumptions have been empirically tested in a recent case study which provides some evidence that

¹³⁷ Easton (65), *op. cit.*, p.186f

¹³⁸ *Ibid.*, p.307

¹³⁹ Karl Deutsch: *Analysis of International Relations*, (Englewood Cliffs, NJ: Prentice Hall, 1968), pp.119-31

¹⁴⁰ Stanley Hoffmann: "Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe", *Daedalus*, vol.95, no.3, 1966, pp.862-915

élite mobilisation does indeed affect levels of mass support for the EU.¹⁴¹ Previous empirical research by Dalton and Duval also supports this argument. They demonstrate that public attitudes towards European integration are frequently conditioned by the way national political élites and the media portray, and react to, political developments in the EU.¹⁴²

However, the scope for the political leadership to pursue legitimisation policies is limited, and in some cases no amount of active legitimisation can prevent levels of legitimacy falling below a minimum threshold. Beetham warns against an oversimplified account of legitimisation which treats citizen beliefs largely as the product of direct influence by the powerful. Political leaders never influence, let alone control, *all* the means of disseminating and reproducing ideas in any society. Even totalitarian political systems have been unable to achieve comprehensive felt legitimacy, despite their monopoly over official propaganda. This is because people are never merely the passive recipients of ideas or messages to which they are exposed. They tend to be selective, assessing ideas and information against their own lived experience, beliefs and values.¹⁴³ Cognitive mobilisation of West European electorates over recent decades has enhanced their ability to formulate independent attitudes towards their political system.¹⁴⁴

In conclusion, political leadership can succeed in legitimating political systems over time, but the dynamics of legitimacy are determined at both mass and élite level. There is considerable, but not unlimited scope for political leadership to influence the legitimacy of a political system by means of legitimisation policies. In particular, political leadership can adjust the components of felt legitimacy themselves, for instance through constitutional (*regime*) and economic (*authorities*) reform or by promoting a communal ideology (*community*). Alternatively, political élites can seek

¹⁴¹ Bernard Wessels: "Support for Integration: Elite or Mass-Driven?", in: Oskar Niedermayer and Richard Sinnott (eds.): Public Opinion and Internationalised Governance, (Oxford: Oxford University Press, 1995), p.161f

¹⁴² Russell Dalton and Robert Duval: "The Political Environment and Foreign Policy Opinions - British Attitudes towards European Integration 1972-79", British Journal of Political Science, vol.16, no.1, 1986, pp.113-34

¹⁴³ Beetham (91), op. cit., p.105f

¹⁴⁴ Ronald Inglehart: "Long-Term Trends in Mass Support for European Unification", Government and Opposition, vol.12, no.2, 1977, pp.150-77

to legitimise a political system by influencing the public perception of the political system through media coverage, propaganda and education.¹⁴⁵

The impact of élite action depends on a number of contextual variables. For instance, élites are less likely to be able to lead public opinion on an issue where citizens have deeply held values and beliefs or which is contested among the élites themselves.¹⁴⁶ Two useful indicators for the degree of élite consensus on the EU are the positions of the media and of political parties. Empirical evidence suggests that the media have a certain amount of influence on whether citizens evaluate the EU positively or negatively.¹⁴⁷ Likewise, political parties are able to mobilise their supporters quite successfully both for and against the EU.¹⁴⁸ Consequently, if media coverage is politically polarised and the “European question” is entangled in the competitive struggle between parties, successful legitimation of the EU becomes more difficult. On the other hand, a broad pro-European consensus among political parties and the media facilitates attempts to legitimate the EU through political leadership.

2.6 Challenges to the Dual Concept of Legitimacy

Having identified and discussed the detailed structure of the dual concept of legitimacy, this section considers some of the wider theoretical and methodological problems associated with formal and felt legitimacy.

Formal legitimacy is based on a legal-institutionalist methodology. Traditional institutionalism has been confined to descriptive, formal comparative analysis of political systems and their institutions. Its proponents treat legal rules and procedures as the basic independent variable and the functioning of political systems and the behaviour of its actors as a dependent variable. This approach has long been criticised by behaviouralists as being unable to explain the true nature of power relationships between institutions and their actors. Institutionalism neglects the variables which denote informal arrangements of society and their role in the formation of the exercise

¹⁴⁵ Barker (90), *op. cit.*, p.143

¹⁴⁶ Inglehart (77a), *op. cit.*, pp.170-75

¹⁴⁷ Dalton and Duval, *op. cit.*, pp.113-34

¹⁴⁸ Bernard Wessels, *op. cit.*, pp.156-60

of power.¹⁴⁹ However, modern versions of institutionalism can incorporate behaviouralist insights into how a political system operates in practice.¹⁵⁰ New institutionalism, for instance, adopts a wider view of what constitutes institutions which takes account of less formalised aspects of a political system, such as policy networks. It also connects formal institutional rules with their normative context by studying the values, codes and cultures into which institutions are embedded.¹⁵¹

The concept of formal legitimacy acknowledges that the legal allocation of power within a political system cannot fully explain the actual distribution of political power within that system.¹⁵² It therefore complements the analysis of the formal constitutional order of political systems with a discussion of constitutional reality. Consequently, the application of formal legitimacy involves the study of constitutional and legal documents as primary sources, but it also draws on secondary sources in the shape of academic interpretations of power relationships and institutional values within political systems.

The measurability of felt legitimacy poses four major theoretical and methodological challenges. Most of them concern the problem of determining the true nature and intensity of support for a political system. Easton distinguishes between supportive actions as *overt support* for a political system and supportive attitudes as *covert support*.¹⁵³ The empirical measurement of both forms of support cause methodological difficulties. In the most extreme case, political coercion or the fear thereof may make it impossible to gather accurate empirical information about the level of covert or overt public support for a political system. Quiescent behaviour and verbal support may both misrepresent “genuine” individual orientations because they have been performed under duress.¹⁵⁴ However, the methodological requirement for an uncoerced expression of overt and covert support can be considered as met in Western Europe to which this thesis is geographically confined.

¹⁴⁹ For a influential and classic critique see: David Easton: The Political System: An Inquiry into the State of Political Science, (New York: Alfred A. Knopf, 1971 2nd ed.), esp. pp.37-89, 233-306

¹⁵⁰ R. A. W. Rhodes: Understanding Governance - Policy Networks, Governance, Reflexivity and Accountability, (Buckingham: Open University Press, 1997), pp.79-83

¹⁵¹ For an EU-related discussion of new institutionalism see: Kenneth A. Armstrong and Simon J. Bulmer: The Governance of the Single European Market, (Manchester: Manchester University Press, 1998), pp.50-63. Also: Hix (94), *op. cit.*, pp.18-22

¹⁵² Westle (89), *op. cit.*, p.171

¹⁵³ Easton (65), *op. cit.*, p.159

¹⁵⁴ O’Kane, *op. cit.*, pp.480-84

A second, more general methodological problem lies in the definition of the necessary degree, breadth and intensity of support for a political system to qualify as legitimate.¹⁵⁵ On one side of the argument, Wright draws attention to the fact that Western democracies have historically rarely enjoyed comprehensive and active citizen support. Democratic political systems can therefore be considered legitimate as long as there is no significant active opposition to them.¹⁵⁶ This leads Wright to reject Easton's argument about the importance of diffuse support for the legitimacy of a political system. Concluding from his US-based study of public attitudes Wright also rejects Easton's basic distinction between specific and diffuse support because he denies its theoretical validity and usefulness.¹⁵⁷ He measures support mostly in terms of "trust" which, at his time of writing, had been shaken in the American political system by the Watergate scandal and the Vietnam war.¹⁵⁸ Based on contemporary empirical research he argues that

*"efficacy and trust, far from being independent of outputs, seem to be rather sensitive to them: their level appears to rise and fall precisely in response to these 'disappointments' against which the reservoir of diffuse support is supposed to protect the system."*¹⁵⁹

However, because of its theoretical imprecision the notion of "trust" is eliminated from the dual concept of legitimacy which resolves most of the theoretical objections to Easton's distinction between specific and diffuse support.¹⁶⁰ Besides, empirical research from a non-American context have often been more reconcilable with Easton's theory than Wright's US-based study.¹⁶¹ Even Wright concedes that systems theory offers a viable account of the impact of the crucial social group of "consenters" on the stability of democratic government.¹⁶² This can easily be reconciled with Easton's argument that

¹⁵⁵ Westle (89), *op. cit.*, p.198-200

¹⁵⁶ James D. Wright: *The Dissent of the Governed*, (New York: Academic Press, 1976), p.275-9

¹⁵⁷ *Ibid.*, pp.72-7, 196-200

¹⁵⁸ *Ibid.*, p.259ff

¹⁵⁹ *Ibid.*, p.196

¹⁶⁰ Oskar Niedermayer and Bettina Westle: "A Typology of Orientation", in: Oskar Niedermayer and Richard Sinnott (eds.): *Public Opinion and Internationalised Governance*, (Oxford: Oxford University Press, 1995), p.37

¹⁶¹ Ekkehart Zimmermann: "Crises and Crises Outcomes: Towards a New Synthetic Approach", *European Journal of Political Research*, vol.7, no.1, 1979, p.88

¹⁶² Wright, *op. cit.*, pp.270-76

*“equal expression of supportive attitudes cannot automatically be given equal weight with respect to their consequences for the persistence of a system. A few powerful members, such as an active political élite, a military cadre, or an organised intelligentsia, may be able to make their positive or negative support count for more than high levels of support from unorganised millions.”*¹⁶³

While this may be particularly true as far as the persistence of non-democratic political system is concerned, Wright underestimates the importance of mass legitimacy for democracies. Almond and Verba’s *Civic Culture* study started from the opposite premise that successful democracies required active mass participation based on the informed rationality of citizens.¹⁶⁴ Westle maintains that persistent disinterest in the political process by a large section of the population might undermine the foundations of a democratic political system, even if that effect was not intended.¹⁶⁵ While support from the politically relevant members of a political system may be sufficient for its *stability*, in order to achieve *legitimacy* a political system, in particular a democratic one, must be able to enjoy at least some degree of support from all social and political groups.¹⁶⁶

Westle’s normative objections make sense even from a purely empirical point of view. A democratic political system is by its very nature (“one member, one vote”) more dependent on widespread support, since at least formally every citizen is politically relevant. This has been most visibly reflected in the referenda on European integration held in various member states over the past decades.¹⁶⁷ Despite the emphasis on élite support in the early neo-functionalist literature on European integration, more recent studies have emphasised the need for general public support for the EU.¹⁶⁸ That is not to deny the important role of élites in mobilising support for a political system.¹⁶⁹ But the question of whether the EU currently suffers from a *legitimacy* deficit because it

¹⁶³ Easton (65), *op. cit.*, p.167

¹⁶⁴ But Almond and Verba also argue that participatory citizenship must be complemented with trust, passivity and deference to authority for political systems to be viable and stable. Almond (80), *op. cit.*, p.16

¹⁶⁵ Westle (89), *op. cit.*, p.199

¹⁶⁶ *Ibid.*, p.39

¹⁶⁷ Richard Sinnott: “Bringing Public Opinion Back in”, in: Oskar Niedermayer and Richard Sinnott (eds.): *Public Opinion and Internationalised Governance*, (Oxford: Oxford University Press, 1995), p.31

¹⁶⁸ *Ibid.*, pp.19-31, Niedermayer (91), *op. cit.*, p.322f

does not enjoy mass support must be separated from the question of whether élites can successfully influence the dynamics of *legitimation* by mobilising such support over time.¹⁷⁰

The comparative approach adopted here will help to determine at least *relative* levels of legitimacy for different political systems. It follows that a political system suffers from a legitimacy deficit when its level of felt legitimacy is markedly lower relative to other political systems. In the case of formal legitimacy, *legitimacy incompatibilities* exist when the constitutional orders of two overlapping political systems (national and supranational, for example) challenge or undermine each other. Felt legitimacy will always be imperfectly realised, and the legitimacy of state power is a question of degrees rather than absolutes, even at the level of the individual citizen.¹⁷¹

Advocates of constitutional reform, for example, will often either criticise the legitimising basis of some aspects of state power (e.g. republicans living in a constitutional monarchy) or they will point to what they conceive as an inconsistency between this legitimising basis and the constitutional power which is derived from it. Nonetheless, they will be unlikely to reject outright all current state power as illegitimate, and a distinction must be drawn between a legitimacy deficit and a complete erosion of legitimacy. Easton believes that minimal levels of support are often difficult to determine empirically “on a scale dividing viability from collapse. It may represent, rather, a critical range within which systems or its objects may roam.”¹⁷² Sometimes this critical level can only be determined *ex post facto* once a political system has collapsed.¹⁷³

A third theoretical problem arises because some existing public opinion surveys can only partly and incompletely be related to the various categories of felt legitimacy, as the next few chapters will demonstrate.¹⁷⁴ It is very important to appreciate the epistemological limitations of survey techniques for analysing the legitimacy of a

¹⁶⁹ Bernard Wessels, *op. cit.*, p.160f

¹⁷⁰ The former is concerned with the analysis of the status quo (the subject of chapters 3-5), whereas the latter investigates the dynamics of change (the subject of chapter 6).

¹⁷¹ Westle (89), *op. cit.*, p.244

¹⁷² Easton (65), *op. cit.*, p.223

¹⁷³ *Ibid.*, p.224

¹⁷⁴ See comprehensive discussion of the application of Easton's concept to a broad range of opinion surveys in: Westle (89) *op. cit.*, pp.91-168

political system.¹⁷⁵ The dual concept of legitimacy recognises that a purely quantitative approach based exclusively on an interpretation of public opinion surveys may be an insufficient indicator of the legitimacy of a political system.

The empirical application of felt legitimacy will therefore complement *quantitative* survey data with a discussion of *qualitative* indicators of the felt legitimacy of a political system. Possible indicators suggesting a low level of felt legitimacy might be the existence of significant anti-system parties, very low participation rates at elections, mass protest movements or, in the most dramatic case, even the occurrence of outright rebellion and widespread civil disobedience.¹⁷⁶ If public opinion surveys are thus put into a wider context, a reasonable accurate empirical picture of the legitimacy of political systems can be gained. This is particularly illustrative when gauging the intensity of public attitudes: a comparatively low number (say 20%) of people dissatisfied with their political system may pose a greater threat to its legitimacy if sufficiently motivated and mobilised to engage in anti-system conduct.¹⁷⁷

The fourth theoretical and methodological problem concerns the causal relationship between public attitudes (covert support), public behaviour (overt support) and the legitimacy of a political system. Barry has accused political culture methodology of determinism, since it assumes that political socialisation produces political attitudes, which in turn cause political behaviour and underlie political structures.¹⁷⁸ Barry believes this causality can work the other way round, but many scholars of legitimacy are happy to acknowledge that institutions and performance influence attitudes.¹⁷⁹ Indeed, this mutual interdependence lies at the heart of Easton's systems theoretical discussion of legitimacy as well as the dual concept of legitimacy developed here.¹⁸⁰

Barker is similarly reluctant to accord legitimacy the status of an independent variable and an analytically distinct source of support for political systems.¹⁸¹ He is sceptical

¹⁷⁵ Jan W. Van Deth: "Introduction: The Impact of Values", in: Jan W. Van Deth and Elinor Scarbrough (eds.): *The Impact of Values*, (Oxford: Oxford University Press, 1995), p.12

¹⁷⁶ Zimmermann, *op. cit.*, p.91f, 94-96

¹⁷⁷ Easton (65), *op. cit.*, 234

¹⁷⁸ Brian Barry: *Sociologists, Economists and Democracy*, (London: Macmillan, 1970), p.45ff

¹⁷⁹ David Beetham: "In Defence of Legitimacy", *Political Studies*, vol.41, no.3, 1993, p.489

¹⁸⁰ Easton (65), *op. cit.*, pp.27-33

¹⁸¹ Barker (90), *op. cit.*, p.58ff, 196

about a causal account of legitimacy because it faces the difficulty of differentiating empirically between acceptance of power and acceptance of authority (justified power). To illustrate such difficulties, he cites the example of a terrorist bank robber and an “ordinary” criminal bank robber, only one of which disobeys the political system *because* he deems it unjust or illegitimate. Barker believes that an observer cannot distinguish between these two cases, but his argument can be challenged in the following way.¹⁸²

To begin with, his example is not entirely relevant to this thesis which postulates a link between *support* and system *stability* rather than between *obedience* and *stability*.¹⁸³ As argued before, obedience may be habitual, superficial and unstable. Support on the other hand expresses (stable) moral agreement with the authority of a political system. The dual concept of legitimacy adopts a method for quantifying support for the political system which measures supportive beliefs separately from supportive actions.¹⁸⁴ It can therefore distinguish between observed behaviour (obedience) and the motives behind such behaviour (legitimacy). Since it is applied to contemporary political systems, the dual concept also avoids the methodological problem of being unable to determine the beliefs of member of *historic* political systems.¹⁸⁵ In short, the dual concept of legitimacy is not affected by any of the theoretical obstacles which make Barker reluctant to explore the causal links between political support and system stability.

The fifth methodological problem arises from the fact that some empirical studies have recorded a considerable lack of political awareness and cognitive sophistication among citizens. Public opinion was often found to lack a clear ideological structure, to support mutually inconsistent beliefs and to fluctuate capriciously which led Converse to conclude that public opinion researchers were often studying “non-attitudes”.¹⁸⁶ But his preferred solution, namely to restrict research to the political attitudes of élites, is unsatisfactory. As argued above, democratic political systems are structurally linked to public opinion regardless of whether public opinion has followed élite

¹⁸² *Ibid.*, p.58

¹⁸³ See: Introduction, p.13f

¹⁸⁴ See p.88f above.

¹⁸⁵ Barker (90), *op. cit.*, p.59

¹⁸⁶ Philip Converse: “Attitudes and Non-Attitudes”, in: E. Tufte (ed.): The Quantitative Analysis of Social Problems, (Reading/Mass.: Addison-Wesley, 1970), p.168-89

attitudes or has been formed independently. Besides, Converse's findings have been at least partly mitigated by the "cognitive mobilisation" of Western electorates as a direct consequence of improved educational levels among citizens over recent decades.¹⁸⁷ As far as fluctuations in the level of support are concerned, these tend to occur predominantly in attitudes towards particular policies or political actors (specific support) rather than in beliefs about the underlying legitimacy of political institutions or political identity (diffuse support). Finally, the dual concept of legitimacy acknowledges the potential for low levels of public cognitive sophistication by cross-checking some of the results of opinion surveys with polling data about electoral knowledge of the political system of the EU.

2.7 Conclusion

The second chapter has introduced the dual concept of legitimacy which provides the theoretical underpinning for a comparative empirical investigation into the legitimacy of the Germany, Britain and the EU. The theoretical framework chosen fulfils the conditions listed at the end of the first chapter. It is theoretically detailed enough to capture the multi-dimensional nature of a notion as complex as legitimacy. It constitutes a second-order theory of legitimacy which does not pass a value judgement on the legitimising principles employed by political systems. Instead, it provides a framework for empirical analysis of actual levels of legitimacy.

The dual concept examines the formal legitimising principles of a political system and enquires whether and how these legitimising claims are accepted at the level of felt legitimacy. A legitimacy deficit, therefore, does not arise because a political system fails meet some external normative criterion of legitimacy, but because it is considered insufficiently legitimate by its members. Finally, the normative neutrality of the dual concept makes it ideally suited for comparative research because it can illustrate the country-specific nature of the legitimacy deficit of the EU. As a second-order theory, the dual concept can therefore analyse how national first-order beliefs about the legitimacy of the EU differ amongst member states.

¹⁸⁷ Ronald Inglehart: The Silent Revolution, (Princeton: Princeton University Press, 1977)

Chapter Three: Formal and Felt Legitimacy of the UK

3.1 Introduction

The first chapter argued that the formal and felt legitimacy of the EU is contingent upon the member state from whose perspective it is analysed. This is because EU is institutionally closely intertwined with its member states (formal legitimacy) and its popular perception is strongly influenced by factors such as political culture and identity which are largely determined at the national level (felt legitimacy). This chapter and the next provide two contrasting national reference points, Britain and Germany, from whose perspective the EU's legitimacy is analysed in chapter five.

It is argued below that Britain's formal and felt legitimacy differ in some crucial respects from that of Germany which means that the nature of the challenges arising from EU membership differs as well. Britain's historically embedded, uncoded constitution, common law jurisprudence and a unitary doctrine of sovereignty give rise to a formal legitimacy which cannot easily accommodate EU membership. The EU is based on an alien legal and state tradition, and it challenges the core of the British constitution, parliamentary sovereignty. High levels of felt legitimacy for Britain's political system and a national identity which (con-)fuses national with parliamentary sovereignty mean that supranational integration is often perceived as a threat rather than an opportunity. The low constitutional and cultural fit of Britain's formal and felt legitimacy with the character of the EU results in a distinctive national perspective from which the legitimacy of the EU can be analysed.

3.2.1 Formal Legitimacy: Constitutional Philosophy

Most of the differences between Britain's and Germany's formal legitimacy, and their varying degree of compatibility with the EU, have their origin in distinct national constitutional philosophies, in particular different conceptions of the state, sovereignty and jurisprudential traditions. Analysis must therefore begin with

Britain's constitutional philosophy which has in many respects developed separately from, and partly in opposition to, the constitutional tradition of Western Europe.¹

The key to an understanding of Britain's unique constitutional philosophy lies in the absence of a codified constitutional document or a body of constitutional law. The content of the British constitution has to be inferred from its sources, the legal and non-legal (practices, conventions) constitutional rules.² This means that important constitutional principles, such as the *royal prerogative* or *parliamentary sovereignty*, are not themselves grounded in statute. Many conventions derive their authority from unanimous acceptance and recognition, but others fall into a grey area where their status as a convention either has not yet been fully established or is increasingly considered questionable.³ In short, the British constitution remains based on an informal, subtle and implicit operational code whose evolution is based on political practice.

Dicey has characterised the British constitution as "historic" because it gains its strength and authority from the long historical continuity of its norms and institutions.⁴ The origins of the monarchy and the House of Lords date back to Anglo-Saxon times and the House of Commons emerged in the medieval period. Evolutionary change of institutional *functions* within a framework of unchanging *forms* has been the hallmark of the British constitution. The lack of a special legal procedure for amending the constitution creates unique dynamics because constitutional change is often implicit, occurs without a clearly defined end and has frequently unpredictable long-term implications. Important developments sometimes become apparent only in retrospect and may not be reflected in formal constitutional change.⁵

One crucial phase in the gradual historical evolution of Britain's constitutional philosophy is the struggle between Crown and Parliament in the 17th century which resulted in the constitutional settlement of 1688. The outcome of the Glorious

¹ Kenneth Dyson: *The State Tradition in Western Europe*, (Oxford: Martin Robertson, 1980), p.36

² Wade and Bradley, *op. cit.*, pp.12ff

³ Philip Norton: *The Constitution in Flux*, (Oxford: Blackwell, 1984), p.7

⁴ Quoted in: S. E. Finer, Vernon Bogdanor and Bernard Rudden: *Comparing Constitutions*, (Oxford: Clarendon Press, 1995), p.100

Revolution which vested sovereignty in the Crown-in-Parliament has a threefold significance. First, it marks an important departure from West European constitutional developments. The assertion of parliamentary supremacy made it impossible for the Crown to emulate the continental trend towards monarchical absolutism.⁶ Indeed, from a Whig perspective of history the British constitutional model of limited, parliamentary government was consciously contrasted with the emergence of centralised, autocratic monarchy on the continent. The struggle between Crown and Parliament was therefore not only about internal sovereignty, but it also became an identity-shaping struggle to assert external sovereignty in opposition to the perceived monarchical despotism in France and the claim to spiritual leadership from the Roman Catholic Church.⁷

Second, Britain departed from the West European state tradition by not developing an abstract concept of the *state*. Whereas continental Europe witnessed a practical and theoretical concern with state-building, the notion of an autonomous state acting out its inherent purposes was too bound up with the establishment of absolute monarchical rule to become acceptable in Britain.⁸ In continuity with medieval political practice the constitution evolved as a series of restrictions placed on the ancient (and extra-parliamentary) prerogatives of the *Crown* whose powers were balanced by the traditional rights of Parliament, the courts and local communities. The Crown as the British symbol of the state is the fount of executive authority in whose name the most important executive and judicial office-holders exercise their powers.⁹ The *royal prerogative* constitutes “the gradually diminishing residuum of customary authority, privilege and immunity, recognised at common law as belonging to the Crown, and the Crown alone.”¹⁰ In most cases exercised by convention through Her Majesty’s Ministers, the prerogative encompasses powers such as the appointment of ministers, the making of treaties, the power of pardon, the making of legislation through the Privy Council (*Orders in Council*), the dissolution of Parliament or the

⁵ Nevil Johnson: *In Search of the Constitution*, (London: Methuen, 1977), p.132f

⁶ Dyson (80), *op. cit.*, p.39ff

⁷ See discussion on pp.120ff below.

⁸ Dyson (80), *op. cit.*, pp.38-41

⁹ Johnson (77), *op. cit.*, pp.210

¹⁰ S. A. de Smith: *Constitutional and Administrative Law*, (London: Penguin, 1971), p.45

declaration of war.¹¹ The Sovereign is the nominal head of government to which Her Majesty's Ministers are formally answerable and to whom the armed services and the police swear allegiance.¹² The Monarchy as person and institution also serves as a cultural symbol of unity by representing the traditional affective ties of community in the multi-national society of the UK.

Third, British jurisprudence is based on judge-made common law rather than the heritage of Roman law which influenced continental legal systems. Britain's distinct jurisprudential tradition offers another explanation why little attention was paid to defining the state as a political, legal or socio-cultural concept. The doctrine of *precedent*, central to the English common law system, circumscribes the scope for judicial discretion. Precedent is binding on the judiciary, and judicial discretion is restricted to cases where no legal precedent exists. This allows the legal system to evolve naturally and organically without interference from a coercive state with the power to validate legal rules. Unlike the Roman law tradition, British jurisprudence does not conceive of the state as a formally recognised legal institution, subject to a system of public law.¹³ There is no genuine public law structure stipulating certain administrative legal standards (other than the rule of law) protected by administrative courts. Likewise, no effort was made to express the idea of the state through an explicit and legally codified constitution which could have clearly identified and articulated the state's purpose and institutional operation.¹⁴

Fourth, the constitutional settlement of 1688 enshrined the legal principle of indivisible parliamentary sovereignty which derived from a distinct English approach to constitutional jurisprudence based on the command theory of law. The command theory of law emerged in the 17th century and was originally advanced in the writings of Thomas Hobbes.¹⁵ It was later refined in the works of Bentham¹⁶ and John Austin¹⁷, and has dominated English jurisprudence until recently.¹⁸ The command

¹¹ T. C. Hartley and J. A. G. Griffith: Government and Law - An Introduction to the Working of the Constitution in Britain, (London: Weidenfeld and Nicolson, 2nd ed. 1981), p.196

¹² Norton (84), *op. cit.*, p.14, or: Geoffrey Marshall and Graeme C. Moodie: Some Problems of the Constitution, (London: Hutchinson, 4th ed. 1967), p.41

¹³ Johnson (77), *op. cit.*, pp.82ff, 90

¹⁴ Dyson (80), *op. cit.*, p.212f

¹⁵ Thomas Hobbes: Leviathan, (ed. C. B. Macpherson, Harmondsworth: Penguin, 1968)

¹⁶ Jeremy Bentham: Of Laws in General, (ed. H. L. A. Hart, London: Athlone Press, 1970)

¹⁷ John Austin: The Province of Jurisprudence Determined, (London: Weidenfeld and Nicolson, 1954)

theory of law defines law positively, without any reference to its content. This distinguishes it from both the common law and the natural law traditions which stipulate that all law must conform to, respectively, certain procedural conditions or the normative law of nature. Instead, the command theory defines law with reference to its source, the will of the sovereign. By separating legality from morality, laws retain their legal validity even if they run counter to socially acknowledged moral principles, as long as they have emanated from the determinable sovereign law-maker.

In Britain this sovereign law-maker is Parliament, in contrast to most continental constitutions which vest sovereignty in the people.¹⁹ The 1689 constitution therefore rests on two logically separate legitimising concepts. The first, the concept of unlimited and indivisible sovereignty, has its origins in the command theory of law. But this notion of sovereignty is not legitimised by the Hobbesian argument of *homo homini lupus*. Instead, sovereignty is based on the John Locke's notion of *consent* as the basis for political authority.²⁰ This is the second legitimising principle of the 1689 settlement, and it draws on an understanding of consent as practised under the pre-revolutionary constitution. It reflects the traditional English notion dating back in its rudimentary form to the Magna Carta which conceived of legitimate government as government consented to by the (parliamentary) representatives of the *political nation*.²¹

Because sovereignty lies in Parliament rather than with the people, history has shown the concept of parliamentary sovereignty to be compatible with a variety of forms of representation. In Locke's own time, the scope of the *political nation* was confined to those with a material interest in the state, in other words, the propertied classes. In constitutional terms, the notion of *democracy* is an innovation introduced with the Reform Act of 1867.²² The constitutional settlement between King, Lords and Commons did not involve *the people* as a constituent power who have remained

¹⁸ Norman P. Barry: *An Introduction to Modern Political Theory*, (London: Macmillan, 2nd ed. 1989), p.36

¹⁹ Heidrun Abromeit: "Volkssouveränität, Parlamentssouveränität, Verfassungssouveränität: Drei Realmodelle der Legitimation staatlichen Handelns", in: *Politische Vierteljahresschrift*, vol.36, no.1, 1995, pp.49ff

²⁰ John Locke: *Two Treatises of Government*, (ed. Peter Laslett, Cambridge: Cambridge University Press, 1960)

²¹ Judge (93), *op. cit.*, pp.6-7

²² *Ibid.*, p.24

subjects of the Crown rather than becoming citizens with constitutionally guaranteed rights.²³ It is therefore misleading to speak of popular sovereignty, as Albert Dicey does.²⁴ First, British constitutional doctrine conceives of legal sovereignty as indivisible. It can either rest with the people or with parliament, but not both. Second, the authority of Parliament is strictly speaking not derived from the sovereignty of *the people*. Rather, parliamentary sovereignty is legitimised by the (presupposed) tacit consent of the *political nation*.²⁵

These four features of Britain's constitutional philosophy, an uncoded constitution, a distinct state tradition, common law jurisprudence and the unitary doctrine of sovereignty, have resulted in a formal legitimacy which cannot easily accommodate EU membership. There is little "fit" between the institutional structure and cultural norms of the EU and the UK, which means that membership in the EU poses unique challenges for Britain's formal legitimacy. This can be demonstrated by analysing the elements of formal legitimacy particularly affected by EU membership, namely the constitutional supremacy of Parliament, the role of courts and law, subnational government, political culture and executive-legislature relationship.

3.2.2 Formal Legitimacy: Central Features and the Impact of EU Membership

The Doctrine of Parliamentary Sovereignty

Conceiving of sovereignty as indivisible and vesting it in the Crown-in-Parliament has two important implications for the formal legitimacy of the UK. First, the doctrine of parliamentary sovereignty becomes the paramount constitutional principle in relation to which all other institutions or legitimising norms are legally speaking subordinate. The Crown-in-Parliament, comprising the two Houses of Parliament and the Sovereign, is omniscient with no executive or legislative matter being in principle outside its reach. The only way in which legislation can be amended or

²³ Dyson (80), *op. cit.*, p.40

²⁴ Albert Venn Dicey: Introduction to the Study of the Law of the Constitution, (London: Macmillan, 9th ed. 1939)

²⁵ Consequently, parliamentary sovereignty also rules out the possibility of any constitutional doctrine of mandate. See: Carol Harlow: "Power from the People? Representation and Constitutional Theory", in: Patrick McAuslan and John McEldowney (eds.): Law, Legitimacy and the Constitution, (London: Sweet & Maxwell, 1985), p.73f

repealed is through a new Act of Parliament (“Parliament cannot bind its successors”). Such legal supremacy entails the rule that Parliament’s power over its own procedure, privileges and immunities be respected and not interfered with by the law courts.²⁶ This is because, legally speaking, Parliament is the highest court in Britain - hence it is also styled the *High Court of Parliament*.²⁷ Courts cannot set aside duly enacted statute law and judicial rulings can be altered by Parliament even retrospectively. Even the Crown’s prerogative powers, although in origin independent of Parliament, can be restricted by the latter. Indeed, the scope of royal prerogative is “gradually diminishing” because some of its powers have been replaced by (constitutionally superior) statute passed in Parliament.²⁸ As the terms Crown-in-Parliament or High Court of Parliament suggest, the supreme legal authority is therefore vested in a body that exhibits a fusion of powers with the “supreme executive, legislative and judicial authority all rolled into one”.²⁹

Second, the combination of an uncoded constitution and a unitary doctrine of sovereignty have created unique constitutional dynamics. In the absence of a legally entrenched constitution or a body of constitutional law which would stipulate any special formal requirements for enacting or amending constitutional norms, Parliament is theoretically unconstrained in its legal power to effect constitutional change. Statutes relating to constitutional law are changed or repealed in exactly the same way as any other statute.³⁰ However, while the combination of an uncoded constitution and a doctrine of parliamentary sovereignty may facilitate the change of subordinate constitutional norms, it also precludes the possibility of qualifying the omnicompetence of Parliament by introducing rival centres of sovereignty. If ultimate legal sovereignty ceased to be located in Parliament alone, the very core of the British constitution would be undermined.

These constitutional dynamics of Britain’s formal legitimacy have been clearly illustrated by the European Communities Act 1972, which makes the legal provisions for the UK’s accession to the EC in 1973. Passage of the 1972 Act, or subsequently

²⁶ Wade and Bradley, *op. cit.*, p.31

²⁷ Finer, Bogdanor and Rudden, *op. cit.*, p.57

²⁸ Norton (84), *op. cit.*, p.6

²⁹ *Ibid.*, p.57

³⁰ Finer, Bogdanor and Rudden, *op. cit.*, p.43

arising implications of EU membership, have never necessitated any formal constitutional change, unlike in Germany for example.³¹ In that sense the British constitution was flexible to adapt to a new legal order. On the other hand, EU membership threatens to undermine the doctrine of parliamentary sovereignty and hence the very core of the British constitution. The potential incompatibility between parliamentary sovereignty and Britain's EU membership was already acknowledged in 1971 when Lord Denning argued that

*"...if this country should go into the Common Market and sign the Treaty of Rome, it means that we will have taken a step which is irreversible. The sovereignty of these islands will thenceforth be limited."*³²

The most important consequence of the 1972 Act is that its section 2 (4), in conjunction with section 2 (1), effectively guarantees the supremacy of Community law by expressing a rule of construction whereby UK courts should interpret parliamentary statute in such a manner as to be consistent with European law.³³ EU membership has therefore raised the novel and important constitutional question whether British courts even have the power to strike down or suspend Acts of Parliament should they find them conflicting with European law. In order to make the supremacy of EU law compatible with parliamentary sovereignty, the judicial doctrine of "literal rule" had to be abandoned, according to which statutes were interpreted literally by the courts. Instead, courts sometimes had to interpret parliamentary statutes *purposively* by going as far as to imply words to fill a gap in order to render them compatible with EU law.³⁴ In cases where this was impossible, courts decided to deny effectiveness to UK legislation *to the extent* that it conflicts with EU law and under the proviso that the courts were satisfied that the inconsistent domestic legislation did not intend to repeal sections 2 (1) or 2 (4) of the 1972 Act.³⁵

³¹ See: Chapter 4, pp.144ff

³² Blackburn v Attorney General (1971), 2 All ER 1380 at 1381(CA)

³³ Lawrence Collins: European Community Law in the United Kingdom, (London: Butterworth, 4th ed. 1990), p.28

³⁴ Pickstone v Freemans plc (1989) AC 66, (1988) 2 All ER 803

³⁵ For example: R. v Secretary of State for Employment, ex. p. Equal Opportunities Commission (1994) 1 All ER 910 (HL). For the intention of repeal to be recognised by the courts nowadays, Parliament would need to legislate in *express repeal* of some or all of the provisions of the 1972 Act. See: Collins, *op. cit.*, p.39

This uneasy constitutional compromise was severely tested in the landmark *Factortame* case in which the Court of Appeal reversed an earlier decision of the Divisional Court temporarily to disapply parts of the 1988 Merchant Shipping Act, which the plaintiffs had considered incompatible with EC law. The Court of Appeal argued that the courts had no power to disapply Acts of Parliament under the British constitution.³⁶

Upon further appeal, the House of Lords confirmed the view that interim relief could not be granted since Acts of Parliament were considered compatible with EC law *until* found incompatible. Notwithstanding, their Lordships acknowledged that the Community principle of supremacy might force them to disregard the provisions of national law, and they referred the case to the ECJ for preliminary ruling.³⁷ Only when the European Court confirmed its Simmenthal doctrine³⁸, did the House of Lords subsequently granted the interim relief requested, and Lord Bridge remarked:

*"...to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."*³⁹

As a result, the House of Lords *in effect* disapplied parts of the Merchant Shipping Act 1984 for *implied* repeal of European legislation.⁴⁰ Their Lordships preserved constitutional doctrine by assuming that, unless done so expressly, Parliament has no intention to pass legislation contravening EC law. This meant that, in order to follow Parliament's intent, the Merchant Shipping Act 1988 must be interpreted such as to become consistent with EC law.

The consensus among jurists holds that courts would continue to abide by the doctrine of parliamentary sovereignty and uphold an Act of Parliament *expressly* overriding

³⁶ *R v Secretary of State for Transport, ex p Factortame* (1989), 2 CMLR 353 at 400-404 (CA)

³⁷ *Factortame* (89), *op. cit.*, 2 All ER 692 at 693 (HL)

³⁸ *Case C-213/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* (1990) ECR 2433 at 2434, See also: *Chapter 5*, pp.183ff

³⁹ *R. v. Secretary of State for Transport ex parte Factortame Ltd. (no.2)* 1991 CMLR 3

⁴⁰ *Ibid.*

EC law.⁴¹ Also, the doctrine of parliamentary sovereignty can be assumed to have remained formally intact, since Parliament retains the power to amend or repeal the 1972 Act.⁴² At the same time, membership of the EC has significantly increased the role of both domestic courts and the supranational ECJ with its rapidly developing body of case law so that future conflict between their powers of adjudication on the compatibility of British with EC law and the principle of parliamentary sovereignty must remain a very real possibility.⁴³

EU membership has indirectly also given rise to an entirely different kind of challenge to the sovereignty of Parliament. The device of a popular referendum was first employed in the debate about continued British membership in the Common Market in 1975, and the use of referenda has now entered constitutional practice.⁴⁴ In being based on popular rather than parliamentary sovereignty, referenda are alien to constitutional tradition which they have sometimes been accused to undermine.⁴⁵ However, the results of referenda are not binding and need to be confirmed by statute. While their may be overwhelming *political* pressure on Parliament to legislate in conformity with the outcome of the ballot, it is not *legally* obliged to do so, thus preserving its sovereignty. Also, Parliament retains the power to repeal legislation endorsed in a referendum.⁴⁶

The Executive-Legislature Dimension

It is important to distinguish carefully between parliamentary sovereignty as a constitutional concept and the constitutional reality of Parliament's role in the law-making process and its position vis à vis the Government. From a historical perspective, the House of Commons has gradually become the dominant element within the constitutional framework of the Crown-in-Parliament.⁴⁷ By convention the

⁴¹ In support of this assessment, see for instance: A. W. Bradley: "The Sovereignty of Parliament - in Perpetuity?", in: J. Jowell and D. Oliver (eds.): The Changing Constitution, (Oxford: Oxford University Press, 1985), pp.32-40; D. Lasok and K. P. E. Lasok: Law and Institutions of the European Union, (London: Butterworth, 6th ed. 1994), pp.363-64; Collins: op. cit., p.40

⁴² Bradley, op. cit., p.93. More doubtful: Wade, op. cit., pp.1-4

⁴³ Abromeit stresses the ultimate incompatibility of British parliamentary sovereignty with forms of supranational governance. Abromeit (95), op. cit., pp.63-64

⁴⁴ Norton (84), op. cit., p.221

⁴⁵ See discussion in: Ibid., pp.219-225

⁴⁶ Ibid., p.217

⁴⁷ For instance: Parliament Acts 1832, 1911, Representation of the People Acts 1867, 1884, 1918, 1948

Queen does not exercise her right to refuse assent to legislation, and the Sovereign has lost nearly all discretion in the appointment of Ministers.⁴⁸ Because it is non-elective, the House of Lords has also become increasingly subordinate to the Commons and today mainly fulfils the function of a revisory body which can only exercise delaying powers over legislation. The Royal Commission installed by the 1997 Labour Government to consider options for long-term reforms of the Lords does not envisage a considerable increase in the Lord's power in the future.⁴⁹ In short, the exercise of legislative sovereignty by the Commons is *in theory* nearly unfettered.

However, a number of parallel historic developments have meant that, in *constitutional reality*, the powers of the House of Commons have increasingly become concentrated in the hands of the Government and the Prime Minister of the day. By virtue of their legal status, Ministers of the Crown exercise important prerogative powers such as the conduct of foreign affairs and the making of Orders in Council.⁵⁰ Only Ministers may authorise financial legislation, although all taxation and expenditure requires an Act of Parliament. While the same legislative procedure applies for both private and government bills, the latter are advantaged because the Government disposes of far greater resources for the drafting of bills and has control over the parliamentary timetable.⁵¹ The precedence of government business over private business and procedural rules such as the *guillotine* to curtail parliamentary debate further facilitate implementation of the Government's legislative agenda.⁵²

Another important factor was the advent of the modern party system and the resulting need to manage party discipline amongst MPs through the "whipping system". This is reinforced by the Prime Minister's power of patronage and an electoral system which tends to assure single-party government. The convention of collective ministerial responsibility also increased governmental control over Parliament, since MPs wishing to sanction individual Ministers are ultimately faced with the alternatives of

⁴⁸ Vernon Bogdanor: *The Monarchy and the Constitution*, (Oxford: Clarendon Press, 1995), p.84ff

⁴⁹ *The House of Lords Bill: Lords Reform and Wider Constitutional Reform*, (London: House of Commons Research Paper 99/7, 1999)

⁵⁰ *Ibid.*, p.92

⁵¹ Johnson (77) *op. cit.*, p.205

⁵² Finer, Bogdanor and Rudden, *op. cit.*, p.65

either supporting the entire Government or voting it out.⁵³ Moreover, Parliament's capacity to enforce ministerial responsibility, aided by its Select Committees, is hampered by the size of government departments and the administrative secrecy epitomised in the Official Secrets Act.⁵⁴

The above developments have profoundly transformed the law-making process over the past 150 years and led Richard Crossman to predict the degradation of the House of Commons, and even of the Cabinet, to the "dignified" part of the constitution next to the Lords and the Sovereign.⁵⁵ Others have accused the British political system of degenerating into an "elective dictatorship."⁵⁶ More recently, Peter Hennessy criticised Prime Minister Blair for replacing cabinet government with a "Napoleonic" style of government.⁵⁷

But such radical analysis has been widely contested. Norton has argued that Parliament does exercise considerable power as a *policy-influencing* body, even though its *policy-making* capabilities are limited.⁵⁸ Second, parliamentary reforms such as changes in the work and structure of Select Committees have helped to reverse the trend of parliamentary loss of influence and bolstered a more independent behaviour from MPs.⁵⁹ Developments since the last general election suggest that the trend towards more independent-minded Select Committees exercising greater executive scrutiny has continued.⁶⁰ Third, the fact that the House of Commons' political influence vis à vis the Government is often rather weak does not affect its

⁵³ Alan Beattie: "Ministerial Responsibility and the Theory of the British State", in: R. A. W. Rhodes and Patrick Dunleavy (eds.): Prime Minister, Cabinet and Core Executive, (New York: St. Martin's Press, 1995), pp.158-61

⁵⁴ Colin Turpin: "Ministerial Responsibility", in: Jeffrey Jowell and Dawn Oliver: The Changing Constitution, (Oxford: Clarendon Press, 3rd ed. 1994), p.151. Some members of the Royal Commission on the Constitution even went as far as denouncing individual ministerial responsibility as "little more than a constitutional fiction", Royal Commission on the Constitution, 1968-73, ii, Memorandum of Dissent, Cmnd.5460-1, (London: HMSO, 1973), p.4

⁵⁵ Crossman, *op. cit.*, pp.39-54

⁵⁶ Lord Hailsham: The Dilemma of Democracy, (London: Collins, 1978), esp. pp.125-132

⁵⁷ Peter Hennessy: "The Blair Style of Government: An Historical Perspective and an Interim Audit", Government and Opposition, vol.33, no.1, 1998, p.3f

⁵⁸ Philip Norton: "Parliament and Policy in Britain: The House of Commons as a Policy-Influencer", in: Philip Norton (ed.): Legislatures, (Oxford: Oxford University Press, 1990), p.179

⁵⁹ *Ibid.*, pp.190-94, Judge is more critical of the argument about a revival of Parliament through internal reform, Judge (93): *op. cit.*, pp.214-6

⁶⁰ Philip Norton: "Nascent Institutionalisation of Committees in the British Parliament", in: Lawrence Longby and Roger Davidson (eds.): The New Roles of Parliamentary Committees, (London: Frank Cass, 1998b), pp.151ff

theoretically near-omnicompetent constitutional position, since the Government depends on the confidence of the Commons the withdrawal of which can be tabled in a motion at any time.⁶¹ Consequently, when the Government's majority in the Commons is very small, MPs may be able to exert correspondingly greater leverage over the policy process.

While Parliament may to some extent have reasserted its domestic role as a policy-influencer, it has struggled to adapt to the legislative process of the EU.⁶² To some extent, the problem affects all member states. As in Germany, EU membership has given the Government a potential structural advantage over Parliament because, as the principal institutional link between national and European institutions, the former can on occasions play the role of a gatekeeper.⁶³ However, this problem is accentuated in Britain by the fact that Parliament remains badly attuned to EU membership.

Parliamentary scrutiny of European affairs is hampered by the dominance of a strong, centralised executive which can exercise considerable control over the legislature in a system of single party government. As a "talk" rather than a "work" parliament, the House of Commons is institutionally ill-suited to the detailed, influential scrutiny of EU policy initiatives.⁶⁴ Shortly after accession to the EC, the Commons instituted a Scrutiny Committee to examine EC legislative proposals and recommend important issues for debate by the whole House. However, Government Ministers often consented to bill in the Council of Ministers without prior consultation of the Committee or a debate in the House, notwithstanding the "scrutiny reserve" enshrined in a 1980 resolution of the House.⁶⁵ The Committee had also been given very limited terms of reference by the Government, thus denying it, for example, proper pre-legislative scrutiny of the Single European Act.⁶⁶ In 1990 a revised Resolution was

⁶¹ Finer, Bogdanor and Rudden, *op. cit.*, p.68

⁶² Vernon Bogdanor: "Britain and the European Community", in: J. Jowell and D. Oliver (eds.): *The Changing Constitution*, (Oxford: Clarendon Press, 3rd ed. 1994), p.8

⁶³ Stephen George: "The Legislative Dimension", in: Stephen George (ed.): *Britain and the European Community - The Politics of Semi-Detachment*, (Oxford: Clarendon Press, 1992), p.102

⁶⁴ Kenneth Armstrong and Simon Bulmer: "United Kingdom", in: Dietrich Rometsch and Wolfgang Wessels (eds.): *The European Union and Member States - Towards Institutional Fusion?*, (Manchester: Manchester University Press, 1995), p.274

⁶⁵ David Judge: "The Failure of National Parliaments?", *West European Politics*, vol.18, no.3, 1995, p.86f

⁶⁶ George, *op. cit.*, p.94

adopted, the remit of the Scrutiny Committee widened and two new European Standing Committees were introduced to allow greater debate on EU proposals.⁶⁷

Despite conceding some reforms which improved parliamentary scrutiny, the Government has retained control over the powers and terms of reference of Parliament's scrutiny committee. What stands out, therefore, is "the replication and reinforcement of pre-existing power differentials between the UK parliament and executive in the processing of EC legislation."⁶⁸ While the centralised nature of government in the UK has arguably slowed the adjustment of Parliament to EU membership, it has helped the executive to adapt to the European dimension.⁶⁹

Single party government, executive control over Parliament and a European Secretariat at the Cabinet Office have all facilitated policy leadership and co-ordination at Prime Ministerial level.⁷⁰ To some extent these characteristics are conditional on the size of the Government's parliamentary majority and the political salience of the policy issue. If the majority is narrow and if the policy issue raises political controversy or has constitutional implications for parliamentary sovereignty, then the scope for Prime Ministerial policy leadership is reduced.⁷¹ Nevertheless, as a rule British Prime Ministers can exert greater influence over national EU policy than many of their continental counterparts because they normally face fewer (or weaker) domestic veto points, such as coalition partners, Parliament or subnational government. These factors also help to explain Britain's good record in implementing EU law.⁷²

Apart from these institutional constraints, there is also a behavioural and political dimension to Parliament's slow adaptation to EU membership. The institutional context of adversarial majority party government has accentuated the continued party political controversy over EU policy and the sovereignty issue.⁷³ As discussed below, British parliamentary culture has discouraged a behavioural adaptation towards a less

⁶⁷ Judge (95), *op. cit.*, p.88

⁶⁸ *Ibid.*, p.86

⁶⁹ George, *op. cit.*, p.94f

⁷⁰ Armstrong and Bulmer (95), *op. cit.*, p.264-66

⁷¹ A good example may be the Major Government's difficulties in ratifying the TEU on the basis of a very small parliamentary majority. *Ibid.*, p.259-61, 265f

⁷² George, *op. cit.*, p.97

confrontational scrutiny of the substance of EU legislation. MPs are therefore less accustomed to the scrutinising and negotiating legislative tradition which characterises EU policy-making.⁷⁴

This explains why the House of Lords, whose less partisan parliamentary culture emphasises detailed legislative review rather than confrontational debate, is deemed to exercise more effective scrutiny of EU affairs. Working through five sub-committees, the Lord's Select Committee on the European Communities reviews EU draft legislation and reports on proposals which raise important constitutional or policy issues.⁷⁵ Although the House of Lords lacks the scrutiny reserve power of the Commons, its Select Committee has established a very high reputation, even in comparison with other member states.⁷⁶ The House of Lords may be constitutionally subordinate to the Commons, but it has adopted a procedural approach to EU legislation which enables more detailed and rigorous parliamentary scrutiny than that of the Commons. As suggested above, this seemingly counter-intuitive conclusion can be explained in terms of a unique political culture in Britain which is not well attuned to the policy-making style of the EU.

Political Culture⁷⁷

Structural features of Britain's formal legitimacy like the dynamics of relative majority voting or the unitary nature of the British state which concentrates formal powers and public attention on a sovereign Parliament at the centre have contributed to a distinctive political culture.⁷⁸ Parliament is considered the central arena for the public scrutiny of the Government, which makes for an adversarial rather than co-operative style of politics between government and opposition. British political

⁷³ Armstrong and Bulmer (95), *op. cit.*, p.257

⁷⁴ Philip Giddings and Gavin Drewry: "Scrutiny Without Power? The Impact of the European Community on the Westminster Parliament", in: Philip Giddings and Gavin Drewry (eds.): *Westminster and Europe*, (London: Macmillan, 1996), p.314

⁷⁵ Philip Norton: *Does Parliament Matter?*, (Hemel Hempstead: Harvester Wheatsheaf, 1993), p.126

⁷⁶ Philippe A. Weber-Panariello: *Nationale Parlamente in der Europäischen Union*, (Baden-Baden: Nomos, 1995, p.106f

⁷⁷ In this and subsequent chapters *political culture* is used in a wider sense to denote "the culture of political institutions" and the political system as a whole as expressed in institutional values and the norms of political conduct. See: Armstrong and Bulmer (98), *op. cit.*, p.51f

⁷⁸ Roger Eatwell: "Britain", in: Roger Eatwell (ed.): *European Political Cultures - Conflict or Convergence?*, (London: Routledge, 1997 a), pp.50ff

culture rests on the premise that divergent interests are best resolved through continuous, partisan public debate in which the choice between two contrasting alternatives is the common way of reaching conclusions. Party political pursuit of power becomes a zero-sum game in which the winner takes all. The long-standing notion of Her Majesty's Opposition as an alternative to the government reflects this confrontational tradition of political accountability and has reinforced the dualistic nature of British politics.⁷⁹

The unitary nature of the British state militates against the idea of institutional power sharing so that the survival of checks and balances depends on the social awareness among political actors of the tacit constitutional assumptions involved.⁸⁰ A general acknowledgement of the authority of common practices, which are seen as the precondition of individual freedoms, has substituted for the formal codification of constitutional arrangements within a hierarchy of legal norms. As a consequence, British political culture has shown little systematic concern for constitutional law or, until recently, the constitutional rights of individuals.⁸¹

Unlike in Germany, parliamentary legislation is often debated on its narrow political merits alone, with little regard paid to its potential legal or constitutional implications - a characteristic visible in the recent legislation for constitutional reform.⁸² Normative questions about human rights like capital punishment, which is permanently abolished under the German Basic Law, have regularly been subject of parliamentary debate because in the tradition of legal positivism they are treated as inherently political rather than legal issues.⁸³ Above all, the reluctance to leave normative legal issues like the scope of individual freedoms for the courts to settle is a reflection of the doctrine of parliamentary sovereignty which accords the judiciary a constitutionally subordinate position vis à vis the High Court of Parliament.

⁷⁹ Nevil Johnson: "Opposition in the British Political System", Government and Opposition, vol. 32, no.4, 1997, pp.487-510

⁸⁰ Johnson (77), op. cit., pp.25-41

⁸¹ Ibid., pp.132ff

⁸² Vernon Bogdanor: Devolution in the United Kingdom, (Oxford: Oxford University Press, 1999), pp.287-298

⁸³ Bradley, op. cit., pp.27-29

EU membership has not been very compatible with Britain's political culture. For example, the judicial activism of the ECJ and its powerful role as a major integrationist actor have often been condemned, even by lawyers, as undemocratic "judicial legislation" and criticised for exceeding the competencies granted in the Treaties.⁸⁴ Because the EU represents a challenge to Britain's formal legitimacy and national identity, the issue of membership has understandably been politically contentious. But Britain's adversarial political culture has amplified and continuously renewed the controversy surrounding the "European question", thus entrenching an élite cleavage among political parties and the media.⁸⁵ However, the dividing lines of this cleavage are not static, as both main parties have crossed them at least once at some point over the last few decades and have experienced different forms and degrees of intra-party divisions over the issue. As a consequence of this élite cleavage, there has been continued political mobilisation both for and against the EU. This has reduced the scope for Government or other political actors to pursue active legitimisation policies to increase mass support for the EU because any such strategy has faced strong political opposition and counter-mobilisation at élite level.⁸⁶ Arguably, Britain's adversarial political culture has therefore delayed and slowed down the adaptation of political opinion to EU membership.⁸⁷

However, EU membership is slowly beginning to transform some aspects of Britain's political culture. The opportunity since the late 1960s for British subjects to take cases against the government to the European Court of Human Rights gradually heightened public awareness of the rights-based political culture of continental Europe. In addition, the long period of Conservative rule during the 80s and most of the 90s drew attention to the relative lack of constitutional checks and balances against a government introducing far-reaching political change. These developments gave rise to a widespread political climate in favour of greater legal protection of civil liberties to which the 1997 Labour Government responded with the Human Rights Act 1998. As argued below, the Act is likely to accelerate the judicialisation of Britain's

⁸⁴ Trevor C. Hartley: "The European Court, Judicial Objectivity and the Constitution of the European Union", *Law Quarterly Review*, vol. 112, no. 1, 1996, pp. 95ff

⁸⁵ Neill Nugent: "British Public Opinion and the European Community", in: Stephen George (ed.): *Britain and the European Community*, (Oxford: Clarendon Press, 1992), p. 191

⁸⁶ Simon Bulmer: "Britain and European Integration: Of Sovereignty, Slow Adaptation and Semi-Detachment", in: Stephen George: *Britain and the European Community - The Politics of Semi-Detachment*, (Oxford: Clarendon Press, 1992), p. 27f

parliamentary tradition and to throw into sharp relief the conflict between a politics-based and a rights-based political culture.

Any further Europeanisation of Britain's political culture would probably require the adoption of a more proportional electoral system to increase the likelihood of coalition governments and an adaptation of those parliamentary procedures and traditions which encourage the current adversarial conduct of politics.⁸⁸ Such measures could induce a behavioural change towards a less dualistic, more consensual and co-operative political culture which may over time even help to soften the present élite cleavage on the EU. For the time being, however, the compatibility of Britain's political culture with EU membership remains low.

The Constitutional Status of the Courts

Britain's formal legitimacy circumscribes the constitutional position of another fundamental doctrine, the *rule of law*. Parliamentary sovereignty implies that the role of the judiciary is confined to the interpretation of statutes (parliamentary intent) and judicial review of executive action that occurs on a statutory or traditional (prerogative) basis. However, some have regarded the doctrine of the rule of law as a significant counterweight to the powers of Parliament. Dicey even ranks the rule of law as one of the two pillars of the constitution next to parliamentary sovereignty.⁸⁹ Understood as a principle of constitutional morality, it is designed to disable government from abusing the unfettered power of parliamentary sovereignty. In this (Diceyan) way, the rule of law may even play a constitutional role akin to that of a Bill of Rights in other countries, but this view has been widely contested.⁹⁰ It rests on a broad, normative (rather than a narrow, procedural) interpretation of the rule of law which is more concerned with the fair and legitimate use of powers rather than

⁸⁷ See: Chapter 5, pp.216ff

⁸⁸ See: Voting Systems: The Jenkins Report, (London: House of Commons Research Paper 98/112, 1998)

⁸⁹ Albert Venn Dicey: "The Rule of Law", in: Jack Lively and Adam Lively (eds.): Democracy in Britain, (Oxford: Blackwell, 1994), pp.178-9

⁹⁰ For a summary of the discussion see: Jeffrey Jowell: "The Rule of Law Today", in: Jeffrey Jowell and Dawn Oliver: The Changing Constitution, (Oxford: Clarendon Press, 3rd ed. 1994), pp.59-61

lawfulness.⁹¹ Yet governments have sometimes exercised powers legally derived from statute which nevertheless contravened long-held constitutional conventions about how government *should* be conducted.⁹² Moreover, the courts are only empowered to apply the narrow interpretation of the rule of law (whether or not acts are *ultra vires*). Dicey clearly over-estimated the constraints on government that the broader sense of the rule of law might exercise, but the doctrine has not become totally insignificant.

First, courts have become less deferential in their stance towards government over the past 30 years and have begun a more determined and politicised application of judicial review which is epitomised by a recent ruling of the House of Lords which held that even Her Majesty's Ministers can be held in contempt of court.⁹³ These developments have emerged in parallel with a rapid increase in the number of applications for judicial review made to the courts. Judges have also become more creative in using their powers by adopting a wider interpretation of the three grounds for statutory review (lawfulness, fairness, reasonableness).⁹⁴ Second, the repeal of fundamental constitutional statutes, the breach of important conventions or legislation in flagrant breach of the rule of law are considered at least *politically* impossible. Third, the courts imply in their rulings that Parliament intends to conform to the rule of law. They would only disapply the principle of the rule of law if Parliament expressly legislated to that intent, which again would be politically very difficult to do.⁹⁵

However, the most important factor responsible for transforming the constitutional position of the judiciary has been Britain's membership in the EU. As explained above, the primacy of EU law over national legislation has enhanced the importance of domestic courts which have gained the power effectively to disapply those provisions of Acts of Parliament that conflict with EU law. This challenge to the doctrine of parliamentary sovereignty occurred at a time of increasing domestic

⁹¹ Patrick McAuslan and John McEldowney: "Legitimacy and the Constitution: The Dissonance between Theory and Practice", in: Patrick McAuslan and John McEldowney (eds.): Law, Legitimacy and the Constitution, (London: Sweet & Maxwell, 1985), p.11

⁹² For a discussion of examples see: *Ibid.*, pp.1-38

⁹³ M. v. Home Office; sub nom M., Re [1993] 3 W. L. R. 433 H.L.. Held that a Minister of the Crown is amenable to contempt jurisdiction of the court even when acting in his official capacity. It thereby gave the court jurisdiction to grant injunctions against Ministers and other Officers of the Crown.

⁹⁴ Robert Thomas: "Law and Politics", in: Ian Holliday, Andrew Gamble and Geraint Parry: Fundamentals in British Politics, (London: Macmillan, 1999), p.149-53

⁹⁵ Jowell, *op. cit.*, p.73

constitutional debate, especially about the role of courts in protecting civil liberties.⁹⁶ The issue of human rights was also highlighted by a number of high profile defeats for the British Government at the ECHR during the 1980s and 90s.⁹⁷

Some advocates of constitutional reform therefore called for an incorporation of the European Convention of Human Rights into domestic law to facilitate legal redress for UK citizens. The *Factortame* ruling also made it difficult to argue that incorporating the European Convention in analogous fashion to the EC Act 1972 would be incompatible with the British constitution.⁹⁸ More radical reformers argued in favour of adopting a codified constitution with an entrenched Bill of Rights, possibly on the basis of the European Convention of Human Rights.⁹⁹ They suggested that only a clear break with constitutional tradition would buttress Britain's institutions from erosion at EU level and domestically.¹⁰⁰

Having supported constitutional reform in opposition, the 1997 Labour Government duly enacted the European Convention as the Human Rights Act 1998. The Act employs a *rule of construction* similar to the EC Act 1972 discussed above. It allows judges to interpret UK law such as to be compatible with the Convention without enabling them to disapply parliamentary statute. Irreconcilable conflicts will merely be brought to the attention of Parliament on the presumption that it will wish to amend conflicting legislation.¹⁰¹ The format of the incorporation of the European Convention is therefore a compromise between the constitutional doctrine of parliamentary sovereignty and the desire to give further effect to the rights under the Convention.

Despite the preservation of parliamentary supremacy by means of a rule of construction, implementation of the 1998 Act transforms the entire relationship

⁹⁶ For an overview of the constitutional debate see: Anthony Barnett, Caroline Ellis and Paul Hirst (eds.): *Debating the Constitution*, (Cambridge: Polity Press, 1993), Robert Blackburn and Raymond Plant (eds.): *Constitutional Reform*, (London: Longman, 1999)

⁹⁷ Thomas, *op. cit.*, p.159

⁹⁸ Wade (91), p.4

⁹⁹ For example: Charter 88: *Towards a Written Constitution*, (London: Charter 88 Trust, 1993), Will Hutton: *The State We're In*, (London: Johnathan Cape, 1995)

¹⁰⁰ Institute for Public Policy Research: *A New Constitution for the United Kingdom*, (London: IPPR, 1991)

¹⁰¹ *The Human Rights Bill (HL)*, Bill 119 of 1997-98: *Some Constitutional and Legislative Aspects*, (London: House of Commons Research Paper 98/27, 1998), pp.8, 17-22

between the courts and the legislature or the government. A declaration of incompatibility will carry great political weight, and Parliament may find it politically impossible to ignore infringement rulings by the courts. Backed by the often ambiguously phrased European Convention, the British judiciary is likely and to impose far greater constraints on the other branches of government than ever before.¹⁰² The legal interpretation of abstract individual liberties will also transform the role of the courts, hitherto confined to statutory review, and contribute to a greater politicisation of the judiciary.¹⁰³

This in turn may increase political pressure for a reform of the British judiciary in order to strengthen its independence from the political process. For instance, it is increasingly argued that by combining the roles of Cabinet Minister and head of the judiciary the office of Lord Chancellor compromises the independence of the latter.¹⁰⁴ In the wake of reforming the House of Lords it has also been suggested to transfer its legal functions to an independent Supreme Court.¹⁰⁵ Such major reforms would confirm and formalise the increased constitutional importance of the judiciary, but they go far beyond the agenda of the 1997 Labour Government. As suggested further above, an uncoded constitution develops dynamics of its own which means that a programme of limited reforms can create a domino effect of (often) unintended further constitutional change whose eventual equilibrium is difficult to predict.¹⁰⁶ By altering the constitutional balance of power between the courts and Parliament, EU membership and the Human Rights Act may precipitate further and perhaps more radical reforms which threaten to undermine the traditional legitimising principles of the judiciary and ultimately the doctrine of parliamentary sovereignty itself.

The Constitutional Status of Subnational Government

Britain is not a federal state like Germany because the constitutional doctrine of parliamentary sovereignty is inherently unitary in nature. If subnational governments

¹⁰² *Ibid.*, pp.6ff

¹⁰³ Thomas, *op. cit.*, p.160f

¹⁰⁴ Robert Hazell: "Westminster - Squeezed from Above and Below", in: Robert Hazell (ed.): Constitutional Futures - A History of the Next Ten Years, (Oxford: Oxford University Press, 1999), p.115f

¹⁰⁵ The controversy surrounding the Pinochet judgement in the House of Lords fuelled this debate, see: "Next Century's Law Lords May Sit in a Supreme Position", Financial Times, 24/3/1999, p.9

exercised any powers other than explicitly devolved from Parliament, they would therefore undermined the latter's legal legitimacy. Consequently, the 1973 "Kilbrandon Report", which informed the ill-fated Devolution Bills of the late 1970s, explicitly ruled out a federal solution as incompatible with the constitution.¹⁰⁷ Similarly, the powers and the institutional structure of local government itself derive strictly from statute, and they have been subject to considerable legislative change over the centuries.¹⁰⁸

For instance, the Local Government Act 1985 abolished altogether the Greater London Council and delegated its functions to the London boroughs, the Corporation of the City of London and various ad-hoc bodies.¹⁰⁹ The past two decades have also seen legislation reducing the powers of local authorities over schools and hospitals and limiting local budgetary control by empowering the Secretary of State for the Environment to cap local authority budgets on grounds of *excessive expenditure*.¹¹⁰ Some critics have considered these developments as "a direct threat to the tradition of the self-sufficient local authority".¹¹¹ In response to such complaints, the 1997 Labour Government has legislated for the creation of a Greater London Authority with limited devolved powers and an elected mayor for the capital. It has also promised legislation providing for the direct election of local mayors who would assume the role of a chief executive of their Council.

The centralised, unitary nature of the British polity has been highlighted, and to some extent challenged, by EU membership.¹¹² Through its regional and structural funds the Commission has sought to build direct relationships with the regions, bypassing central government. In the absence of a regional tier of government above county level Whitehall attempted to monopolise regional representation and funding negotiations. As a result, the EU funds available were sometimes not fully allocated or did not effectively meet regional priorities. The introduction of Regional Development Agencies and (possibly) elected regional assemblies has occurred at

¹⁰⁶ Also: Hazell, *op. cit.*, pp.114ff

¹⁰⁷ Royal Commission, *op. cit.*, paras.498, 539

¹⁰⁸ Finer, Bogdanor and Rudden, *op. cit.*, p.54

¹⁰⁹ *Ibid.*, p.55

¹¹⁰ *Ibid.*, p.56

¹¹¹ Martin Loughlin: "The Restructuring of Central-Local Government Relations", in: Jeffrey Jowell and Dawn Oliver (eds.): *The Changing Constitution*, (Oxford: Clarendon Press, 3rd ed. 1994), p.271

least partly in order to make subnational institutions more compatible with the EU. EU membership has therefore contributed to a regionalisation of the UK, and it has offered an opportunity for subnational government to recapture some powers from the centre, especially by bidding for and administering the Commission's regional and structural funds and through independent representation in the Committee of the Regions.¹¹³

EU membership has also contrasted Britain's political centralisation with the trend towards federal or devolved arrangements in most other member states, thus increasing popular demand for a regional devolution of powers, particularly in Scotland.¹¹⁴ Finally, the EU has opened new strategic perspectives for the nationalist movement in Scotland and its policy of seeking secession from the UK. If it can secure continued membership in NATO and the EU after secession, Scotland will no longer depend on the UK for its defence or access to world markets. An independent Scotland in Europe would also offer most of the economic advantages of membership in the UK, thus reducing the political and economic cost of secession.¹¹⁵

Mindful of the growing regional discontent, particularly in Scotland, the 1997 Labour Government held referenda in Scotland, Wales and Northern Ireland over its plans to devolve powers to these areas and set up elected regional assemblies. With each of these referenda endorsed by the electorate, Parliament has legislated to devolve legislative control over most domestic affairs to a Scottish parliament and a Northern Irish assembly, and more limited secondary legislative powers, especially over health, education and transport, to a Welsh assembly.¹¹⁶ All three assemblies will be funded through block grants paid annually by the respective Secretary of State. In addition, the Scottish parliament can exercise limited tax-varying powers by varying the basic rate of income tax by up to three per-cent of the rate in the rest of the UK. Each assembly is lead by a cabinet-style executive headed by a first-minister.

¹¹² Bulmer (97), *op. cit.*, p.62

¹¹³ Armstrong and Bulmer (98), *op. cit.*, p.280f

¹¹⁴ For example: Constitutional Unit: Scotland's Parliament - Fundamentals for a New Scotland Act, (London: Constitutional Unit, 1996)

¹¹⁵ Bogdanor (99), *op. cit.*, p.127

¹¹⁶ *Ibid.*, p.202-13

Parliament alone retains the power to amend or repeal the devolution acts, thus preserving parliamentary sovereignty. Moreover, the devolved Scottish and Welsh administrations do not enjoy the wide-ranging powers of the German Länder in EU policy-making.¹¹⁷ The Government has committed itself to involving them in the British negotiating team for Brussels whenever Welsh and Scottish affairs are considered. But the devolved executives cannot advance a specifically Welsh or Scottish position which deviates from the position of the British government.¹¹⁸ Disagreements about whether legislation from the devolved assemblies lies within their powers granted in the devolution acts are referred to the Judicial Committee of the Privy Council. By having the power of both abstract and concrete judicial review the Judicial Committee will thus assume the function of a constitutional court for devolution issues.¹¹⁹

As with the Human Rights Act, devolution will have two important effects on Britain's formal legitimacy. First, the constitutional position of the courts will be bolstered vis à vis Parliament because the legal recourse to the Judicial Committee may be the only way of arbitrating constitutional claims that will be acceptable to both central and regional government.¹²⁰ The Privy Council's pivotal role in settling conflicts of competence between Westminster and the devolved assemblies will also accelerate the politicisation of the judiciary in a particularly sensitive area.

A second important constitutional effect of devolution is the dilution of parliamentary sovereignty in constitutional reality, even if it is formally preserved. Like the Human Rights Act, the full constitutional impact of devolution will only become apparent over time, but it is difficult to envisage circumstances where it would be politically possible for Parliament to repeal the devolution acts, except perhaps in the exceptional case of Northern Ireland.¹²¹ Devolution effectively *divides* legislative powers between Westminster and the devolved assemblies rather than merely *devolving* them, thus creating a quasi-federal relationship.¹²² Indeed, the modus of devolution has been criticised as an unsustainable "half-way house" failing to adapt the unitary nature of

¹¹⁷ See: Chapter 4, pp.148ff

¹¹⁸ For details, see: Bogdanor (99), op. cit., p.278-83

¹¹⁹ Ibid., p.206

¹²⁰ Thomas, op. cit., p.156

¹²¹ Bogdanor (99), op. cit., p.2f

the British constitution in order to prevent the process of devolution from leading to the gradual disintegration of the UK.¹²³

Bogdanor agrees that it will be difficult “to bring into play the constitutional restraints in the Scotland Act. For it would be difficult to imagine an issue more likely to unite Scottish opinion than a conflict between the Scottish Parliament and a remote, London-based government.”¹²⁴ The stability of the current constitutional arrangements will also be tested when Westminster and the devolved assemblies are being governed by different political parties. Conflicts over policy or competencies will then be drawn into the party political controversy of Britain’s adversarial political culture. The success of the devolution acts will therefore depend much more on psychological and political factors than on constitutional ones.

*“The sense of common feeling will have to prevail over the sentiment of states’ rights. Indeed, because it creates governmental relationships of some complexity, quasi-federalism probably requires a greater sense of loyalty to the whole, to the United Kingdom, than is necessary in a unitary state.”*¹²⁵

To summarise, EU membership has reinforced pre-existing domestic challenges to Britain’s unitary state structures. Devolution has been designed to meet these internal and external challenges, to preserve the geographical integrity of the UK and to make its formal legitimacy more compatible with the EU. However, the reforms represent an unstable compromise between the doctrine of parliamentary sovereignty and semi-federal institutional arrangements. Whether this compromise can be stabilised in the long-run will depend on the dynamics of Britain’s uncoded constitution which are largely determined by the evolution of political practice.

Conclusion

Britain’s formal legitimacy has evolved organically around an uncoded constitution, the common law tradition, the concept of the Crown and the central constitutional

¹²² *Ibid.*, p.293

¹²³ John Barnes: *Federal Britain - No Longer Unthinkable?*, (London: Centre for Policy Studies, 1998)

¹²⁴ Bogdanor (99), *op. cit.*, p.288

doctrine of parliamentary sovereignty in relation to which all other institutions and legitimising principles are legally subordinate. This has given rise to a unitary state where the powers of subnational government depend on parliamentary statute. Courts lack the powers to review the substance of legislation, and there is no separate body of constitutional law. A number of institutional developments and a winner-take-all electoral system have resulted in tightly organised parliamentary majorities which allow Prime Ministers and their Governments to exercise centralised political leadership. This institutional structure has fostered an adversarial and weakly judicialised political culture.

Membership in the EU has posed serious challenges to the British constitutional system whose formal legitimacy is in some ways incompatible with supranational integration. Although a direct confrontation has so far been avoided, the supremacy of EU law sits uncomfortably with the core constitutional doctrine of parliamentary sovereignty. The steady influx of European legislation incorporated into British law leads to the uneasy fusion of two very different jurisprudential systems and cultures.¹²⁶ At the level of political culture, the consensual EU policy-making style and continuous bargaining among member states and among parties in the EP contrasts sharply with the British political tradition of adversarial debate, strong one-party government and the notion of the opposition as an alternative government. Finally, EU membership has arguably given nationalist movements, especially in Scotland, a more effective platform from which to advocate secession from the UK.

However, the recent domestic constitutional reforms may over time help to reduce these incompatibilities between the formal legitimacy of the UK and the EU.¹²⁷ Two different viewpoints are emerging on this issue. According to one perspective, the direction of domestic reforms represent a degree of convergence with the formal legitimacy of other EU member states, thus reducing British “exceptionalism”.¹²⁸ EU membership, devolution and the Human Rights Act have all bolstered the (previously subordinate) position of the judiciary vis à vis the other branches of government and

¹²⁵ *Ibid.*, p.295

¹²⁶ Dyson (80), *op. cit.*, p.42f, 110ff

¹²⁷ Frank Vibert: “British Constitutional Reform and the Relationship with Europe”, in: Robert Hazell (ed.): *Constitutional Futures - A History of the Next Ten Years*, (Oxford: Oxford University Press, 1999), p.47ff

will contribute to a greater judicialisation of politics. The increasing intrusion of EU law into the British legal system has introduced a new judicial dimension by diffusing the common law tradition with elements of continental jurisprudence.

More importantly, devolution and the Human Rights Act are beginning to affect the core principle of the British constitution, parliamentary sovereignty, almost as much as EU membership. While great efforts were made to keep the doctrine formally intact, in *constitutional reality* each of the three areas of constitutional evolution have affected the powers of Parliament to the effect that “parliamentary supremacy no longer possesses the clarity and firmness which it enjoyed” only a few decades ago.¹²⁹ EU membership, devolution and the Human Rights Act have changed the previously centralised structure of the British political system by breaking up Parliament’s near legislative monopoly and introducing alternative policy-making bodies, in particular the courts, the devolved assemblies and European institutions.

Over time, these constitutional changes might also affect the political culture of the UK. A more judicialised, consensual and negotiating style of politics could develop which is closer to the patterns in most of the other EU member states. This trend would be reinforced by the mooted adoption of a more proportional voting system for general elections which would increase the likelihood of coalition government and a less adversarial style of politics. Such a *Europeanisation* of Britain’s formal legitimacy may bring about greater constitutional harmony between the UK and Europe.¹³⁰ Indeed, some of the proposals of the constitutional debate over recent years, such as an entrenched constitution or the establishment of a Supreme Court, would further accelerate this convergence of formal legitimacies.¹³¹ Finally, domestic reforms such as devolution or the Human Rights Act are also designed to redress internal challenges to Britain’s felt legitimacy and preserve the Union’s territorial integrity.¹³²

¹²⁸ *Ibid.*, p.47ff

¹²⁹ Bogdanor (99), *op. cit.*, p.294

¹³⁰ Vibert (99), *op. cit.*, p.47

¹³¹ Hazell, *op. cit.*, pp.115ff

¹³² Robert Hazell and Brendan O’Leary: “A Rolling Programme of Devolution - Slippery Slope or Safeguard of the Union?”, in: Robert Hazell (ed.): *Constitutional Futures - A History of the Next Ten Years*, (Oxford: Oxford University Press, 1999), p.22

According to the opposite viewpoint, the above argument ignores the unique dynamics of the British constitution which combine the continuous, evolutionary adaptation of subordinate norms and institutions with the unbroken continuity and stability of its fundamental principles.¹³³ At their core lies the strong and long-standing constitutional tradition of democratic self-government, which is closely bound up with Britain's national identity.¹³⁴ This commitment to representative parliamentary government is symbolised in the constitutional centrality of the doctrine of parliamentary sovereignty. Rather than representing a successful adaptation to internal and external challenges that stabilises the British constitution, the political dynamics unleashed by the reforms of Britain's formal legitimacy threaten to undermine the fundamental features of the constitution, and maybe even the UK's territorial integrity.¹³⁵

The impact of internal and external challenges may stretch the old constitutional principles beyond breaking point, eventually leading to a complete transformation of Britain's constitutional philosophy. Because of the unstable equilibrium they have created, EU membership and devolution, rather than reinvigorating the Union, may also contribute to a gradual territorial disintegration of the UK.¹³⁶ Yet public attachment to the fundamental features of the British constitution remains strong, not least because it is so long-lived and closely bound up with national identity. A *Europeanisation* of the British constitution could therefore undermine its felt legitimacy if it involves the wholesale shift towards new constitutional principles and traditions.¹³⁷ Greater compatibility between the UK and the EU at the level of *formal* legitimacy may result in lower levels of *felt* legitimacy for the domestic (and probably the European) political system to which the discussion now turns. Consequently, it is cultural-normative constraints, such as the commitment to protecting Parliament as the guarantor of British democracy, rather than the lack of legal flexibility which may

¹³³ Philip Norton: "In Defence of the Constitution - A Riposte to the Radicals", in: Philip Norton (ed.): New Directions in British Politics? Essays on the Evolving Constitution, (Aldershot: Edward Elgar, 1991), p.157

¹³⁴ See pp.120ff below

¹³⁵ Johnson (97), *op. cit.*, pp.506-08, John Redwood: The Death of Britain, (London: Macmillan, 1999)

¹³⁶ Hazell and O'Leary, *op. cit.*, p.27

¹³⁷ David Willetts: Modern Conservatism, (Harmondsworth: Penguin, 1992), pp.152ff

ultimately inhibit the constitutional adaptation of Britain's formal legitimacy to the challenges of EU membership.¹³⁸

3.3 Felt Legitimacy

The second part of this chapter deals with the felt legitimacy of the British political system. It divides into sections each dealing with one of the three components of felt legitimacy, namely the political regime, the political authorities and the political community. Each of these components face their own unique measurement problems which will be referred to in the course of the discussion. However, some problems recur throughout the discussion of felt legitimacy in this and the next two chapters. One of them concerns the difficulties associated with cross-national comparative research. While the predominant use of Eurobarometer surveys in this thesis helps to avoid many of these methodological problems,¹³⁹ the Eurobarometer series itself suffers from another common problem of empirical public opinion research on legitimacy. Its survey questions tend to be insufficiently precise about the *object* of support they measure (in other words, *regime*, *community*, *authorities*).¹⁴⁰ Measurements of diffuse support for the political regime are sometimes "contaminated" with evaluations of specific output support, thus blurring the analytical distinction between the diffuse and the specific *mode* of support. The discussion of felt legitimacy in the UK, the FRG and the EU must therefore cross-check the data on diffuse support for possible influences from specific output evaluations. Moreover, the following analysis, while primarily based on the quantitative results of public opinion surveys, will complement these for methodological reasons with a number of qualitative indicators of felt legitimacy.¹⁴¹

3.3.1 Political Community

The *sense of political community* in the UK is rooted in a strongly developed, long-standing national identity. The interpretation of British national history and identity

¹³⁸ Armstrong and Bulmer (95), *op. cit.*, p.254

¹³⁹ Eichenberg and Dalton, *op. cit.*, p.517

¹⁴⁰ Westle (89), *op. cit.*, p.159-164

has been the subject of much academic debate over the past two decades.¹⁴² Nonetheless it is possible for the purpose of this chapter to indicate a number of broadly accepted themes.¹⁴³ According to one influential account, popular British identity developed rapidly in the century following the Act of Union with Scotland in 1707. Britain's protestant identity was shaped mainly in (political and military) opposition to Catholic France as the "hostile Other".¹⁴⁴ Rather than domestic centralisation or homogenisation, it was the perceived dissimilarity from others which unified the peoples of the United Kingdom. British identity celebrated the aspects which differentiated it from other nations.

The rise of Protestantism set Britain apart from a predominantly Catholic European continent and the dogmatic spiritual leadership of Rome. Later on, the 17th century struggle for supremacy between crown and parliament was perceived as confirming the superiority of British parliamentarism, symbol of liberty, over the monarchical absolutism pioneered in France. The historical myth of parliamentary self-government could build on the even longer tradition of limited monarchical power, dating back to the Magna Carta of 1215.¹⁴⁵ In this fashion, the emergence of Britain's historical identity became interwoven with the defence of external and internal sovereignty as symbolised in parliamentary supremacy. Concerns about national and parliamentary sovereignty became mutually reinforcing.¹⁴⁶

The experience of Empire provided another aspect in which national distinctiveness was confirmed through the association of Britishness with free trade, economic prosperity, splendid isolation from Europe and the political influence of a world power.¹⁴⁷ While Britain's involvement in the two World Wars marked the decline of imperial power, the perception of Germany as an evil and dangerous threat and a relatively even distribution of sacrifices across classes further reinforced a sense of

¹⁴¹ Chapter 2, p.88f

¹⁴² For a brief illustration of the main approaches to the "new British history" see: David Cannadine: "British History as a New Subject", in: A. Grant and K. Stringer (eds.): Uniting the Kingdom? The Making of British History, (London: Routledge, 1995), pp12-28

¹⁴³ Eatwell, op. cit., p.51

¹⁴⁴ Linda Colley: Britons: Forging the Nation 1707-1837, (London: Pimlico, 1994), pp.11-54

¹⁴⁵ Eatwell (97a), op. cit., p.52

¹⁴⁶ William Wallace: "What Price Interdependence? Sovereignty and Interdependence in British Politics", International Affairs, vol.62, no.3, 1986, p.382f

¹⁴⁷ Colley, op. cit., pp.56-71, 85-98

national identity.¹⁴⁸ Many continental countries experienced political instability and military invasion during World Wars, but the successful defence of Britain's long-standing territorial integrity and its liberal democracy entrenched the attachment to self government. Coupled with Britain's continuing global political and economic interests such as the strategic alliance with the USA, the (con-)fusion of parliamentary and national sovereignty have meant that European unification tends to be publicly perceived as a threat to national identity rather than a political opportunity.¹⁴⁹

In contrast to Germany, ethnicity was not a central element of British national identity, although the English language played a unifying role.¹⁵⁰ Pre-British identities in Scotland, Wales and Ireland persisted alongside the emerging sense of Britishness in the UK. State and nation have never become fully coterminous, and the emphasis on the UK as the Protestant isles helps to explain why the Irish could never be fully incorporated into the Union. On the other hand, the persistence of subjecthood, which does not link citizenship to ethnic nationality, made it easier to integrate post-war immigrants into British society, especially those from the Commonwealth who were already subjects to the Crown and had grown up under Britain's cultural and linguistic influence.¹⁵¹

The implication of Colley's thesis about the emergence of British identity is that it would come under strain when some of the factors promoting it - the presence of a hostile Other, Protestantism and politico-economic prestige - decline in significance or are diluted, for instance by the immigration of ethnic minorities. Economic decline and the receding memory of Empire and the two World Wars have all contributed to a renaissance of pre-British identities in the component nations of the UK.¹⁵² In parallel, the sense of Britishness is argued to have weakened, and the continued viability of the traditional concept of British identity has recently come under attack.¹⁵³ Despite

¹⁴⁸ Eatwell (97a), *op. cit.*, p.54

¹⁴⁹ Bulmer (92), *op. cit.*, pp.9-14

¹⁵⁰ Eatwell (97a), *op. cit.*, p.52

¹⁵¹ According to the 1991 census, 5.5% of the population come from non-white, immigrant backgrounds. See: *Ibid.*, p.61

¹⁵² Cannadine, *op. cit.*, pp.19ff

¹⁵³ For example: Andrew Marr: *The Day Britain Died*, (London: Profile, 2000), Tom Nairn: *The Break-Up of Britain - Crisis and Neo-Nationalism*, (London: New Left Books, 1977). A political science journal recently devoted an entire issue to the question of "Being British". See: *The Political Quarterly*, vol.71, no.1, 2000

decreasing national homogeneity and the effects of generational and ethnic change, Eatwell cautions not to overstate the problems for the classic view of British identity, and the following survey data seem to support his case.¹⁵⁴ Increasingly strong regional identities which have even given rise to separatist movements seem to coincide with high levels of national attachment and pride.

Across the UK as a whole, 9% feel *very attached* to the EU, 58% to Britain, and 41% feel very attached to their region. But these figures disguise substantial regional disparities which are discussed further down.¹⁵⁵ Based on a series of surveys McCrone and Surridge calculate a level of national pride among Britons considerably higher than in Germany.¹⁵⁶ When asked what made them proud about Britain, nearly nine out of ten respondents mentioned national history and the armed forces, and two-thirds of respondents feel pride in Britain's democratic institutions. These findings indicate that underlying sense of British identity as outlined above still resonates quite strongly among the population, not least because political leadership has failed to offer any coherent new interpretation of what it means to be British.¹⁵⁷

Such observations should not disguise considerable variations in attitudes within the four entities which make up the UK, namely England, Wales, Scotland and Northern Ireland. Northern Ireland is the most obvious area of the UK which suffers from a contested model of identity, both socially and politically. It is a well-known fact that around 40% of the population in Ulster accord no legitimacy to the rule of the British Crown over their territory because they prefer to be governed by the Republic of Ireland instead.¹⁵⁸ Unsurprisingly, a distinctive Northern Irish identity is weakly developed relative to the other areas of Britain, since people in Ulster tend to feel either Irish or British rather than Northern Irish. When asked in a 1996 Eurobarometer poll whether, in the near future, they saw themselves above all as citizens of the EU, citizens of the UK or citizens of their region, Northern Irish respondents saw

¹⁵⁴ Eatwell (97a), *op. cit.*, p.60

¹⁵⁵ Eurobarometer: Standard Eurobarometer no.51, (Brussels: European Commission, 1999), pp.B10-12

¹⁵⁶ David McCrone and Paula Surridge: "National Identity and National Pride", in: Roger Jowell et al (eds.): British and European Social Attitudes, The 15th Report, (Aldershot: Ashgate, 1998), pp.7-10

¹⁵⁷ Eatwell (97a), *op. cit.*, p.65f. The implications for British attitudes to the EU are examined in Chapter Five.

¹⁵⁸ The only official poll on the issue was held in March 1973, but it was widely boycotted by nationalists. On a 58.1% turnout, 98.9% of those voting supported the constitutional link with the UK and only 1.1% voted in favour of joining the Irish Republic. See: Bogdanor (99), *op. cit.*, p.98

themselves disproportionately as European (17%) or British/Irish (68%) compared to the rest of Britain.¹⁵⁹ The high proportion of “Europeans” amongst the population in Ulster may be composed of those who wish to dissociate themselves from the sectarian divide.

In Wales, 34% consider themselves foremost as Welsh citizens as opposed to 52% feeling British first. Scots regard themselves primarily as British citizens (48%) only just outnumber those who feel their strongest allegiance belongs to Scotland (42%). A majority of Welsh (56%) and Scots (50%) identify with the Union Jack, compared to 88% of the English.¹⁶⁰ Hopes that the latent separatist sentiments north of the English border would be contained by granting devolution to Scotland seem premature. A MORI poll conducted in March 1998 revealed that, in the long term, 40% of Scots preferred a devolved Scotland within the UK, 47% a fully independent Scotland and a mere 9% were in favour of neither option, thus presumably preferring the status quo ante. However, Scottish attitudes towards independence fluctuate considerably. From 1997 to 1998 the number of Scottish separatists had risen by ten percentage points.¹⁶¹ By 1999, only 36% of Scottish respondents preferred full independence as opposed to 43% who prefer Scottish devolution within the UK.¹⁶²

These considerable fluctuations suggest that surveys designed to measure diffuse for the *political community* may have become “contaminated” with expressions of specific support for the political authorities. Another indicator of felt legitimacy for the *political community* is the existence and strength of political parties advocating separatism. Plaid Cymru in Wales and the Scottish National Party both formally advocate independence from the UK, albeit with less vigour in the case of Plaid Cymru. In the elections to the Scottish Parliament, the SNP achieved 28.7% on the first vote and 27% on the second which meant that over 70% of voters supported parties opposing Scottish independence.¹⁶³ In Wales, Plaid Cymru polled 28.4% of the first vote and 30.5% of the second.¹⁶⁴ In both cases dissatisfaction with the Labour

¹⁵⁹ Eurobarometer: British Public Opinion on the European Union no.44.2 (unpublished), (Brussels: European Commission, 1996), p.38

¹⁶⁰ MORI: British Public Opinion, vol.22, no.9, 1999, p.3

¹⁶¹ MORI: British Public Opinion, vol.21, no.6, 1998, p.6

¹⁶² MORI: British Public Opinion, vol. 22, no.2, 1999, p.4

¹⁶³ “The New Politics”, The Economist, vol.351, no.8119, 15/5/1999, p.31f

¹⁶⁴ “A Cloudy Dawn”, The Economist, vol.351, no.8119, 15/5/1999, p.35

government at Westminster may have benefited the nationalist parties as voters sought to express their protest in what they may have regarded a “second-order election.”¹⁶⁵ This assumption is borne out by a collection of opinion polls on voting intentions for general elections reveals that in April 1999 support for Plaid Cymru hovered around a mere 14%, whereas only around 25% of Scots would vote for the SNP in an election for Westminster.¹⁶⁶ In view of these data it is maybe surprising that 62% of Scots believe Scotland will be a fully independent country in fifteen years time, regardless of whether they would welcome such a development.¹⁶⁷

3.3.2 Political Regime

Since the political regime component of felt legitimacy can be further subdivided into constitutional philosophy, constitutional order and constitutional reality, one must find survey questions whose responses reveal public attitudes towards each of these sub-categories. Measuring support for the political regime is fraught with difficulties because respondents to opinion surveys are prone to confuse the different *objects* of support. Westle’s comprehensive study of empirical applications of the Eastonian paradigm concludes that most of the survey questions she has analysed are imprecise in their reference to *the* political regime, or they even confuse the *regime* with another object of support, such as the *political community*. Besides, many survey questions, while ostensibly geared towards measuring regime support, stimulate responses evaluating specific output support rather than diffuse support (Westle’s example is the Eurobarometer question on how democracy *works* in one’s country). Strongly cyclical variations of support over time which coincide with a country’s business cycle are strong indicators of such “mis-targeted” surveys, Westle argues.¹⁶⁸

Particular care has therefore been taken, in this as well as in the subsequent two empirical chapters, to ensure that the survey data selected do actually measure public attitudes towards the object of support they are designed to focus on. Public attitudes towards Britain’s constitutional philosophy, for example, have to be measured in

¹⁶⁵ K. Reif and H. Schmitt: “Nine Second-Order Elections: A Conceptual Framework for the Analysis of European Parliament Election Results”, European Journal of Political Research, vol.8, no.1, 1980, pp.3-44

¹⁶⁶ MORI: British Public Opinion, vol.22, no.3, 1999, p.7

¹⁶⁷ MORI (6/98), op. cit., p.6

terms of support for the principle of parliamentary sovereignty or, failing such a high level of specificity, support for democracy as an abstract political concept. In 1989, Eurobarometer conducted a survey asking West European publics about their attitudes towards their political systems in general.¹⁶⁹ Fuchs et al consider some of these survey questions appropriate performance-independent indicators of diffuse support for a country's constitutional philosophy because they elicit responses about the more abstract notion of democracy as such.¹⁷⁰

The first, more abstract question asked whether respondents were in favour or against the idea of democracy in principle without thinking of any existing democracies. 95.3% of Britons were *very much* or *to some extent* in favour of the idea of democracy. In a second question, UK respondents were asked whether they thought democracy was the best political system in all circumstances, whether in certain circumstances a dictatorship could be a good thing, or whether living in a democracy or under a dictatorship made no difference to people like them. Here, only 77.4% of British respondents considered democracy the best political system in all circumstances, marginally below the EC average of 78%. However, of those who disagreed about two thirds were indifferent rather than positively oriented towards dictatorship.

The most likely interpretation of these findings points to the special case of Northern Ireland. If counted separately, only 65.3% of Northern Irish respondents agree that democracy is the best form of government, and the value for the Irish Republic is even lower at a mere 64.9%.¹⁷¹ Both in Ulster and the Republic those quoting indifference outnumber the qualified supporters of dictatorship by about two to one, thus reflecting little appetite for dictatorial government. More than nine out of ten Irish, both north and south of the border, support the abstract idea of democracy. It seems that disappointment with their actual democratic system led many Irish to feel indifferent between dictatorship and democracy as a form of government, especially since radical republican propaganda denounces democracy in the Province as a sham.

¹⁶⁸ Westle (89), *op. cit.*, p.166

¹⁶⁹ Eurobarometer: Survey: Racism, Xenophobia and Intolerance, (Brussels: European Commission, 1989), pp.8-10

¹⁷⁰ Fuchs, Guidorossi and Svensson, *op. cit.*, p.348

¹⁷¹ *Ibid.*, p.349

Also, Northern Ireland is a somewhat exceptional position, given the ubiquitous army presence, the partially restricted application of civil rights under the Prevention of Terrorism Act and the fact that the notions of *ethnos* and *demos* so closely intertwined in the Province.

Another Eurobarometer series measures general support for all three components of the political regime (philosophy, order, reality). Respondents are requested to indicate their attitudes vis-à-vis the political society they live in, namely whether they believe it ought to be “radically changed by revolutionary action”, whether it should be “gradually improved by reforms” or whether it “must be valiantly defended against all subversive forces.” The results are illustrated in fig.3.1 below.

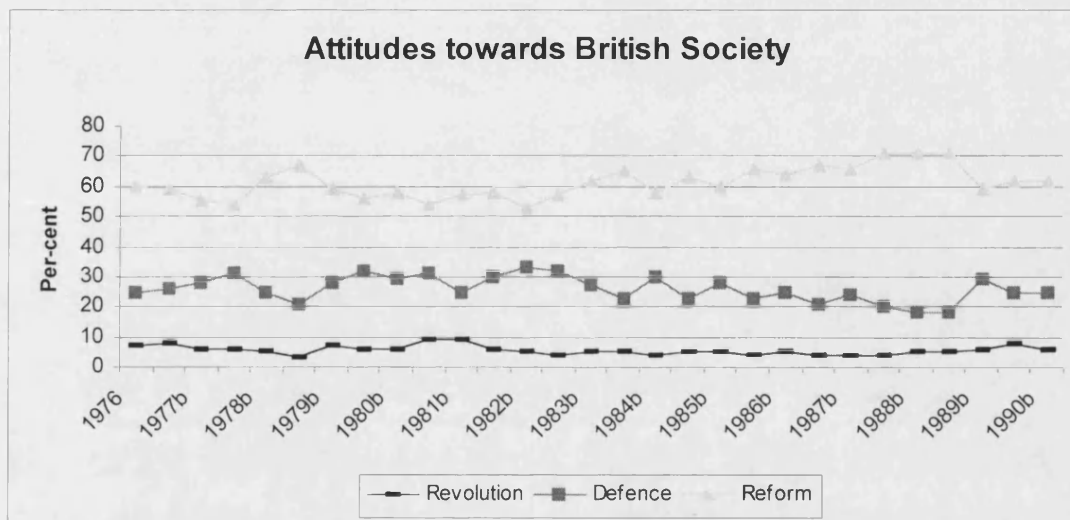


Fig. 3.1¹⁷²

Over a period spanning almost fifteen years the number of people wanting to overthrow the socio-political system of the UK never exceeded a single-digit percentage of the population. At the same time, there are about twice as many people in favour of reforms as are staunch supporters of the status quo. This ratio of reformers over conservatives is considerably higher than in the Federal Republic, for instance, where a larger number of respondents are willing to defend the status quo.¹⁷³ However, allowance has to be made again for the special case of Northern Ireland which may also account for public revolutionary sentiment in the UK at levels

¹⁷² Eurobarometer: Trends 1974-1993, (Brussels: European Commission, 1994), pp.37-48, and subsequent issues.

¹⁷³ See Chapter 4, p.168f

roughly twice as high as in Germany. Qualitative analysis of Britons' attitudes towards society seem to support these findings. After all, with the exception of Northern Ireland, no organised terrorist groups have operated in the UK for the last few decades with the aim to overthrow the political and social order of the country. Even as far as non-violent political activity is concerned, no significant "anti-system parties" exist in the UK.¹⁷⁴ Those which might fall in that category, like the British Communist Party or the BNP, are electorally irrelevant, partly thanks to the majoritarian electoral system.

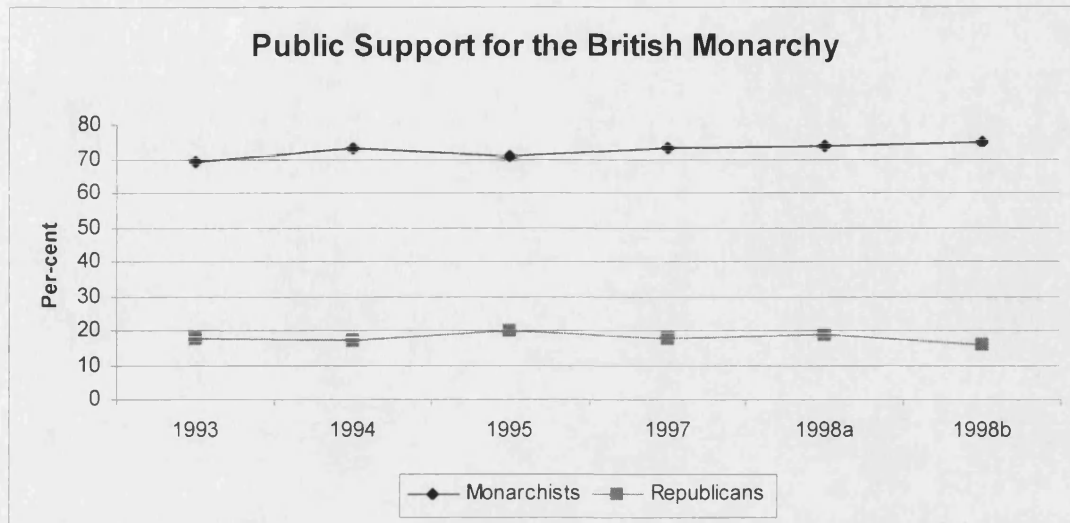
Moving on to the felt legitimacy of the constitutional order, it is especially revealing to analyse levels of support for those institutional features which have recently come under sustained criticism or have been met with demand for reform. The legitimacy of the hereditary principle has increasingly been questioned by constitutional reformers in Britain. This would suggest low levels of felt legitimacy for the (unreformed) House of Lords and a monarchical head of state. However, this assumption is not borne out by the quantitative data available.

Starting with the monarchy, consistently more than two-thirds of the British public have wanted to retain a hereditary head of state over the past five years, even during periods of intense negative media coverage on the personal problems of the Royal Family (see fig.3.2). Even specific output support for Queen Elisabeth II as a person, rather than the institution of the monarchy, consistently shows significant positive net satisfaction values when the public is asked about the way the Queen is performing her role as monarch.¹⁷⁵ In summer 1998, for instance 73% of respondents were satisfied and only 18% dissatisfied with the Queen's reign and 63% expressed satisfaction with the Prince of Wales's performance as heir to the throne.¹⁷⁶

¹⁷⁴ Giovanni Sartori: Parties and Party Systems, (Cambridge: Cambridge University Press, 1976), p.127ff

¹⁷⁵ MORI: British Public Opinion, vol.19, no.2, 1996, p.5, and MORI: British Public Opinion, vol.21, no.7, 1998, p.4

¹⁷⁶ Ibid., p.4

Fig.3.2¹⁷⁷

The situation is slightly different for the House of Lords, partly because a large section of the British public confesses to knowing very little about the institution. In 1998, 81% of respondents admitted to knowing “just a little” or “hardly anything at all” about the House of Lords, a figure largely unchanged from earlier surveys in 1991 and 1995.¹⁷⁸ As regards public attitudes towards the House of Lords just *prior* to the House of Lords Bill 1999, 55% of those interviewed preferred a partly or wholly elected second chamber and 21% opted for the status quo, but amongst people who felt they knew “a great deal” or “fair amount” about the House of Lords, the largest number (31%) wanted to preserve the status quo and a further 10% merely wanted to remove the voting rights of hereditary peers.¹⁷⁹

In a similar poll conducted by Gallup in 1998, an even larger number of people (35%) wished to retain the current composition of the House of Lords, again making the status quo the most popular option if directly compared to any one of the other alternatives.¹⁸⁰ However, almost two-thirds of respondents rejected the status quo, pointing to a lack of consensus on attitudes towards the House of Lords which may well have been caused by the lack of public knowledge and (probably) interest in the issue.

¹⁷⁷ *Ibid.*, p.4

¹⁷⁸ MORI(6/98), *op. cit.*, p.6

¹⁷⁹ *Ibid.*, p.6

¹⁸⁰ Gallup Political and Economic Index, Report no.454, June 1998, p.6. Of the others, 32% favour an unspecified reform of the House of Lords, while 27% wish to see the institution abolished.

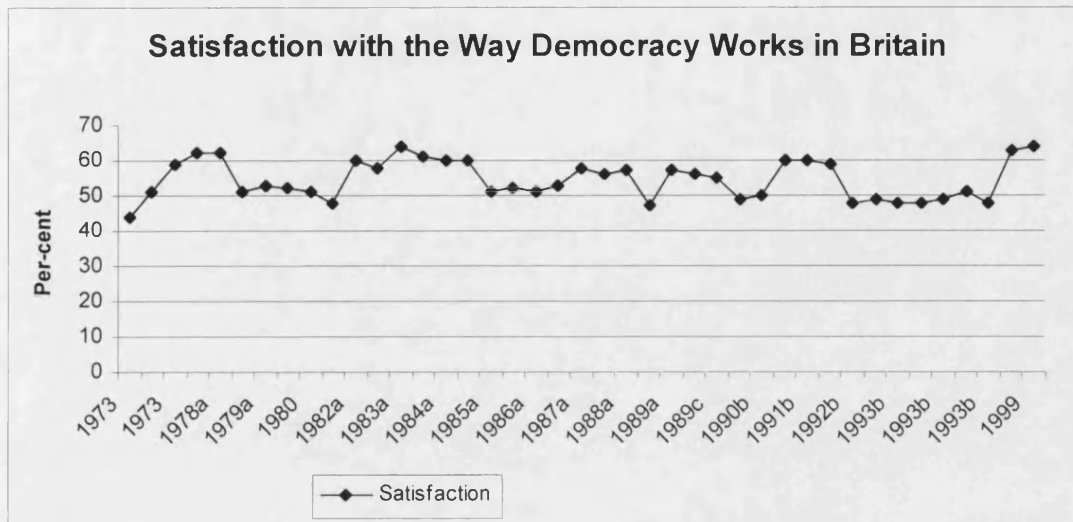
How does the British public evaluate the constitutional order of the UK and its translation into *political reality*? One obvious set of data to consult is the widely used Eurobarometer series on satisfaction with democracy whose exact wording is: “On the whole, are you very satisfied, fairly satisfied, not very satisfied or not at all satisfied with the way democracy works (in your country)?” The principle advantage of this series is its suitability for comparative research, since long-term data exist for Britain and Germany as well as the EU. However, scholars disagree as to whether the attitudinal object of this survey question is the *regime* or the *authorities*. Westle is highly critical of the contradiction in the way the question is formulated between a reference to diffuse regime support (“democracy”) and specific output support (“*satisfied with the way democracy works*”).¹⁸¹ Fuchs et al believe the Eurobarometer indicator does reflect a generalised attitude towards the political system, and they are dismissive of its classification as either diffuse or specific. Instead, they argue respondents in this survey evaluate not democracy as such, but constitutional reality or the “constitution in operation”.¹⁸²

One possible way of settling this issue is to compare the data from this particular survey with fluctuations in indicators of specific support, such as party allegiance, satisfaction with the government or future economic expectations. If responses to the Eurobarometer question on satisfaction with democracy are strongly correlated to satisfaction with government, or party preference, or economic optimism, then they are more likely to measure specific output support rather than diffuse regime support. This is because diffuse support is characterised by fundamentality, durability and its independence from fluctuations in specific support.¹⁸³ The data from the Eurobarometer survey on satisfaction with democracy are depicted in fig.3.3 below.

¹⁸¹ Westle (89), *op. cit.*, p.163

¹⁸² Fuchs, Guidorossi and Svensson, *op. cit.*, p.332

¹⁸³ Easton (75), *op. cit.*, p.445

Fig.3.3¹⁸⁴

The data reveal noticeable fluctuations in satisfaction levels, but within an overall percentage band of no more than about fifteen points and at a very substantial average level of satisfaction of over 50%. However, Fuchs et al draw attention to a significant regional variation when extrapolating the responses given by Ulster interviewees. Starting from very low satisfaction levels of around 25% in 1976, there is a gradual, if highly fluctuating, increase in satisfaction with democracy towards a value of around 40% in 1991.¹⁸⁵ When counting the Province separately from the rest of Britain, Fuchs et al calculate a mean satisfaction rate over the period 1976-1991 of 59% for Britain and a mere 35% for Northern Ireland.¹⁸⁶

Fuchs et al also correlate the Eurobarometer survey with the party allegiance of respondents. As with interviewees in all the other member states, British respondents who were at the same time supporters of the party in government were more satisfied with the way democracy worked in the UK. The variance in satisfaction between government and opposition supporters in Britain amounts to remarkable 32.5 percentage points - one of the highest of all the countries surveyed by Eurobarometer.¹⁸⁷ Since these data derive from surveys conducted mostly during the 1980s, the explanations for this striking satisfaction gap offered by Fuchs et al (large

¹⁸⁴ Eurobarometer: Trends, *op. cit.*, pp.19-34, and subsequent issues.

¹⁸⁵ Fuchs, Guidorossi and Svensson, *op. cit.*, p.338

¹⁸⁶ *Ibid.*, p.341

¹⁸⁷ *Ibid.*, p.345

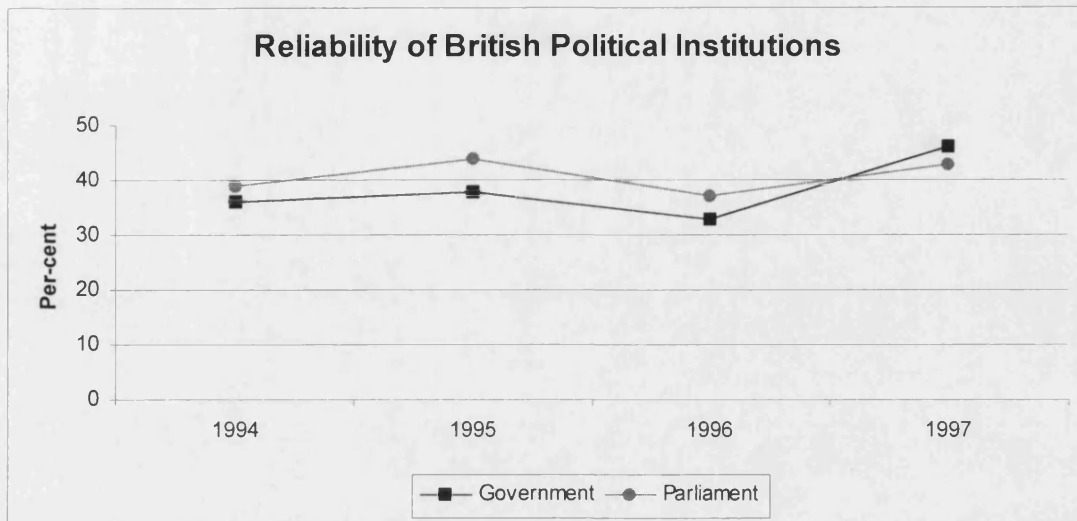
ideological divisions between both parties and Labour's decade-long inability to win general elections) sound plausible.¹⁸⁸

Qualitative analysis supports the hypothesis that in particular during the 1980s and early 90s a significant section of British society was dissatisfied with the political regime rather than merely with the outputs it produced. The long era of Conservative governments pursuing far-reaching institutional reform and policy change has highlighted the potential political implications of the doctrine of parliamentary sovereignty, namely the inability of other constitutional actors such as the law courts or even the House of Lords to balance significantly the political will of the House of Commons.

The potential for strong policy leadership by central government, an adversarial political culture and the ideological divisions between the two main parties during the 1980s will all have contributed to the negative impact on felt legitimacy. The most striking example of this development were the violent public demonstrations against the Community Charge in 1990. The Britons who took to the streets that year did not accord legitimacy to Parliament's power to charge taxes, and they vented their anger in the streets because they perceived no opportunity to seek redress from within the political system. On a far smaller scale, similar phenomena could be observed on a number of occasions during the 1990s, be it street blockades against the export of live stock or the unlawful encampments at road-building sites.

A good indicator of public disillusionment with their domestic political institutions is another survey which asks to what extent people feel they can rely on their own national parliament and government to make decisions which are in the interest of people like themselves (see fig.3.4).

¹⁸⁸ *Ibid.*, p.346

Fig.3.4¹⁸⁹

Two features are striking about this set of data, although it covers too short a time period to allow long-term trends to be visible. For the first three years, confidence in British political institutions is lower than the Europe-wide average (in 1994, for instance, the mean value of all the fifteen member states amounts to 44% for national governments and 46% for national parliaments).¹⁹⁰ Since the election of a Labour government for the first time in 18 years and the defeat of a very unpopular Conservative administration in 1997, British trust in both Westminster and Whitehall has rebounded. It even exceeded the European average of 37% for national governments and 40% for national parliaments in late 1997. Second, confidence in parliament is nearly always higher than the belief in the reliability of government, except for 1997.

A continuing public attachment to the idea of a sovereign and independent Parliament functioning as the “great inquest of the nation” may be a plausible explanation for the higher level of confidence placed in Westminster. Scandals which have tarnished this image, on the other hand, such as the so-called “cash-for-questions” affair may have contributed to government being the better trusted political institution in 1997. However, comparison with past trends and the experience of other European countries suggests this development to be of a temporary nature only. When recently low, but fluctuating, levels of specific support are discounted, diffuse support for the political

¹⁸⁹ Eurobarometer no.42, (Brussels: European Commission, 1995), p.B28, and subsequent issues.

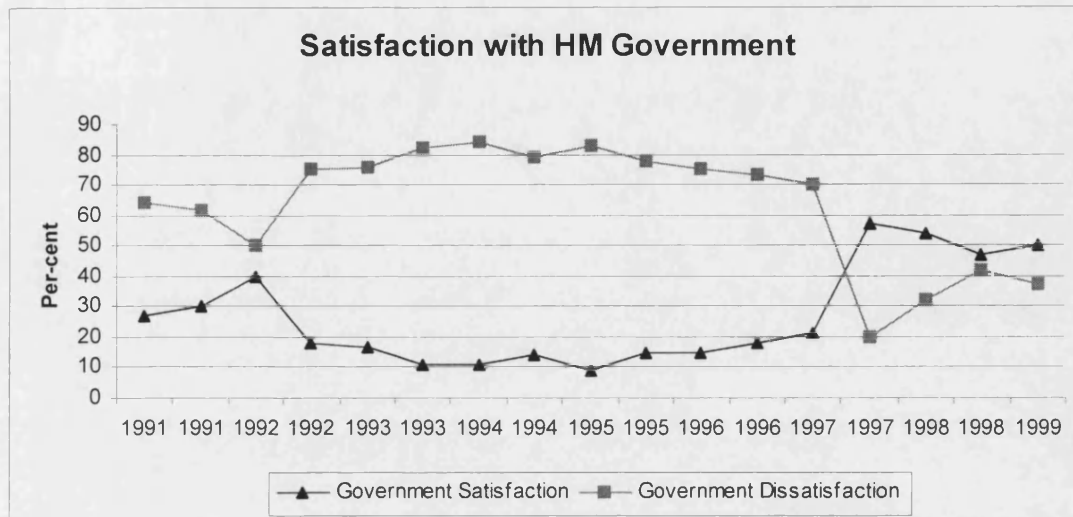
¹⁹⁰ Ibid., p.B28

regime remains strong. This analysis is confirmed by high levels of pride in Britain's political institutions which were seen to be a major factor explaining comparatively strong feelings of general national pride in Britain. As discussed above, political institutions such as a sovereign Parliament and the Monarchy are still closely bound up with Britain's national identity which means that diffuse regime and community support are mutually reinforcing.

The question arises how recent constitutional reforms and continuing European integration, whose cumulative effect is to dilute the distinctive character of the UK's political institutions, will affect diffuse support for the political regime. Despite the popularity of individual reforms such as devolution, taken together they threaten to undermine the core principle of the British constitution as well as an important element of Britain's national identity. It remains questionable whether the UK's political culture and its sense of identity would easily adapt to such a radical constitutional transformation. Replacing the historically evolved, fundamental core of Britain's formal legitimacy with new constitutional principles may therefore cause a backlash in felt legitimacy.

3.3.3 Political Authorities

The most straightforward measures of specific support for the political authorities are opinion surveys on popular satisfaction with the government of the day. An analysis of these data sets helps to confirm the hypothesis that substantial political change coupled with long-standing political domination by the Conservative Party has affected public evaluations of satisfaction with democracy (see fig.3.5).

Fig.3.5¹⁹¹

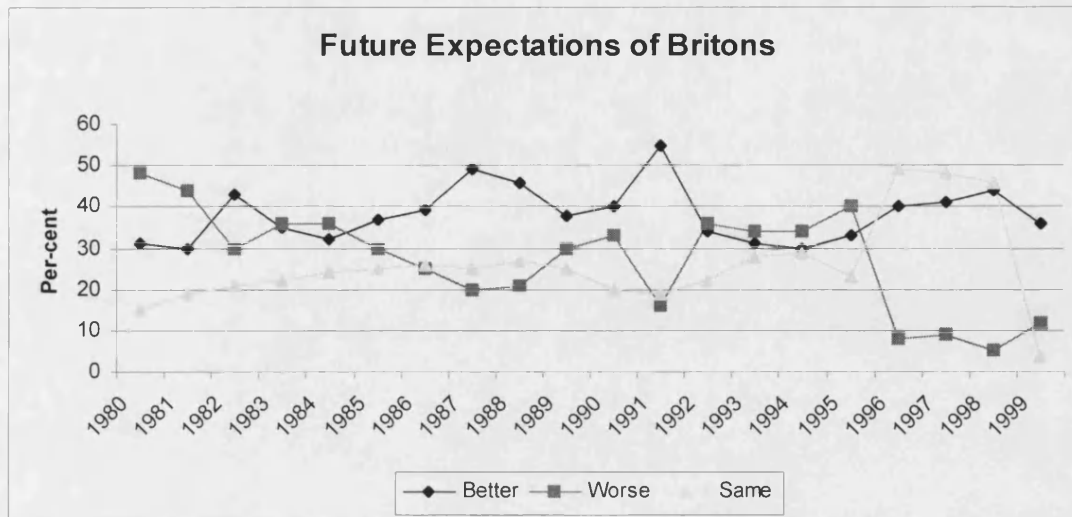
Remarkably, the 1997 election of a Labour Government marks the first time for almost a decade where a greater proportion of the electorate was satisfied with the government than not. Even at the time of the 1992 election, which saw a return of the incumbent administration, there was a net-dissatisfaction of ten percentage points.

Notwithstanding, voter turnout at general elections has consistently held up at around 74% which indicates that the electorate has retained its faith in the democratic system.¹⁹² After all, participation in elections has often been viewed as one of the most active forms of legitimating a political system.¹⁹³ While some respondents may therefore be genuinely dissatisfied with a political system that consistently fails to return a government of their own political persuasion, the consistently high election turnouts and the impact of party allegiance suggest that evaluations of satisfaction with democracy at least partly measure specific rather than diffuse support. A comparison with another Eurobarometer survey, this time on personal expectations for year ahead, might help to shed yet more light on the degree to which fluctuations in satisfaction with democracy might be influenced by the economic cycle (see fig.3.6).

¹⁹¹ MORI: *British Public Opinion*, vol.14, no.10, 1991, p.2, and subsequent issues.

¹⁹² Source: *House of Commons Library*. For more details, see: Fig.5.6, p.193

¹⁹³ Beetham (91), *op. cit.*, p.92

Fig.3.6¹⁹⁴

Juxtaposing the graph representing Britons expecting the year ahead to be better for them personally with fig.3.3 depicting satisfaction with the way democracy works in Britain, the evidence is ambiguous. For the first few years of the 1980s satisfaction with democracy declined before rebounding dramatically from about 1983 onwards. Future expectations for that period are relatively low throughout the first half of the 1980s with the exception of a short-lived euphoria in 1982.

However, if one compares the decade from about 1985 to 1995 there seems to be a broad correlation between future personal expectations and the levels of satisfaction with democracy. Both graphs experience a decline towards the end of the 1980s, to be followed by a significant rise between the end of 1989 and the beginning of 1991. Subsequently, another decline sets in which is arrested towards the end of the year 1993. It can be concluded that respondents evaluating their satisfaction with democracy seem to be at least weakly influenced by their attitudes towards specific outputs, such as economic well-being. The attitudinal object of this Eurobarometer survey thus appears to be a hybrid between diffuse regime evaluation and specific output support.

3.4 Conclusion

This chapter has provided one distinct national perspective from which the legitimacy of the EU can be studied. The first part identified the central features of formal legitimacy in the UK which have a low constitutional fit with the EU.

The primacy and supremacy of EU law challenges the sovereignty of Parliament and hence the unitary structure of Britain's formal legitimacy. EU membership has strengthened the role of the courts and, indirectly, generated pressure for the devolution of political power towards subnational government. On the other hand, Parliament has struggled to adapt to EU membership, which reinforces its structural domination by the executive. Also, the scrutiny of EU legislation requires a consensual and bargaining policy-making style that differs from Britain's adversarial, debate-oriented political culture. The effect of EU membership and recent constitutional reforms like devolution and the Human Rights Act has been to modify Britain's formal legitimacy by diluting the doctrine of parliamentary sovereignty to the point of threatening to undermine the fundamental aspects of Britain's formal legitimacy.

Such a development may endanger the felt legitimacy of the British constitution because, for historical reasons, parliamentary sovereignty has come to be equated with national sovereignty and has formed an important part of political culture and national identity. The second part of the chapter has revealed that the British political system enjoys high levels of felt legitimacy. Diffuse support for the political regime has experienced a temporary decline during the 1980s, but this trend appears to have been reversed in the past few years. A well-established national identity, which has been built on Britain's historic exceptionalism and the fusion of national with parliamentary sovereignty, remains reflected in high levels of national attachment and pride, but coincides with growing nationalism within the component parts of the UK. The legitimacy of the UK as one political unit is now questioned by a significant minority among Scots. Ulster is a special case in all three categories of felt legitimacy, and its future within the UK remains much more uncertain than Scotland's.

¹⁹⁴ Eurobarometer: Trends, *op. cit.*, p.234, and subsequent issues.

Chapter Four: Formal and Felt Legitimacy of the FRG

4.1 Introduction

This chapter provides a second national reference point from which the legitimacy of the EU can be analysed. Germany's formal and felt legitimacy differs in some significant respects from that of Britain which means that the nature of the challenges which arise from EU membership differ as well. This chapter argues that the Germany's political system is more compatible with European integration than the UK because there is a good constitutional and cultural fit between the FRG and the EU. The differences and contrasts between the two case studies of Britain and Germany will help to demonstrate in chapter five how the EU's legitimacy varies with the distinct national contexts of its member states. Retaining the format of the last chapter, the first section examines the distinct characteristics of Germany's formal legitimacy and the challenges they have faced from EU membership. The second section analyses the felt legitimacy of the German political system.

4.2.1 Formal Legitimacy: Constitutional Philosophy

Differences in the formal legitimacy of Britain and Germany originate in distinct constitutional philosophies. Unlike the UK, Germany's constitutional philosophy is rooted strongly in the state tradition of Western Europe.¹ As in the history of many other continental European countries, the evolution of German jurisprudence was heavily influenced by the Roman law tradition. This offered the legal basis for the state-building process by which post-medieval Europe sought to respond to internal and external political challenges.² Law was conceived of, and developed as, the articulation of the *state*, enumerating the principles according to which public power is exercised. This later gave rise to an interpretation of the state as an abstract, impersonal entity with a clearly defined *Staatsgebiet*, *Staatsvolk* and *Staatsgewalt* (territory, people and central authority). The state became a formally recognised legal

¹ Dyson (80), *op. cit.*, p.28-36

² *Ibid.*, p.41

entity, subject to its own distinct norms and procedures and comprising a whole range of political institutions.³

The relationship between rulers and subjects was regulated with recourse to the Roman law distinction between private and public law, and special administrative courts began to adjudicate the emerging body of public law. Concern with the validity and legality of state action gave rise to the doctrine of the *Rechtsstaat* which seeks to ensure regularity and uniformity in the exercise of power and to protect the inviolability of the legal order.⁴ Academic lawyers sought to devise a legal system characterised by precision, a preference for rational logic over historical experience and a strict hierarchy of the sources of law.⁵ While these aspects of the West European state tradition are reflected in Germany's constitutional philosophy, two distinctive features set it apart from the development of other continental states.

First, the perversion of the concept of the *Rechtsstaat* during the Third Reich led to the adoption of a heavily normative theory of natural law and a rejection of legal positivism. The latter's separation of law from morality was widely perceived to have helped totalitarianism maintain the pretence of abiding by the rule of law.⁶ The legal philosophy underlying modern German constitutional thought conceptually merges law and morality by making the former conform to the external moral norms of natural law. It was felt that the Germany's post-war legal system needs moral content in order to be able to function as a protection against dictatorship. Claiming to be based on reason alone, natural law jurisprudence aspires to moral objectivism. Natural law theory operates on the principle that *lex iniusta non est lex*. At its heart lies the liberal idea of certain universally valid and inviolable human rights which any legitimate constitutional order must respect and give protection through the courts. Such rights are deemed essential for the development of human individuality and self-determination.

³ *Ibid.*, pp.34, 40-42

⁴ Nevil Johnson: *State and Government in the Federal Republic of Germany*, (Oxford: Pergamon Press, 2nd ed. 1983), pp.13-17

⁵ Dyson (80), *op. cit.*, p.108ff

⁶ Johnson (83), *op. cit.*, p.16

Second, the emphasis on natural law theory implies that another jurisprudential doctrine considered open to political abuse, legal sovereignty, was similarly shunned in the design of the German post-war constitution. German jurisprudence follows the tradition of the French revolution which stipulates that all power vested in the state emanates from the deliberate decision by “the people”. But it has rejected the notion of an all-encompassing and unconstrained popular sovereign.⁷ German constitutional law thus embodies two, potentially contradictory, jurisprudential doctrines: the egalitarian concept of popular sovereignty and natural law theory.

The German constitution, the Basic Law, reflects the competition between these two doctrines. Its article 20/2 stipulates that all exercise of state authority, including the framing of the constitution, must be derived from and made accountable to the people (*Staatsvolk*). Legitimacy is conferred through free, secret and equal elections to the German parliament which, to give substance to the notion of popular sovereignty, must exercise “a prevailing influence over the exercise of state power”.⁸ But the popular sovereign is not omniscient. Its scope is restricted by the moral principles of natural law which declare absolute and eternal the constitutional protection of those individual rights and freedoms that might suffer under an unconstrained tyranny of the majority.⁹ Explicitly protected are articles 1 and 20 which declare the Federal Republic a democratic and social federal state based on the rule of law and inviolable human rights. In its interpretation of art.79, the Federal Constitutional Court (FCC) furthermore declared immutable the principles of popular sovereignty, separation of powers, government accountability, the multi-party system and judicial independence.¹⁰

These provisions follow Fichte’s dictum that the people have no right to change their constitution if it is rational (according to the criteria of rationality employed by the natural law school!).¹¹ Another example of the competition between popular sovereignty and natural law theory is the power of the FCC to overturn legislation

⁷ Gunnar Folke Schuppert: “The Constituent Power”, in: Christian Starck (ed.): Main Principles of the German Basic Law, (Baden-Baden, Nomos, 1983), p.38

⁸ Eckart Klein and Thomas Giegerich: “The Parliamentary Democracy”, in: Ulrich Karpen: The Constitution of the Federal Republic of Germany, (Baden-Baden: Nomos, 1988), p.146

⁹ This is the so-called “Ewigkeitsgarantie”, or “perpetuity clause” contained in Art.79/3 BL, Schuppert, op. cit., pp.46-47

¹⁰ Ibid., p.47

from the “political representatives of popular sovereignty” (i.e. parliament) if they violate the natural law principles embodied in the Basic Law. The idea that popular sovereignty must be held in constitutional check to preserve individual liberties is seen as a solution to the inevitable conflict between personal freedom and parliamentary majoritarianism.¹²

In that sense the constitution, rather than the people, is sovereign, and the exact scope of popular sovereignty is indeed contested.¹³ Popular sovereignty was not even exercised when the Basic Law was adopted because it was never subjected to a referendum.¹⁴ However, the Constitutional Court has declared the Basic Law is legitimate and in accordance with popular sovereignty because it embodies the socio-political values of the German people.¹⁵ Constitutional lawyers like Kriele argue that the people only enjoy the powers assigned to them in the constitution. If they were to exceed them, they would thereby abolish the constitutional state.¹⁶ Such thinking reflects a general opposition to the concept of indivisible sovereignty which is often associated with tyrannical majoritarianism rather than the *pouvoir constituant* of the social contract.¹⁷ Strictly speaking, therefore, the Basic Law does not even conceive of an ultimate *sovereign*.¹⁸

By refusing to regard sovereignty as indivisible, German jurisprudence has removed the conceptual difficulties which hamper a systematic separation of powers under the British doctrine of parliamentary sovereignty. A diffusion of sovereignty not only enabled the erection of strong *judicial* checks and balances. It is equally reflected in the long-standing constitutional practice of organising Germany as a *federal* state, which marks it off from the state traditions of most other large European countries.¹⁹ A unified German nation state only emerged in 1871 out of a loose confederation among numerous kingdoms and principalities and, except for the duration of the Third

¹¹ Fichte quoted in: Abromeit (95), *op. cit.*, p.52

¹² Ulrich Karpen: “Application of the Basic Law”, in: Christian Starck (ed.): Main Principles of the German Basic Law, (Baden-Baden: Nomos, 1983), p.59

¹³ Abromeit (95), *op. cit.*, p.59

¹⁴ *Ibid.*, p.59

¹⁵ Schuppert, *op. cit.*, p.43

¹⁶ Martin Kriele: Einführung in die Staatslehre: Die geschichtlichen Legitimitätsgrundlagen des demokratischen Verfassungsstaates, (Reinbek: Rowohlt, 1975)

¹⁷ Abromeit (95), *op. cit.*, p.51

¹⁸ *Ibid.*, p.59

¹⁹ Dyson (80), *op. cit.*, p.115

Reich, Germany has never been a unitary state.²⁰ Finally, in the absence of an indivisible sovereign German statehood is also open to the possibility of supranational integration.²¹

In conclusion, Germany's constitutional philosophy is based on Roman law and the state tradition of Western Europe, but the emphasis on natural law and a conception of sovereignty as divisible also differentiates Germany from that tradition. This distinct constitutional philosophy has given rise to a formal legitimacy marked by a diffusion of sovereignty and institutional pluralism.²² These characteristics are reflected in the supreme position of the Basic Law and the FCC, Germany's federal structure, the relationship between executive and legislature and Germany's political culture. There is a good "fit" between Germany's institutional structure and cultural norms and the EU which means that Germany's formal legitimacy faces different, and often less severe, challenges from EU membership than in the British case. The nature of these challenges can be illustrated by examining the central features of Germany's formal legitimacy below.

4.2.2 Formal Legitimacy: Central Features and the Impact of EU Membership

The Supreme Constitutional Status of the Basic Law and Judicial Review

The supremacy of the Basic Law and the pivotal constitutional role of the FCC as its authoritative interpreter and guardian are the most visible reflection of the (horizontal) diffusion of sovereignty that characterises Germany's formal legitimacy. The Court derives indirect democratic legitimacy from the fact that its members are elected jointly by the two chambers of parliament.²³ Positioned at the pinnacle of the judicial structure, the FCC interprets the Basic Law, settles disputes between the federation and the Länder and rules upon the constitutionality of statutes upon appeals from citizens (*constitutional complaint*), the Federal President, the Federal Government, Bundestag, Bundesrat or the Länder. Unlike with British courts, decisions of the

²⁰ Johnson (83), *op. cit.*, pp.3-9

²¹ Abromeit (95), *op. cit.*, p.64

²² Simon Bulmer and William Paterson: The Federal Republic of Germany and the European Community, (London: Allen & Unwin, 1987), p.17

²³ Arts.93 and 94, Basic Law

Constitutional Court are binding for all state authority and cannot be overturned by subsequent legislation. In ruling on the compatibility of a statute with the constitution the Court can make reference to certain normative natural law principles that inform the spirit of the Basic Law.²⁴

This has created ample scope for an ever more expansive interpretation of the Court's powers, leading to its metamorphosis from being the *guardian* towards becoming the *master* of the constitution.²⁵ Its importance in the German political system has acquired a dimension where "much of the political history of the Federal Republic, both in domestic and international affairs, and many important chapters of its social and economic history can be written through the Court judgements."²⁶ Although it generally enjoys a high degree of moral authority among the population, its judgements have on occasions proven controversial. Indeed, the powers of the FCC itself have been subject to sometimes fundamental academic and political criticism throughout its history.²⁷ Two criticisms have been raised consistently over the years. First, its extensive interpretation of its own powers results in highly political questions being settled by the Court, which instead should belong to the domain of parliaments accountable to the electorate. Second, politicisation of the Court only serves to undermine its status as independent legal arbiter by exposing it to partisan political conflict. Despite various suggestions for reform, most commentators would already be satisfied with a behavioural departure from the judicial activism the FCC has displayed over recent decades.²⁸

The constitutional centrality of the FCC and the supreme status of the Basic Law itself have been challenged by EU membership and, for a time, German reunification. As in Britain, the primacy of EU law has meant that a supranational court adjudicates on the compatibility of German legislation - and indeed the Basic Law itself - with the European legal order.²⁹ Unlike Britain, this has not given rise to *fundamental* incompatibilities between the formal legitimacies of the FRG and the EU. Since the

²⁴ Schuppert, *op. cit.*, p.47

²⁵ Klaus H. Goetz: "The Federal Constitutional Court", in: Gordon Smith, William E. Paterson and Steven Padgett (eds.): *Developments in German Politics 2*, (London: Macmillan, 1996a), p.97

²⁶ *Ibid.*, p.102

²⁷ For a very balanced overview see: Ulrich R. Haltern: "High Time for a Check-Up: Progressivism, Populism, and Constitutional Review in Germany", *Harvard Jean Monnet Working Papers*, no.5/1996

²⁸ Goetz (1996a) *op. cit.*, p.106

drafters of the Basic Law rejected the notion of a unitary sovereign, post-war German jurisprudence conceives of sovereignty as diffused rather than indivisible. With regard to EU membership, this diffusion of sovereignty is reflected in art.24 of the Basic Law. Art.24 plays the crucial role of “integration lever” because it permits the transfer of legal authority to international organisations on a statutory basis without requiring constitutional amendments. The provisions of art.24 and the Basic Law’s commitment in its Preamble to a “united Europe” have hence been characterised as a “commitment to open statehood”.³⁰

Whenever the FCC ruled on the constitutionality of Germany’s EC/EU membership it was more concerned with the protection of constitutional norms rather than the protection of an active sovereign.³¹ The court repeatedly stipulated that the integration process must not undermine the essential core of the Basic Law on the grounds that art.79/3 BL protects forever Germany’s federal structure and the fundamental rights and principles of the Basic Law.³² When European integration assumed a new quality with the ratification of the TEU, it was felt that art.24 on its own had become an insufficient constitutional foundation to support the integration process in the future. The occasion for an adaptation of the Basic Law to redefine the constitutional relationship with the EU arose in the wake of German reunification.

To some extent, the demise of the GDR presented a challenge to the Basic Law *itself*, since the Treaty of Unification could have taken recourse to art.146 BL which suggested the adoption of an altogether new constitution. In the end, the Kohl government favoured an accession of the East German Länder to the FRG on the basis of art.23 BL, which made wholesale constitutional change redundant.³³ A “Joint Constitutional Commission” of Bundestag and Bundesrat was subsequently appointed to study the options for more limited reform of the Basic Law.³⁴ The Commission

²⁹ Goetz and Cullen, *op. cit.*, p.25

³⁰ Christian Rath: “Die unionswärtige Gewalt des Deutschen Bundestages. Zur verfassungsrechtlichen Legitimation des gemeinschaftlichen Rechtssetzungsprozesses”, in: *Zeitschrift für Parlamentsfragen*, vol.25, no.1 (Sonderband), 1995, p.124

³¹ Abromeit (95), *op. cit.*, p.64

³² For a more detailed discussion see *Chapter 5*, pp.189ff

³³ Goetz and Cullen, *op. cit.*, p.10

³⁴ Peter J. Cullen and Klaus H. Goetz: “Concluding Theses on Constitutional Policy in Unified Germany”, in: Klaus H. Goetz and Peter J. Cullen (eds.): *Constitutional Policy in Unified Germany*, (London: Frank Cass, 1995), pp.166-67

suggested only minor constitutional amendments, which may reflect a historically-induced reluctance to tamper with a stable constitutional framework that enjoys widespread public support (“constitutional patriotism”).³⁵ But the lack of any substantial amendments to the Basic Law is equally attributable to the institutional checks and balances of Germany’s formal legitimacy which militate against constitutional reform. After all, political opinion was split and some, notably among the SPD and many East Germans, had hoped for more far-reaching modifications.³⁶ They were particularly disappointed that the reform of the Basic Law did not include a relaxation of the near-ban on federal referenda or other plebiscitary devices which had been discussed by the Constitutional Commission.³⁷

The Commission’s most significant proposals concern the adaptation of the Basic Law to the process of European integration. Since the old art.23 BL had become obsolete once reunification was completed, it was rewritten to reinforce and clarify the “integration-gear” character of the Basic Law. The new Article reaffirms the Germany’s commitment to participate in the development of the EU towards a united Europe, but it ties this participation to certain conditions.³⁸ The constitutionality of European integration is now explicitly subject to the “eternity clause” of art.79/3 BL in order to accommodate the concerns of the FCC. The new art.23 further stipulates a development of the EU in congruence with the democratic, law-governed, social and federative fundamental principles of the Basic Law.³⁹

Although intended to resolve inherent conflicts between the Basic Law and European integration, the subsequent judicial interpretation of art.23 may create more problems than they solve. For example, the FCC rather boldly implied in its Maastricht judgement that in any future development of the EU is constrained by the German interpretations of democracy, federalism, the *Rechtsstaat* and *Sozialstaat* principle.⁴⁰

³⁵ Ekkart Zimmermann: “Germany”, in: Roger Eatwell (ed.): European Political Cultures - Conflict or Convergence?, (London: Routledge, 1997), p.93

³⁶ Goetz and Cullen, op. cit., p.13f

³⁷ Ibid., p.31

³⁸ Georg Ress: “The Constitution and the Maastricht Treaty: Between Co-operation and Conflict”, in: Klaus H. Goetz and Peter J. Cullen (eds.): Constitutional Policy in Unified Germany, (London: Frank Cass, 1995), pp.48-51

³⁹ Other provisions include the domestic participation of Bundestag, Bundesrat and Länder in the legislative process of the EU which will be discussed below.

⁴⁰ Cullen and Goetz, op. cit., pp.171

So far, the FCC has been satisfied that European integration is compatible with the Basic Law and that the conditions of art.23 are thus met.⁴¹ While the judgement leaves the door open for a more critical future assessment, it is unrealistic to imagine that the Court would obstruct EU reforms on the grounds that they may not conform to the FCC's interpretation of the provisions of art.23. A more likely development is for the Court either to adopt a very wide interpretation of the article or to choose to ignore it in future rulings.⁴² Importantly, constitutional compatibility hinges on the future *nature* of the EU rather than the fact that the EU limits the legal sovereignty of the Federal Republic. Unlike the UK, there is only a *conditional* incompatibility between the formal legitimacies of the FRG and the EU because the "genetic code" of Germany's formal legitimacy, the Basic Law, has always been programmed towards supranational integration.⁴³

The good constitutional fit between Germany and the EU has also been enhanced by attempts to project domestic constitutional norms at the European level.⁴⁴ One example for this practice are the conditions for the future development of the EU contained in art.23 of the Basic Law, another the German push for the incorporation of a Charter of Basic Rights into the EU Treaties.⁴⁵ The latter is particularly significant, since in its rulings on the compatibility of the EU with the Basic Law the FCC has been more concerned about constitutional norms, such as protection of fundamental human rights, than the transfer of sovereignty as such.⁴⁶ These continuous efforts to enhance the in-built compatibility of the Basic Law with European integration have helped to manage the challenges of EU membership for other aspects of Germany's formal legitimacy as well.

⁴¹ Ress, *op. cit.*, pp.60f, 65

⁴² Goetz and Cullen, *op. cit.*, p.35f

⁴³ Klaus H. Goetz: "Integration Policy in a Europeanised State: Germany and the Intergovernmental Conference", *Journal of European Public Policy*, vol.3, no.1, 1996, p.37

⁴⁴ Simon Bulmer: "Shaping the Rules? The Constitutive Politics of the European Union and German Power", in: Peter Katzenstein (ed.): *Tamed Power - Germany in Europe*, (Ithaca: Cornell University Press, 1997), p.67

⁴⁵ For recent proposals by Germany's Foreign Minister Joschka Fischer to adopt a European Charter of Basic Rights, see: "Fischer in Warning On Euro Stability", *Financial Times*, 22/1/1999, p.2, "Bill of Rights Plan to Unite Europe", *The Daily Telegraph*, 22/1/1999, p.14

⁴⁶ See: *Chapter 5*, pp.189ff

The Federal Dimension

If the pivotal constitutional role of the FCC symbolises the *horizontal* division of sovereignty, then Germany's federal structure is legitimised by applying the "checks-and-balances" principle *vertically* through a geographical dispersal of constitutional power. Each of the sixteen sub-federal states (Länder) have their own elected parliament and government exercising a number of original governing powers.⁴⁷ This is to protect against the centralisation and potential abuse of state power by the federal government which had occurred during the Third Reich.⁴⁸ Additionally, there is a traditional legitimacy for federalism which was a characteristic of most previous German constitutions. As Watts points out, the federalism of the Basic Law is not founded upon the need to accommodate significant regional ethnic or cultural divisions.⁴⁹ The framers of the Basic Law could therefore opt for a modernised version of the typically German "horizontal federalism" which - rather than leaving large original legislative powers for the Länder - dispersed the exercise of federal executive (and some legislative) powers. Horizontal or "co-operative" federalism is characterised by the fact that the federal and regional level of government are to a great extent interdependent because their competencies are "interwoven" (*Kompetenzverflechtung*).⁵⁰

First, state governments are represented in the second chamber of the federal parliament, the Bundesrat, whose approval is needed for all federal legislation affecting the Länder.⁵¹ Successive judicial decisions have widened the scope of Bundesrat involvement to about sixty per-cent of federal legislation, even including minor amendments to existing statutes.⁵² Second, the implementation of most federal legislation is carried out by the Länder administrations which operate independent of

⁴⁷ However, "federal law shall take precedence over Land law." See: Art.31 Basic Law

⁴⁸ Klein and Giegerich, *op. cit.*, pp.147-48, see also: Eckart Klein: "The Concept of the Basic Law", in: Christian Starck (ed.): Main Principles of the German Basic Law, (Baden-Baden: Nomos, 1983), pp.15-37

⁴⁹ Ronald Watts: "West German Federalism: Comparative Perspectives", in: Charlie Jeffery and Peter Savigear (eds.): German Federalism Today, (Leicester: Leicester University Press, 1991), pp.23-39

⁵⁰ Fritz W. Scharpf: Optionen des Föderalismus in Deutschland und Europa, (Frankfurt: Campus Verlag, 1994), pp.46-47

⁵¹ Art.50, Basic Law

⁵² Roland Sturm and Charlie Jeffery: "German Unity, European Integration and the Future of the Federal System: Revival or Permanent Loss of Substance?", in: Charlie Jeffery and Roland Sturm (eds.): Federalism, Unification and European Integration, (London: Frank Cass, 1993), p.165

federal supervision (“administrative federalism”), thus severely curtailing the scope of the federal government’s executive and administrative powers.⁵³ A third important feature of German federalism is the pooling of tax revenue between the three levels of government (local, state and federal), rather than allocating the income generated by particular taxes to one particular level of government.

This interdependence between the Federal Government and the Länder was further institutionalised as a consequence of the constitutional reforms of the late 1960s, establishing so-called *Joint Tasks* for both levels of government.⁵⁴ Special procedures were drawn up for the creation of detailed legislation, planning and finance in a whole range of Joint Task areas, such as higher education, agricultural policy and regional economic development. Accompanied by a creeping expansion of Bonn’s powers in the field of *concurrent* legislation, the Joint Task legislation “saw the Länder governments gradually drawn into an increasingly centralised policy process in which their functions became ‘interlocked’ with those of the federal government.”⁵⁵ This trend has gradually deprived the Länder of the capacity for independent political and economic policy-making. At the same time, the Federation has become highly dependent on securing agreement on policy with the Länder. The expanding powers of the Bundesrat and the prevalent political convention, if not legal stipulation, of unanimous decision-making in Joint Tasks areas has handed the Länder increasing veto power over policy proposals.⁵⁶

While the problems arising from this increasingly interlocked policy-making have given rise to *internal* challenges for German federalism, the impact of EU membership has presented important *external* challenges. Externally, EU membership has challenged German federalism because it began to erode the constitutional autonomy and powers of the Länder.⁵⁷ The gradual transfer of Länder competencies to European institutions was not initially compensated with Länder participation in the European policy-making process. Consequently, European integration amounted to an

⁵³ Art.84, Basic Law

⁵⁴ Art.91a/b, Basic Law

⁵⁵ Sturm and Jeffery, *op. cit.*, p.165

⁵⁶ Simon Bulmer: “Unity, Diversity and Stability: The ‘Efficient Secrets’ Behind West German Public Policy”, in: Simon Bulmer (ed.): *The Changing Agenda of West German Public Policy*, (Aldershot: Dartmouth, 1989), p.21f

⁵⁷ Bulmer and Paterson, *op. cit.*, p.188ff

indirect centralisation of power in the Federation because the Federal Government, by virtue of its presence in the Council of Ministers, retained legislative influence over the policy areas transferred from the Länder. In response to this external challenge, the Länder have primarily sought to bolster their influence over EU policy-making through their constitutional position in the Bundesrat. Immediately upon accession in 1957 the Bundesrat introduced an EC Committee which has generally been comprehensively briefed by the Federal Government on new EU draft legislation.⁵⁸ Although the influence of its resolutions on Germany's negotiating position has often been limited, the Bundesrat could exercise a degree of indirect, informal influence over the Federal Government as a consequence of its veto power over large areas of domestic legislation.

This veto power was also employed at the time of the Maastricht Treaty whose domestic implementation required Bundesrat approval. The Länder could therefore negotiate a significant enhancement of their EU policy-making influence to redress the federal balance of power.⁵⁹ The revised art.23 BL empowers the Bundesrat to participate in the Government's formulation of EU policy to the extent that the Länder's interests and competencies are affected. In cases of disagreement, a two-thirds Bundesrat majority can bind the Federation to the Länder's negotiating position on particular EU policies. In areas where the Länder enjoy exclusive legislative powers, they can even exercise the Government's voting rights in the Council of Ministers.⁶⁰ The Länder have also been instrumental in lobbying for the Committee of the Regions and the subsidiarity clause which were both introduced in the TEU.⁶¹

In short, the Länder have been successful in adapting to the external challenge of EU membership, and their success can be measured at both the domestic and the European level. Domestically, the Länder have been able to integrate EU policy-making into the constitutional structures of co-operative federalism. The new art.23 replicates the characteristics of domestic policy-making, such as the interdependence between federal and sub-federal government and the need for a high degree of inter-

⁵⁸ Dietrich Rometsch: "The Federal Republic of Germany", in: Dietrich Rometsch and Wolfgang Wessels (eds.): *The European Union and Member States - Towards Institutional Fusion?*, (Manchester: Manchester University Press, 1996), pp.86

⁵⁹ *Ibid.*, p.88

⁶⁰ Art.23/6, Basic Law

Länder co-ordination. At the European level, the Länder have secured a new regional dimension to the EU's institutional framework. The Committee of the Regions extends the role and influence of the Länder beyond the domestic constitutional context and enables them to operate independently at the European level. These developments amount to a *Europeanisation* of Germany's federal system which has enhanced the already significant institutional congruence between the FRG and the EU.⁶² After all, both are characterised by an intergovernmental sharing of powers and a system of vertical and horizontal joint policy-making where executives dominate and policy implementation is carried out by subnational administrations.⁶³

Adaptation of Germany's federal structure to the *external* challenge of EU membership has thus reinforced the institutional characteristics of Germany's co-operative federalism which have themselves become the subject of *internal* challenges within the Federal Republic. First, there has been increasing criticism against the democratic deficiencies of interlocked policy-making which came to be known as *Politikverflechtung*.⁶⁴ Democratically, co-operative federalism facilitates the domination of policy-making processes by the political and administrative executives, thereby undermining parliamentary influence or control.⁶⁵ The governments participating in joint decisions not only escape the scrutiny of their own parliaments. Every single government on its own can deny specific electoral responsibility for the joint decisions pursued with reference to constraints imposed by intergovernmental bargaining.⁶⁶ Joint decision systems also seem to obstruct their own institutional evolution.⁶⁷ This was clearly illustrated in the 1980s when the Kohl administration found it impossible to "unlock" German federalism by overcoming the constitutional hurdle necessary to remove art.91 from the Basic Law.⁶⁸

⁶¹ Rometsch, *op. cit.*, p.89f

⁶² Goetz (96b), *op. cit.*, p.36

⁶³ Fritz W. Scharpf: "The Joint-Decision Trap: Lessons from German Federalism and European Integration", *Public Administration*, vol. 66, no.3, 1988, p.243ff

⁶⁴ Scharpf first developed his theory in: Fritz W. Scharpf, Bernd Reissert and Fritz Schnabel (eds.): *Politikverflechtung - Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik*, (Kronberg: Scriptor, 1976)

⁶⁵ Scharpf (94), *op. cit.*, p.93

⁶⁶ Fritz W. Scharpf: "Politische Optionen im vollendeten Binnenmarkt", in: Markus Jachtenfuchs and Beate Kohler-Koch: *Europäische Integration*, (Opladen: Leske & Budrich, 1996), p.122

⁶⁷ Scharpf (88), *op. cit.*, p.267

⁶⁸ Sturm and Jeffery, *op. cit.*, p.166

Second, the unity of purpose between richer and poorer Länder on which the effective functioning of co-operative federalism depends gradually waned during the 1980s, heralding a rather disruptive phase of “litigious federalism”.⁶⁹ More prosperous states appealed to the FCC against the established method of financial equalisation amongst German states. The inter-state conflict has rapidly increased with the accession of the five economically weak East German Länder to the Federal Republic in 1990. These developments have evoked predictions of the emergence of a “two-class federalism” in which economically strong states will increasingly pursue independent policies while Berlin will exert centralising pressure on poor Länder appealing to financial support from the federation.⁷⁰

Third, co-operative federalism enjoys a decreasing degree of felt legitimacy and is held in low esteem by the political class, the media and the general public.⁷¹ Years of mutual blockade over major political reform projects have been accompanied by long-winded, but ultimately fruitless attempts at conciliation between Bundestag and Bundesrat. Joint task policies (for instance on university education) have discredited themselves for their lack of vision or substance. The general disenchantment is reinforced by a slightly weakened public attachment to the goal of social harmonisation (partly because reunification has made full fiscal equality unachievable for some time to come).⁷² There is also a widespread perception of the financial equalisation system as cumbersome, inefficient and a disincentive to Länder reform. This has motivated some Länder to start what could turn into a new phase of litigious federalism.⁷³

Despite these internal challenges and the difficulties surrounding the integration of the five new Länder of Eastern Germany, the Joint Constitutional Commission suggested only minor constitutional amendments which amounted to a “non-reform” of German

⁶⁹ *Ibid.*, p.166f

⁷⁰ Heidrun Abromeit: *Der verkappte Einheitsstaat*, (Opladen: Leske und Budrich, 1992), p.81ff

⁷¹ See for instance: “Nichts geht mehr”, *Der Spiegel*, no.32, 4/8/1998, p.63, or: “Föderalismus in der Sackgasse”, *Frankfurter Allgemeine Zeitung*, 17/8/1998, p.10

⁷² Witness for instance the recent debate about the appropriate level and duration of the so-called “Solidarity Surcharge” levied on top of income tax to finance East German reconstruction.

⁷³ “Klage gegen “absurde” Praxis des Finanzausgleichs”, *Frankfurter Allgemeine Zeitung*, 31/7/1998, pp.1-2

federalism.⁷⁴ Apart from the rewording of art.23, amendments to art.74, 75 and 80 brought about a minor reallocation of competencies in favour of the Länder, especially in the area of concurrent powers. Consequently, there are still calls for a comprehensive constitutional reform of federalism⁷⁵, and both CDU and F.D.P. included demands for a reform of the federal structure in their manifestos for the 1998 federal election.⁷⁶

In conclusion, German federalism has successfully adapted to the *external* challenge of European integration, but it has done so on the basis of an institutional structure which is facing increasing *internal* challenges. This raises the question whether the Länder's ability to participate in European policy-making will suffer from the same problems that have challenged co-operative federalism in domestic policy-making. In particular, the new provisions for Länder participation threaten to exacerbate the institutional complexity of Germany's European policy-making. If all Länder began to use their extensive new rights to the full (which many have not had the resources to do), the degree of consensus and policy co-ordination required may complicate the formulation of Germany's European policy to an extent that it risks becoming immobilist, reactive and incoherent.⁷⁷ Second, the growing divergence of interests between rich and poor as well as Eastern and Western Länder begins to extend to the European dimension as well, thus undermining the inter-state consensus necessary for an effective operation of the provisions of art.23.⁷⁸ Third, the provisions of art.23 reinforce the executive dominance of Germany's co-operative federalism because they require close co-operation between the Federal and Länder governments. Joint policy-making in EU affairs marginalises democratic institutions because it hinders effective parliamentary scrutiny by the Bundestag or the Landtage.⁷⁹

⁷⁴ Charles Jeffrey: "The Non-Reform of the German Federal System after Unification", West European Politics, vol.18, no.2, 1995, pp.252-72

⁷⁵ For example: Otto Graf Lambsdorff and Carl Christian von Weizsäcker: Wider die Erstarrung in unserem Staat - Für eine Erneuerung des Föderalismus, (Königswinter: Friedrich Naumann Stiftung, 1998)

⁷⁶ Christlich Demokratische Union: Wahlplattform von CDU und CSU 1998-2002, (Bonn: CDU Bundesgeschäftsstelle, 1998), p.9, Freie Demokratische Partei Deutschlands: Das Wahlprogramm der Liberalen zur Bundestagswahl 1998 (Sankt Augustin: Liberal Verlag, 1998), pp.65-67

⁷⁷ Charles Jeffrey: The Länder Strike Back - Structures and Procedures of European Integration Policy-Making in the German Federal System, (Leicester University Discussion Papers in Federal Studies no. FS94/2, 1994), p.30

⁷⁸ Ibid., p.28ff

Without the prospect for any large-scale constitutional reform of German federalism, the emergence of a “territorially differentiated policy regime”, in the domestic as well as the European arena, will contribute to the gradual “unlocking” of the current over-rigid institutional arrangements.⁸⁰ The pressures arising from internal and external challenges may therefore combine to cause the slow transformation of Germany’s formal legitimacy towards a less co-operative style of federalism.

The Executive-Legislature Dimension

Germany’s executive-legislature relationship is another important example for the horizontal diffusion of sovereignty and the institutional pluralism that characterise the formal legitimacy of the Federal Republic. Again, this contrasts with the UK where power is concentrated in the executive and domestic veto points are often weak.

At first sight, the similarities between Britain and Germany appear strong. Although the Bundestag is not sovereign in the unitary sense of the British Parliament, it is the institution with the strongest claim to embody the doctrine of popular sovereignty. This is reflected in two general legal principles: the supremacy of statute law and the principle that all essential political acts must be conducted on a statutory basis.⁸¹ While Bills can be introduced by the Federal Government or members of either Bundestag or Bundesrat,⁸² all statutes have to be passed as Acts of Parliament by the Bundestag and they precede all other acts of state.⁸³ The yearly budget must be passed by federal statute, as must international treaties which regulate the political relations of the federation or relate to matters of federal legislation.⁸⁴ In *constitutional reality*, just as in the UK, most legislation is sponsored by the government, and the Chancellor has the power to determine the general policy guidelines of the government.⁸⁵ Nevertheless, there are also some important structural differences between the two political systems.

⁷⁹ Weber-Panariello, *op. cit.*, p.305

⁸⁰ Klaus H. Goetz: “Kooperation und Verflechtung im Bundesstaat - Zur Leistungsfähigkeit verhandlungsbasierter Politik”, in: R Voigt (ed.): *Der kooperative Staat - Krisenbewältigung durch Verhandlung?*, (Baden-Baden: Nomos, 1995), p.158ff

⁸¹ Johnson (83), *op. cit.*, p.16

⁸² Art.76, Basic Law

⁸³ Karpen, *op. cit.*, p.69

⁸⁴ Klein and Giegerich, *op. cit.*, p.157, also: Art.59, Basic Law

⁸⁵ This is the so-called *Richtlinienkompetenz* of Art.65, Basic Law

First, a proportional voting system has ensured that, with one exception in the 1950s, the federal government has always depended on a coalition of parties for its parliamentary majority. Government by coalition constrains the Chancellor's latitude for centralised policy leadership because he can normally exercise less direct control over his cabinet and his parliamentary majority than British Prime Ministers. The Chancellor's room for manoeuvre is also limited by the principles of ministerial autonomy (*Resortprinzip*) and cabinet collegiality.⁸⁶ This horizontal division of power within the federal executive leaves individual ministries as relatively independent, autonomous actors, thus leading to sectorised policy-making where inter-departmental co-ordinating mechanisms are weak compared to the UK.⁸⁷ Federal ministries only have a comparatively small number of staff and are primarily concerned with policy-making rather than implementation. In contrast to Britain, where administrative decentralisation is a relatively recent phenomenon, the bulk of the policy-implementation is delegated to the Länder administrations.⁸⁸

Second, despite the far greater *de jure* constitutional powers of the British Parliament, its German counterpart might be described as more powerful in terms of its influence on legislation.⁸⁹ One reason why it is considered a "work" rather than a "talk" parliament is the relative strength of committees in the Bundestag whose position is even constitutionally protected.⁹⁰ Committees are well resourced, have the power to set their own agenda and can even draw on the expertise of civil servants who participate actively in committee work. Members of the Bundestag committees are also willing to take much more of a cross-party approach when scrutinising legislation than is the case in Britain.⁹¹ This means that a considerable number of amendments are passed which are retained in the final version of bills.

⁸⁶ Bulmer (89), *op. cit.*, p.24

⁸⁷ *Ibid.*, p.24f

⁸⁸ Johnson (83), *op. cit.*, pp.95-97

⁸⁹ Philip Norton: "The Institution of Parliaments", in: Philip Norton (ed.): *Parliaments and Governments in Western Europe*, (London: Frank Cass, 1998a), p.3f

⁹⁰ Thomas Saalfeld: "The German Bundestag - Influence and Accountability in a Complex Environment", in: Philip Norton (ed.): *Parliaments and Governments in Western Europe*, (London: Frank Cass, 1998), p.53

⁹¹ *Ibid.*, pp.60ff

Third, there is a structural and personal separation between the government and the parliamentary parties which have their own, separate organisation and political leaders.⁹² This separation is even more pronounced in the Bundesrat, since Länder governments sometimes take a different policy stance from that of the federal parties to which they belong. This limits the Chancellor's influence over his MPs which is also constrained by the fact that he has a far more limited scope for patronage than British Prime Ministers.⁹³ As a result, the Chancellor needs to accommodate to some extent the policy agenda of his own party and, due to the frequency of government by coalition, that of his coalition partners. In order to amend the Basic Law he must even build a consensus with the major opposition parties, since constitutional change requires a two-thirds majority in both Bundestag and Bundesrat.

Fourth, the Government's powers are constrained by the power of the FCC to review the constitutionality of legislation, the Bundesbank and the federal dimension of the German state. As discussed above, the Länder governments are represented in the Bundesrat which co-operates in the federal legislative process and can even initiate Bills of its own.⁹⁴ If Bundesrat decides to wield a veto over legislation, a "conciliation committee" between the two houses must find a mutually agreed compromise if the Bill under consideration is to be enacted. There is also no direct governmental or parliamentary control over monetary policy which are the sole responsibility of the independent Federal Bank, although its power over short-term interest rates has now been transferred to the ECB.⁹⁵

EU membership has not significantly challenged these characteristics of federal policy-making, although it has threatened to marginalise the role of the Bundestag. European policy-making is conditioned by the same factors that influence domestic politics. The decentralisation of executive power means that neither the Chancellor nor the Foreign Ministry have a comprehensive mandate for formulating and co-ordinating a coherent EU policy.⁹⁶ Instead, a specialised ministerial bureaucracy and the *Resortprinzip* have led to a sectorised policy-making of considerable institutional

⁹² William E. Patterson and David Southern: *Governing Germany*, (Oxford: Blackwell, 1991), p.117

⁹³ *Ibid.*, pp.127-9

⁹⁴ Bundesrat participation occurs mainly in the areas of education, state and local finance, police and some environmental and transport matters.

⁹⁵ Art.88 Basic Law

complexity. Diffused ministerial responsibility and underdeveloped inter-departmental co-ordination have complicated the formulation of a coherent policy agenda.⁹⁷

While these characteristics replicate the domestic pattern to some extent, the Bundestag has experienced a more serious challenge to its constitutional role from EU membership. As in Britain, EU membership puts the Bundestag at a structural disadvantage because governments operate at the intersection between the domestic and the European level, enabling them to centralise power and act as gatekeepers for national parliaments. For a long time the Bundestag has therefore played a marginal role in the EU policy process, since it lacked effective influence over the Government's European policy.⁹⁸ The Bundestag belatedly adapted to the challenge of EU membership in the wake of the constitutional reforms undertaken in 1994.⁹⁹ The new art.23 obliges the Federal Government to inform the Bundestag comprehensively and at the earliest opportunity about new EU draft policies. It also grants *scrutiny reserve* powers by enabling the Bundestag to vote on a resolution before a decision is taken in the Council. The Federal Government is obliged to take account of parliamentary resolutions in the course of Council negotiations. To facilitate a faster parliamentary response to EU draft legislation, the revised art.45 establishes a special Committee on European Union which may exercise the Bundestag's rights in EU affairs. These legally codified adaptations of Germany's formal legitimacy were further reinforced by the FCC's Maastricht judgement which stressed the legitimising function of the Bundestag's role in European integration.¹⁰⁰

Reforming the Basic Law has enhanced the compatibility of the Bundestag's domestic constitutional role with the formal legitimacy of the EU, but its ability to exercise legislative influence has remained marginal in constitutional reality.¹⁰¹ There is "no evidence for any real increase in the Bundestag's role"¹⁰² since its powers in EU policy-making was strengthened by the Basic Law, partly because the Bundestag still

⁹⁶ Bulmer and Paterson, *op. cit.*, pp.17, 25-42

⁹⁷ Rometsch, *op. cit.*, pp.69-74

⁹⁸ Bulmer and Paterson, *op. cit.*, pp.166ff

⁹⁹ Rometsch, *op. cit.*, pp.76-81

¹⁰⁰ See: *Chapter 5*, pp.189ff

¹⁰¹ Weber-Panariello, *op. cit.*, p.283ff

¹⁰² Goetz (96b), *op. cit.*, p.32

lacks an effective sanction to enforce its constitutional powers of scrutiny reserve. Another explanation would point to the broad political consensus in favour of European integration. This meant that MPs often preferred to strengthen the powers of the EP rather than the Bundestag because they regarded the latter as a more suitable institution for effective parliamentary scrutiny of EU legislation.¹⁰³ Moreover, the loss of parliamentary influence did not precipitate the same level of political concern as in the UK, partly because, for historical reasons, German political culture attaches more importance to democratic procedures than to the tradition of parliamentary *self-government*.¹⁰⁴

Political Culture

The historic legacy of political extremism and repeated state failure, a distinct constitutional philosophy and numerous institutional checks and balances have all made for a very consensual political culture in the post-war Federal Republic.¹⁰⁵ Political debate is based on an inquisitorial and problem-solving rather than an adversarial approach to politics. Elite behaviour is “coalescent” and bargaining in a policy-making process which seeks to co-opt opposition parties and outside interests in order to overcome inter-institutional blockades.¹⁰⁶ The resulting political style stresses mutual interdependence, social responsibility and pursuit of the public interest.¹⁰⁷ These values are reflected in the notion of a *social market economy* and the spirit of “social partnership” between government, business and the trade unions which has enjoyed support across the political divide. Also, the bureaucracy and political parties are strongly interpenetrated which reinforces the stress on rational expertise in political debate.¹⁰⁸ The German civil service, unlike its British counterpart, does not discourage membership of a political party, and civil servants on

¹⁰³ See for example: Rita Süßmuth: “Die Rolle des deutschen Bundestages im europäischen Einigungsprozeß zwischen Anspruch und Wirklichkeit”, in: Renate von Hellwig (ed.): Der Deutsche Bundestag und Europa, (München: moderne industrie, 1993), pp.10-20

¹⁰⁴ Abromeit (95), *op. cit.*, p.64

¹⁰⁵ Zimmermann (97), *op. cit.*, p.88

¹⁰⁶ Johnson (83), *op. cit.*, p.116

¹⁰⁷ Dyson (80), *op. cit.*, p.68f

¹⁰⁸ *Ibid.*, p.69

temporary leave are strongly represented in both Länder parliaments and the Bundestag.¹⁰⁹

By implication, German political culture shows an inherent lack of respect for politicking, and many contentious issues are depoliticised by reliance on legal norms and recourse to constitutional review by the FCC. The practice of judges objectively deducing one “right” answer from an all-embracing normative legal system often emasculates policy debate between government and opposition because politicians pre-emptively calculate the “constitutional risks” of any proposals for political reform.¹¹⁰ Another example for the judicialisation of political values are the “state objectives” listed in the Basic Law. They provide normative guidance to political life because they are intended to express the ultimate societal values and aspirations of German body politic.¹¹¹ The importance attached to them by constitutional lawyers, but also the German public at large, was highlighted by the post-unification reform of the Basic Law which resulted in environmental protection being added to the list of state objectives.¹¹²

The German state tradition also draws attention to the legal relationship between the state apparatus and society, and there is a strong belief that citizens are better protected by judges than by politicians.¹¹³ Citizens can make constitutional complaints to the FCC and their individual rights and duties vis à vis the state are clearly enshrined in law and the constitutional bill of rights. This desire for legal certainty in the exercise of state power is strongly reflected in the concept of *Rechtsstaat* and the comprehensive public law system which enshrines public policy in a stable and legalistic institutional matrix.¹¹⁴

¹⁰⁹ Renate Mayntz: “German Federal Bureaucrats: A Functional Elite between Politics and Administration”, in: Ezra Suleiman (ed.): *Bureaucrats and Policy-Making, A Contemporary Overview*, (New York: Holmes and Meier, 1984), p.183

¹¹⁰ Abromeit (95), *op. cit.*, p.60f

¹¹¹ Goetz (96a) *op. cit.*, p.99

¹¹² Goetz and Cullen, *op. cit.*, p.32

¹¹³ Johnson (83), *op. cit.*, p.207

¹¹⁴ Arthur Benz and Klaus H. Goetz: “The German Public Sector: National Priorities and the International Reform Agenda”, in: Arthur Benz and Klaus H. Goetz (eds.): *A New German Public Sector? Reform, Adaptation and Stability*, (Aldershot: Dartmouth, 1996), pp.15ff

To summarise, Germany's political culture, which discourages political accountability by adversarial public debate, stands in marked contrast to British political traditions, but it also differs from other continental countries in its attachment to imperative legal norms and a strong judicialisation of politics.¹¹⁵ These differences help to explain why its domestic political culture has been more compatible with EU membership than in many other European countries.

First, the EU has presented less of a challenge to Germany's formal legitimacy and national identity, thus making the issue of membership politically less contentious than in the UK.¹¹⁶ Since at least the late 1950s there has been a broad, if sometimes nuanced, elite consensus among political parties and the media in favour of European integration.¹¹⁷ Whenever the EU *did* become the subject of party political controversy, as it did among the F.D.P. in the 50s, the Greens in the 80s and, briefly and tentatively, the SPD in 1996, any nascent polarisation of the debate was quickly absorbed by the structural constraints of coalition government and a political culture which discourages a radical departure from the prevailing political consensus.¹¹⁸ The absence of any significant elite mobilisation of public opinion against the EU has provided greater scope for active legitimisation policies to increase and stabilise support for the EU. Germany's political culture has therefore been conducive to the adaptation of public opinion to EU membership.

Second, Germany's political culture exhibits a far-reaching congruence with the EU, thus "creating a milieu in which German political actors can feel at home."¹¹⁹ Both political systems exhibit a depoliticised, coalition-building and power-sharing style of policy-making, which values constructive and co-operative problem solving above the dogmatic defence of political position.¹²⁰ As in Germany, European politics and integration are characterised by an emphasis on legal norms and a juridified style of governance, and they proceed within a clearly defined constitutionalised framework

¹¹⁵ Dyson (80), *op. cit.*, p.213

¹¹⁶ See pp.161ff below.

¹¹⁷ Bulmer and Paterson, *op. cit.*, p.123-54

¹¹⁸ *Ibid.*, pp.153-55

¹¹⁹ Peter Katzenstein: "United Germany in an Integrating Europe", in: Peter Katzenstein (ed.): *Tamed Power - Germany in Europe*, (Ithaca: Cornell University Press, 1997), p.40

¹²⁰ Bulmer, (97), *op. cit.*, p.67

rooted in the Roman law tradition.¹²¹ Similarities between the EU and the FRG even extend to the corporatist involvement of the social partners and a commitment to economic cohesion. This high degree of congruence has meant that EU membership poses less of a serious challenge to Germany's domestic political culture than in the case of Britain.

Conclusion

EU membership has not directly challenged the core of the German constitution as much as it has in the case of Britain. In some respects, the EU's formal legitimacy is not fundamentally different from that of the Federal Republic itself.¹²² As a federation, the German political system is accustomed to multiple vertical layers of government, and the European political systems has adopted a version of "horizontal federalism" which is rather similar to that operating within the Federal Republic itself. The legal systems of the EU and the FRG are both products of the Roman law tradition, and the judicial review of parliamentary legislation, whether by the FCC or the ECJ, has long been a common feature of Germany's political system. Even at the level of political culture, Germany is characterised by the same consensual, bargaining policy-making style that also predominates in the EU, right down to the preference for "concerted action" as symbolised in ECOSOC.

Even where EU membership has challenged aspects of Germany's formal legitimacy, national institutions have responded through constitutional, procedural and policy adaptation to European integration. This *Europeanisation* of Germany's formal legitimacy has been particularly visible in the federal dimension, the legislative dimension, the jurisprudence of the FCC and amendments to the Basic Law. In some areas, such as the role of the Bundestag in European policy-making, structural factors have limited the adaptation of national institutions, but in these cases a general commitment to integration has led to the search for European solutions to domestic problems. Examples include demands for a strengthening of the EP, the proposal of a Charter of Fundamental Rights and the successful lobbying to establish the Committee of Regions.

¹²¹ *Ibid.*, p.62f

¹²² *Ibid.*, pp.61ff

In conclusion, the Europeanisation of Germany's formal legitimacy is not only a consequence of the good initial constitutional fit with the EU or the progressive adaptation of national institutions. Even at a fundamental constitutional level, Germany's formal legitimacy is programmed to accommodate EU membership. The commitment to European integration is now a state objective of the Basic Law and has therefore entered the "genetic code" of the constitution.¹²³ Integration in, and domestic adaptation to, the EU has therefore become part of the institutional logic of the German state.¹²⁴

4.3 Felt Legitimacy

4.3.1 Political Community

The increasing Europeanisation of Germany's formal legitimacy and the deeply embedded commitment to European integration have to be understood in the context of Germany's unique national identity.¹²⁵ A modern German nation state only emerged after the unification of 1871, and nation-building took place "with blood and iron" against external enemies, in particular France, rather than through a process of internal revolution or evolution. The state-building process could draw on the origins of German nationalism, which predates national unification and arose in opposition to the Napoleonic conquest of Germany. Rather than adopting the values of universal rights and citizenship of the French Revolution, German nationalism developed around the *völkisch* concept of common descent and an organic notion of nation and state following the ideas of Herder and Fichte.¹²⁶ In the decades after 1871 German national identity was heavily propagated politically as a means of diffusing social and political cleavages. The traumatic experience of the First World War, the widespread feeling that it was lost only through "betrayal" on the home front and the perceived injustice of the Treaty of Versailles did little to encourage a reassessment of German nationalism. On the contrary, it provided fertile ground for an extreme radicalisation of national identity and culture during the Third Reich.

¹²³ Goetz (96b), *op. cit.*, p.38

¹²⁴ *Ibid.*, p.36ff

¹²⁵ Bulmer (97), *op. cit.*, p.49f, 67

Complete military defeat and national ruin in 1945 discredited militant German nationalism, and in the post-war era many Germans have been very hesitant to affirm their national identity openly. About a third of Germans considered national pride and patriotism “unimportant” in 1996.¹²⁷ The reconstruction of a German national identity since 1945 assumed two dimensions. Internally, national pride was projected away from ethnicity onto Germany’s successful political institutions, economic recovery and the creation of a stable democratic society. Nationalism became replaced by constitutional patriotism.¹²⁸ As a result, Germans are primarily proud of their economic and scientific achievements, and 68% show pride in their political system.¹²⁹ While this reorientation has found widespread popular resonance and acceptance, the legal definition of German identity still remains rooted in the ethnicity-centred concept of *ius sanguinis*.¹³⁰ Prior to the recent modification of the citizenship law, this has complicated the integration of immigrants and *Gastarbeiter* who, unlike ethnic Germans from Eastern Europe (*Aussiedler*), face substantial obstacles when seeking to acquire German citizenship.

Externally, German identity incorporated a European dimension in the shape of a commitment to the ideal of European unification which has survived reunification.¹³¹ The authors of the Basic Law made explicit provisions for European integration and included in its preamble a “post-national” commitment to a united Europe.¹³² The political reconstruction of post-war Germany and European integration therefore proceeded in parallel, making them like twins who “cannot remember an existence independent of the other.”¹³³ Germany’s historical identity has always been influenced by its geographical location in the centre of Europe (it is bordered by nine other European countries). The federal tradition and the country’s post-war situation also shaped Germany’s national identity. In a “semi-sovereign state” whose nation was

¹²⁶ Zimmermann (97), *op. cit.*, p.89f

¹²⁷ Elisabeth Noelle-Neumann and Renate Köcher (eds.): *Allensbacher Jahrbuch der Demoskopie 1993-97*, (Allensbach: Verlag für Demoskopie, 1997), p.482f

¹²⁸ Jürgen Habermas: *Eine Art Schadensabwicklung*, (Frankfurt a. M.: Suhrkamp, 1987)

¹²⁹ Noelle-Neumann and Köcher (97), *op. cit.*, p.9

¹³⁰ Zimmermann (97), *op. cit.*, p.89

¹³¹ See: Bulmer and Paterson, *op. cit.*, pp.5-7, 111

¹³² Bettina Westle: “Einstellungen zur Nation und zu den Mitbürgern”, in: Oscar W. Gabriel (ed.): *Politische Orientierungen und Verhaltensweisen im vereinigten Deutschland*, (Opladen: Leske & Budrich, 1997), p.64

divided into two separate political systems the concepts of nationhood or national sovereignty provided no useful reference point for national identity.¹³⁴

Germany's sovereignty was fully regained only with reunification in 1990, and for the first time since the war there was once again one German "nation state". Unification revived the lively debate of the 1980s about whether affective identification with the nation is desirable or dangerous. This raised the question to which extent the reunited Germany had regained a degree of "normality" among the nation state of Europe.¹³⁵ But there remains a broad consensus that Germany's historic experiences still offers relevant lessons for the future. Even amidst the enthusiasm for reunification Chancellor Kohl stressed that German unity and European unity represented "two sides of the same coin", and he identified himself as both a German and a European patriot.¹³⁶

There is less scholarly agreement about the nature (and survival) of a national identity in the former GDR. One hypothesis emphasises the impact of authoritarian socialisation which generated a national identity tied to the socialist ideals represented by the East German state. This interpretation implies the development of a political culture very different from that of the West.¹³⁷ Alternatively, a common history, family ties and, above all, the powerful influence of the West German media ensured that a truly distinct East German political culture and identity could never take root and an all-German identity was conserved.¹³⁸

Empirical evidence cannot clearly support either hypothesis. Westle has conducted a sophisticated study of the impact of reunification on the German *sense of a political community*. While her sample of public opinion surveys between 1989 and 1993 records levels of public approval of reunification rarely dipping below 80% in both parts of the country, opposition to unification has risen particularly in the East.

¹³³ Bulmer (87), *op. cit.*, p.15

¹³⁴ Peter Katzenstein: *Policy and Politics in Western Germany - The Growth of a Semi-Sovereign State*, (Philadelphia: Temple University Press, 1987)

¹³⁵ For a survey of the debate, see: Westle (97), *op. cit.*, p.61ff

¹³⁶ Thomas Banchoff: "German Policy Towards the European Union - The Effects of Historical Memory", *German Politics*, vol.6, no.1, 1997, p.64

¹³⁷ For example: G. Schweigler: *National Consciousness in Divided Germany*, (London: Sage, 1975)

¹³⁸ G. J. Glaesner: *Die andere deutsche Republik*, (Opladen: Westdeutscher Verlag, 1989)

Around 17% of both West and East Germans disapproved of the merger of their two countries in the period around 1993.¹³⁹

More detailed analysis reveals that dissatisfaction with the economic situation acts as an important barrier to higher affective support for the new united political community.¹⁴⁰ The disappointment expressed through low specific output support exist almost equally in East and West, but with an improvement of the economic situation in the New Länder, this should prove to be a temporary, if prolonged, phenomenon.¹⁴¹ In the long-run positive output performance should spill over into diffuse support for the community as well as the regime. More worrying is the renewed increase in nostalgic diffuse support for the political community of the old GDR which was already referred to above. After 1991, the trend towards higher diffuse support for the new unified country coupled with weaker identification with the old GDR has been reversed.

Parallel to these developments, a regional identity of the New Länder becomes slowly entrenched, and in 1993 regional identification exceeds both diffuse support for the unified FRG as well as the old East German state.¹⁴² To some extent these attitudes are reciprocal. In 1994, 24% of both East and West Germans agreed with the statement that “I feel more distant towards people in the other part of Germany than I do towards many of the foreigners living in our country”. 78% of East Germans and 76% of their Western neighbours disagreed. In other words, a remarkable quarter of the German population felt a mutual foreignness to the respective other part of the country.¹⁴³ To use Easton’s terminology, the existing *sense of a political community* is not yet sufficiently underpinned by a corresponding *sense of a social community* between East and West.¹⁴⁴

The continuation of these trends is confirmed a 1996 Eurobarometer study asking respondents whether they feel as a citizen of the EU, a citizen of the Federal Republic

¹³⁹ Westle (97), *op. cit.*, p.66

¹⁴⁰ *Ibid.*, p.67

¹⁴¹ Dieter Fuchs: “Welche Demokratie wollen die Deutschen? Einstellungen zur Demokratie im vereinigten Deutschland”, in: Oscar W. Gabriel (ed.): Politische Orientierungen und Verhaltensweisen im vereinigten Deutschland, (Opladen: Leske & Budrich, 1997), p.113

¹⁴² Westle (97), *op. cit.*, p.68f

¹⁴³ *Ibid.*, p.74f

or a citizen of their own region.¹⁴⁵ A clear majority in both East (58%) and West (59%) feel as German citizens, but only 7% of East Germans (as opposed to 16% of their Western compatriots) feel as a citizen of the EU. East Germans seem less likely to perceive their identity in post-national terms, probably because fewer of them have been socialised into West Germany's reconstructed post-war identity. This would explain why East Germans exhibit greater national pride in their country than West Germans.¹⁴⁶ On the other hand, more than one in three (35%) East Germans feels as a citizen of their region as opposed to one in four (25%) West Germans. As would be expected, Bavarians have the strongest regional identity amongst West Germans (33%), which is still below the average level of East German regional identity. The extent to which East German regional identity refers to the area of the old GDR as a whole is revealed by Allensbach survey conducted in the New Länder in 1995. 48% of respondents primarily felt as East German, only 32% felt primarily as German and another 18% felt their strongest allegiance to their *Land*.¹⁴⁷

As far as qualitative confirmation of these trends is needed, one can point to the success of the PDS in assuming the character of a specific "East German party" representing concerns particular to citizens in the New Länder. Its voter base is characterised by a tremendous regional divide, whereby the PDS wins around 20% of the vote of East Germans, but has the support of less than 5% of West German voters in general and regional elections. However, even within the PDS there is no organised movement campaigning for a reversal of reunification, which has become an accepted fact of life.¹⁴⁸

To which extent is this comparative lack of a sense of a common political community temporary and contingent upon the considerable social and economic upheaval that reunification has brought about? In 1996, 81% of West Germans and 76% of East Germans agreed with the statement that "it will take many years until both parts of

¹⁴⁴ See Chapter 2, p.75

¹⁴⁵ Eurobarometer: German Public Opinion on the European Union no.44.2 (unpublished), (Brussels: European Commission, 1996), p.14f

¹⁴⁶ McCrone and Surridge, *op. cit.*, pp.7-10, also: Westle (97), *op. cit.*, pp.67-69

¹⁴⁷ Noelle-Naumann and Köcher (97), *op. cit.*, p.497

¹⁴⁸ Petra Bauer-Kaase and Max Kaase: "Five Years of Unification: The Germans on the Path to Inner Unity?", *German Politics*, vol.5, no.1, 1996, p.22

Germany really form a united whole.”¹⁴⁹ Yet in the same year 58% of West Germans and 49% of East Germans were confident that the two halves of the country will ultimately grow together successfully. The remainder was almost equally divided between people who were uncertain about the outcome and those who were outspoken pessimists.¹⁵⁰ These findings suggest a rather unstable *sense of political community* for the immediate future, but they also point to an eventual consolidation in the level of diffuse support at levels comparable to the West German experience prior to reunification.

4.3.2 Political Regime

As before, it is useful to treat as separate the three components of the political regime identified in chapter two: *constitutional philosophy*, the *constitutional order* and *constitutional reality*. This will help to distinguish a mere popular dissatisfaction with the way the constitution operates in practice (constitutional reality) from cases where people reject the values of democracy as such (constitutional philosophy).¹⁵¹ When a democratic political regime enjoys low diffuse support it is far from certain that people would prefer a non-democratic constitutional philosophy in its stead, but only a breakdown into these three subcategories will allow that conclusion to be drawn.

How then do Germans evaluate the *constitutional philosophy* of democracy which the first part of this chapter has shown to be a central legitimising principle of the FRG? In the 1989 Eurobarometer survey already introduced in the last chapter 95.9% of Germans are to some extent or very much in favour of the idea of democracy as such, considered abstractly without reference to their own political system.¹⁵² A second question asked respondents whether they consider democracy the best form of government under all circumstances, whether in certain cases dictatorship can be positive or whether the alternative did not make any difference to them. Here German respondents come down more firmly in support of democracy than their British counterparts do, even when excluding Northern Ireland. 82.2% believe democracy is always preferable which is above the EC average of 78%, but of the small remainder a

¹⁴⁹ Noelle-Naumann and Köcher (97), *op. cit.*, p.556

¹⁵⁰ *Ibid.*, p.555

¹⁵¹ Westle (89), *op. cit.*, p.171f

¹⁵² Fuchs, Guidorossi, Svensson, *op. cit.*, p.349

plurality is inclined towards dictatorship rather than being indifferent between the two forms of government.¹⁵³

It is also important to ascertain whether respondents and political scientists use the same definition of the attitudinal object surveyed, in this case democracy. A number of surveys conducted by the *Allensbach Institute* make it possible to demonstrate empirically that Germans have at least a rudimentary understanding of what democracy actually means. More than 75% of Germans considered the following characteristics to be defining properties of a democratic country: freedom of expression and a free press, the choice between several political parties, regular free, equal and secret elections and the possibility of an orderly, non-violent change of government. More than two-thirds of Germans added to the list judicial independence, religious freedom, participation in political decision-making and political accountability to the electorate. The number of people identifying these characteristics of a democracy has been more or less stable since the survey was first conducted in 1978.¹⁵⁴ Fuchs et al have concluded from their analysis of a previous version of this Allensbach survey that, indeed, “citizens understand democracy as they should understand it.”¹⁵⁵

The only slight variation occurs with regard to the conceptions of democracy entertained by East Germans. All the defining properties of democracy quoted in the Allensbach survey above are mentioned less often by citizens of the former GDR. This negative gap amounts on average to about seven percentage points. East Germans are far more likely to define democracy by economic characteristics instead, such as worker co-decision, income equality or the absence of severe social destitution.¹⁵⁶ At least some citizens in the Eastern Länder do therefore entertain a slightly different conception of what the term democracy signifies which has probably been influenced by the communist ideology of the former regime.¹⁵⁷

¹⁵³ Eurobarometer: Survey, *op. cit.*, p.9

¹⁵⁴ Noelle-Neumann and Köcher (97) *op. cit.*, p.658

¹⁵⁵ Fuchs, Guidorossi, Svensson, *op. cit.*, p.332

¹⁵⁶ *Ibid.*, p.332

¹⁵⁷ Fuchs (97), *op. cit.*, pp.102-106

This may also explain the East-West gap in a post-unification survey on democracy as an abstract *constitutional philosophy*. 86% of West Germans, but only 70% of their East German compatriots, consider democracy the best form of government. Significantly, however, 23% of East Germans are undecided on this issue. Fuchs interprets this as a sign of a possible confusion between democracy as an abstract *constitutional philosophy* and the (disliked) actual political regime of the FRG.¹⁵⁸ Whereas 80% of West Germans consider the democratic system of the FRG the best form of government, only 31% of East Germans do. This suggests that around 40% of East Germans prefer a democratic system which differs from the one operating in the Federal Republic.¹⁵⁹ Fuchs also draws attention to the fact that 53% of Easterners (27% West Germans) believe equality should ultimately take priority over freedom. Exactly the reverse proportion (33% East, 55% West) believes freedom is ultimately more important than equality.¹⁶⁰ These findings support Fuchs' hypothesis that East Germans tend to be sympathetic towards a *constitutional philosophy* of democratic socialism which puts a stronger emphasis on social justice and direct citizen participation.¹⁶¹

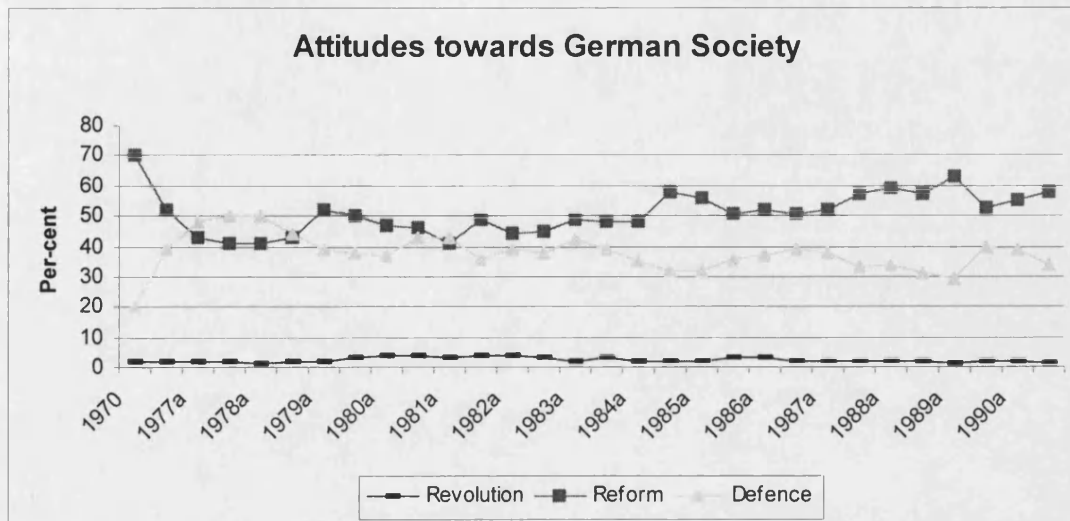
Another way of ascertaining public attitudes towards the German political regime as a whole is to survey public diffuse support for the current political society. As in the last chapter, the question put to (West German) interviewees was whether they wish radically to change society by revolutionary action, whether they think society should be gradually reformed or whether they advocate a valiant defence of society against all subversive forces. The result is depicted in figure 4.1 below.

¹⁵⁸ *Ibid.*, p.96

¹⁵⁹ *Ibid.*, p.106

¹⁶⁰ *Ibid.*, p.102

¹⁶¹ *Ibid.*, p.95, 103

Fig.4.1¹⁶²

There are two outstanding characteristics about these graphs. The first is the sudden decline in the number of people advocating a gradual reform of society from remarkably high levels of around 70% at the beginning of the 1970s. One explanation can be found in the receding intensity of the student protests of the late 1960s whose demands for social and political reform were supported by a broader, non-university political movement. Another explanation is logically connected with the second striking characteristic of fig.1, namely the sudden rise in the number of Germans who felt it necessary to defend their society.

The fact that at times “defenders” even outnumber “reformers” surely has to do with the degeneration of the remaining protest movement into terrorism, most prominently organised in the so-called “Red Army Faction”. While the number of its participants and sympathisers was small (hence lower levels of revolutionary sentiment than in the UK), their activities were often characterised by extreme brutality and caused considerable human casualties and material damage. Since their assassinations and kidnappings were primarily targeted at the political and economic élite, many Germans felt the need to defend their political society against the explicit RAF goal of its violent overthrow. However, except for a series of high profile assassinations in 1988/89, the peak of their activities lies in the late 1970s and the RAF has recently declared itself disbanded. These waves of activity broadly correspond with variations in the level of respondents seeking to defend German society.

Qualitative indicators suggest that German attitudes towards society have by and large consolidated for the past decade at the stable level reached at the end of the Eurobarometer data series. There is no significant revolutionary organisation in the Federal Republic at the moment, and despite a more fragmented party landscape, none of the electorally significant political parties would fit Sartori's famous definition of an "anti-system party" (a party which aims to change the system of government rather than just the incumbent).¹⁶³ Even parties currently at the fringes of the political spectrum, such as the socialist PDS or the far-right Republican Party, tend to restrict their radicality to the policies they advocate rather than to wholesale constitutional reorganisation of the Federal Republic. However, the special case of the PDS will be discussed in more detail below. Finally, participation in general election at levels around or even above 80% of the German electorate are an additional indicator of considerable public faith in, and commitment to, the democratic system.¹⁶⁴

When investigating German public attitudes towards particular aspects of the *constitutional order* or *constitutional reality*, levels of support are lower than for democracy as an abstract *constitutional philosophy*, despite considerable diffuse support for the Basic Law and its political institutions. One of the reasons is the critical evaluations of the way the concept of democracy has been translated into the *constitutional order*. For instance, on the occasion of a reform of the Basic Law in the wake of reunification respondents were interviewed about the reforms they would like to see adopted. 79% of East Germans and 66% of West Germans demanded the introduction of popular referenda - a wish that was not granted in the end.¹⁶⁵

Frustration about the lacking ability to have a referendum on important political and constitutional issues came to a climax over the question of EMU. Despite consistent popular majorities against the introduction of EMU before and even subsequent to its adoption at Maastricht, the Federal Government and large parts of the opposition ruled out a referendum on the issue on the grounds that there was no constitutional

¹⁶² Eurobarometer: Trends, *op. cit.*, p.39f

¹⁶³ Sartori, *op. cit.*, p.127ff

¹⁶⁴ Source: House of Commons Library. For more details, see: Fig.5.6, p.193

¹⁶⁵ Elisabeth Noelle-Neumann and Renate Köcher (eds.): Allensbacher Jahrbuch der Demoskopie 1984-92, (Allensbach: Verlag für Demoskopie, 1993), p.567

basis for such a move.¹⁶⁶ However, 72% of West Germans and 83% of East Germans expressed their desire for exactly such a referendum in 1992.¹⁶⁷ The same survey reflects an East German preference for a more egalitarian constitution, as is reflected in demands for incorporating into the Basic Law the right to housing (90%) and a right to work (85%).¹⁶⁸ Notwithstanding these criticisms, when being asked what made them proud about their country, “the political system” was the East and West Germans’ second most popular response after “the economy.”¹⁶⁹

There appears to be, therefore, a high degree of general felt legitimacy for the German political regime which goes hand in hand with more critical attitudes when it comes to particular aspects or institutions of the constitutional order. This hypothesis is borne out by a 1995 survey investigating whether Germans have a high, mixed or low opinion of a number of political institutions in the Federal Republic.¹⁷⁰ The best result by far is achieved for the office of the Federal President of which 65% have a high opinion and another 26% a mixed one. Only six per-cent have a low opinion of the Presidency, and all these figures are only marginally lower if Eastern Germany is counted separately. The second most respected institution is the FCC of which 36% of all Germans have a high opinion and another 42% a mixed one, followed closely by the Bundesbank for which the respective data are 32% and 42%. Yet approval of the Bundesbank is sharply divergent between East and West. Only 24% of citizens in the new Länder admire the Bundesbank, as opposed to 35% of the Western compatriots, again pointing to different traditions of economic ideology.

All other federal political institutions such as the federal government, the Bundestag or the Bundesrat are not highly thought of by the German public in 1995 and, significantly, opinion fluctuates considerably over time. For instance, 42% of respondents had a high opinion of the Bundestag in 1985 which dropped to a value of 24% in 1995. Most of the fluctuations occur between the categories of “high opinion” and “mixed opinion”. These characteristics may be a sign that respondents understand

¹⁶⁶ See for instance: Ulrich von Wilamowitz-Moellendorff: Bevölkerungsumfragen zur Europäischen Union, (Sankt Augustin: Konrad-Adenauer-Stiftung, 1997), p.1-6

¹⁶⁷ Noelle-Neumann and Köcher (93), op.cit., p.1041

¹⁶⁸ Ibid., p.567

¹⁶⁹ Peter R. Weilemann: Einstellungen zur Europäischen Union nach Maastricht, Interne Studie Nr. 30/1992, (Sankt Augustin: Konrad-Adenauer-Stiftung, 1992), p.20

¹⁷⁰ Noelle-Neumann and Köcher (97), op. cit., p.812f

the survey question as referring to an output evaluation of the incumbents rather than to their diffuse support of the institution as such. This interpretation would also explain the high approval ratings of institutions with a consistently high track record (such as the Bundesbank) or offices whose functions and powers are largely symbolic (such as the Federal President).

Figure 4.2, which depicts public attitudes towards the reliability of political institutions, serves to demonstrate further the interaction between levels of specific and diffuse support below.

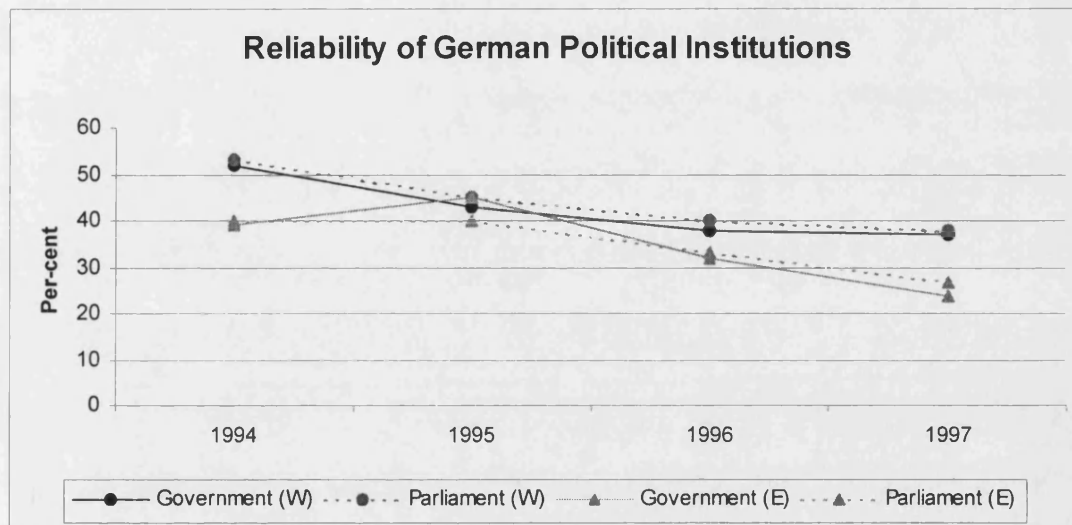


Fig.4.2¹⁷¹

Despite the relatively short time frame, there is a clear and marked deterioration in the perceived reliability of Germany's political institutions. East Germans have become particularly disillusioned about the reliability of the Federal Government and the Bundestag. As in Britain, Parliament scores slightly better than the national government, but the difference is less pronounced than in the UK. This decline correlates with decreasing general approval of the performance of Chancellor Kohl's government as well as declining levels of satisfaction with the functioning of democracy. The two graphs depicting the reliability of government and parliament can therefore be expected to show an upward trend subsequent to the change in the federal government in autumn 1998.

¹⁷¹ Eurobarometer no.42, *op. cit.*, p.B28 and subsequent issues.

In short, the design of the reliability survey seems to suffer from the all too common imprecision as far as the mode of support (specific versus diffuse) is concerned. As already discussed in the last chapter, it shares this features with the Eurobarometer survey on “satisfaction with the way democracy works” whose results are depicted below (fig.4.3).

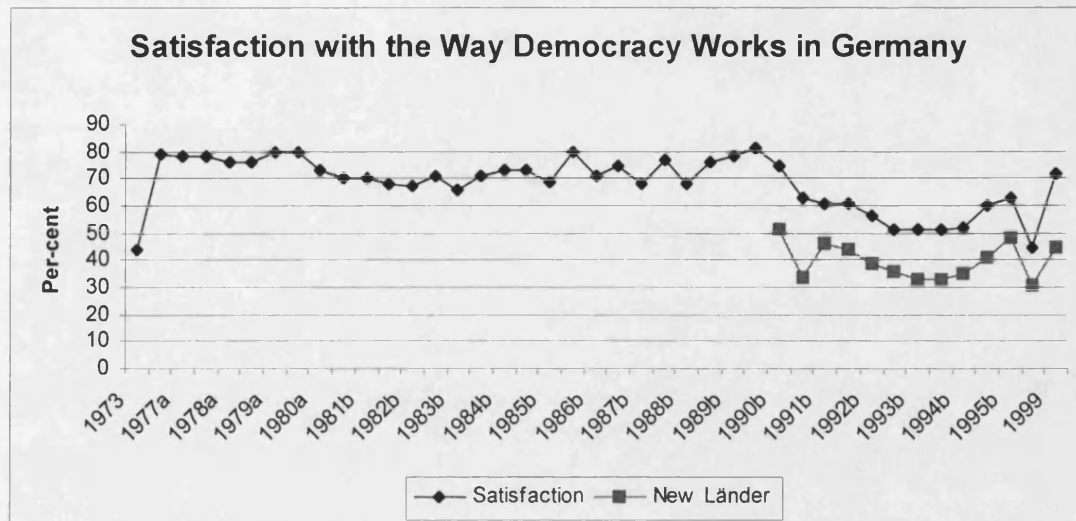


Fig.4.3¹⁷²

There are three striking features in this set of data. The first is a phenomenal doubling of satisfaction at the outset of the data series which will be very difficult to interpret due to the lack of knowledge about movements in satisfaction prior to 1973. The second trend is a rather sharp decline in support after reunification in 1990 from fluctuations around an average level of about 75% to 50% in the mid-nineties. One of the most important factors responsible for this decrease in satisfaction is the regional variation between the old and the new Länder.

Despite what might be described as “unification euphoria” in both parts of the country around the year 1990, East German satisfaction levels are lower right from the beginning where they hardly exceeded 50%.¹⁷³ Once the unification effect wears off, East German become less satisfied in line with their Western compatriots, just as subsequent fluctuations largely occur in tandem between the two parts of the country. The big difference lies in the fact that even at the worst of times still roughly half of the West German population remains satisfied with the way democracy works,

¹⁷² Eurobarometer: Trends, *op. cit.*, p.22f, and subsequent issues.

¹⁷³ *Ibid.*, p.22f, and subsequent issues.

whereas the same applies to sometimes just a third of East Germans. The third striking feature is the sudden rise in satisfaction levels in 1999 which, while maintaining the East-West gap, occurs in parallel in both parts of the country.

To which extent is the marked East German dissatisfaction with democracy really directed at the political regime? How strongly is it influenced by low output support as a consequence of the economic difficulties facing the New Länder, such as low growth and high unemployment? In 1995, 77% of East Germans approved of the decision to introduce a liberal democratic order in their former country, only 17% disapproved of that change. But a rather more substantial 34% sometimes still hanker after the old German Democratic Republic, whereas 64% say they do not look back in nostalgia.¹⁷⁴ Also, East Germans tend to feel less pride in the political regime of the FRG and the Basic Law in particular, and this tendency is particularly accentuated amongst those who express support for the political regime of the old GDR.¹⁷⁵ This is all evidence of lower regime support amongst East Germans, but the influence of output evaluations on the results of surveys about satisfaction with democracy should not be underestimated for either part of the country. That would help to explain the sudden rise in satisfaction levels in both East and West subsequent to the German general election in autumn 1998.

One measure of that influence is the impact of party allegiance on respondents' evaluations. Fuchs et al calculate a comparatively low differential in satisfaction rates of 16.2 percentage points between government and opposition supporters (bearing in mind the value of 32.5 for the UK).¹⁷⁶ This small gap, which is incidentally responsible for one of the highest overall satisfaction rates in Europe, is certainly related to the consensual political culture and policy-making style by which the Federal Republic is characterised. The relatively low ideological divide would also account for the difference to the UK during the 1980s. It should be borne in mind, though, that the calculations by Fuchs et al were accurate at the beginning of nineties and therefore cannot take account of developments since. It is to be expected that the

¹⁷⁴ *Politbarometer*, no.10, 1995, (Mannheim: Forschungsgruppe Wahlen, 1995), p.4

¹⁷⁵ Westle (97), *op. cit.*, p.70-72

¹⁷⁶ Fuchs, Guidorossi and Svensson, *op. cit.*, p.345

correlation between party allegiance and satisfaction with democracy has become stronger, for two reasons in particular.

First, with the emergence of the PDS, the successor to the former communist party of the GDR, as a political force strong enough to gain parliamentary representation the ideological divide has increased. Political support for the PDS is almost exclusively concentrated in the Eastern half of the country. Since it was argued above that many East Germans relate democracy to a different, more egalitarian constitutional order, satisfaction with democracy amongst supporters of the “Party of Democratic Socialism” can confidently be expected to be considerably below the levels recorded for supporters of other parties. This is confirmed by the finding that amongst all East Germans PDS supporters are least likely to be proud of the Basic Law and the political regime of the FRG.¹⁷⁷ Similarly, Kaase and Kaase find a fairly strong correlation between individuals’ left-wing political orientations, dissatisfaction with democracy and favourable attitudes towards socialism.¹⁷⁸

Second, the sixteen year-long reign of Chancellor Kohl will have fuelled the dissatisfaction with democracy amongst opposition supporters in a way not dissimilar to the attitudes of Labour supporters in Britain during the 1980s and for most of the nineties. The increasing deterioration in satisfaction levels, with a short exception around the 1994 federal election, throughout the years leading up to 1998 and the sharp rise after the election in September 1998 all seem to confirm that hypothesis, as the next section will demonstrate.

4.3.3 Political Authorities

Figure 4.4 below records Germans’ satisfaction with the performance of their federal government and the main opposition party on a scale from minus five to plus five. As one would expect, government satisfaction rallied in the months before and after the 1994 election which saw the incumbent administration successfully re-elected. By contrast, government satisfaction remained low in the run-up to the 1998 election, but shot up when the former opposition assumed power. These movements roughly

¹⁷⁷ Westle (97), *op. cit.*, p.72

¹⁷⁸ Bauer-Kaase and Kaase, *op.cit.*, p.19-21

correlate with fluctuations in the graph about satisfaction with the way democracy works in Germany. Analysing a similar set of data over the same time period Kaase and Kaase argue that for East Germans "economic satisfaction and satisfaction with the concept and reality of democracy are closely related."¹⁷⁹

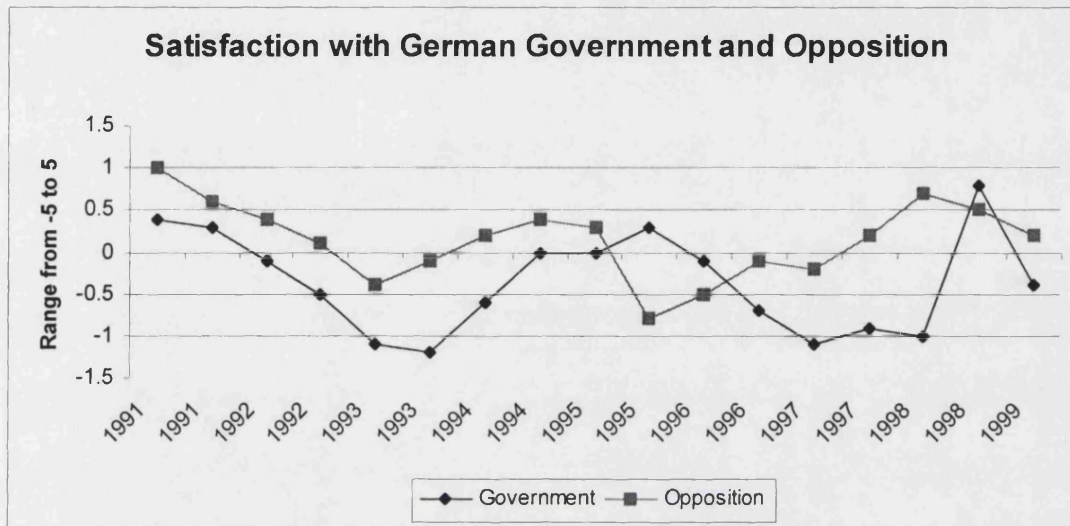


Fig.4.4¹⁸⁰

This suggests a high dependence of diffuse regime support on specific output support, which can be read as a lack of a reservoir of entrenched system support that is independent of performance evaluations. That raises questions about the stability of East German diffuse support for the political regime of the Federal Republic.¹⁸¹ It will not have helped that East Germans' acquaintance with liberal democracy coincided with the onset of a profound economic crisis in the East which has been reflected in very low economic expectations for the future (see fig.4.5 below).¹⁸² Kaase and Kaase even believe to detect a weakening of diffuse support in the West caused by the emphasis on Germany's economic problems.¹⁸³ But the East clearly bears the brunt of the economic malaise. Given that East Germans have joined the FRG with very high expectations for a comprehensive welfare state, the current restructuring process has a

¹⁷⁹ *Ibid.*, p.18

¹⁸⁰ *Politbarometer*, no.8, 1991, (Mannheim: Forschungsgruppe Wahlen, 1991), and subsequent issues.

¹⁸¹ *Ibid.*, p.18f

¹⁸² Oscar W. Gabriel: "Einleitung: Politische Orientierungen und Verhaltensweisen im Transformationsprozeß", in: Oscar W. Gabriel (ed.): *Politische Orientierungen und Verhaltensweisen im vereinigten Deutschland*, (Opladen: Leske & Budrich, 1997), pp.25-27

¹⁸³ Bauer-Kaase and Kaase, *op. cit.*, p.19

particularly negative effect on East German specific support for the political authorities.¹⁸⁴

If the performance of political authorities influences the level of satisfaction with the way democracy works, one would suspect the general economic mood of the nation to do likewise. The graphs below depicts how Germans felt about the situation of their own lives for the year ahead with a separate graph tracking East German responses (fig.4.5).

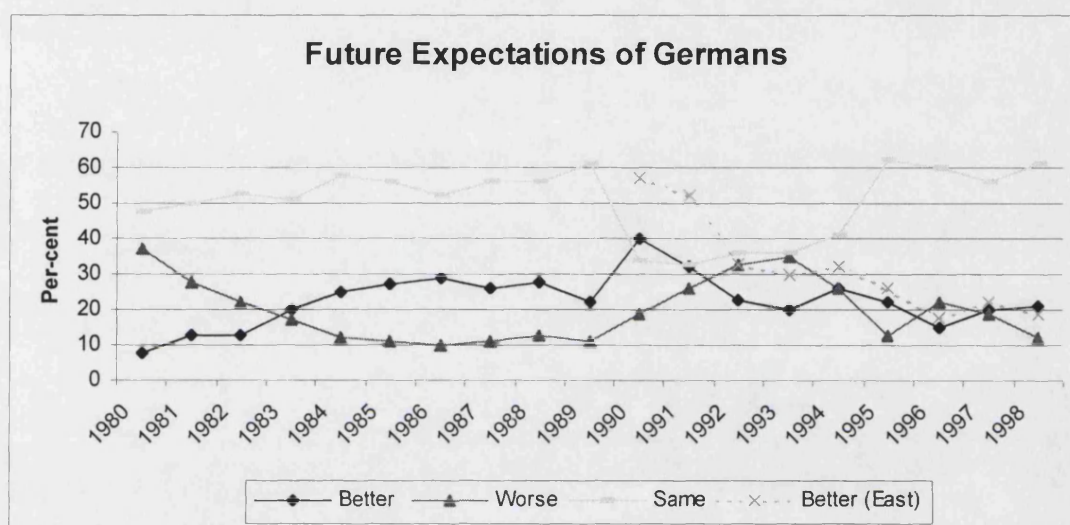


Fig.4.5¹⁸⁵

Correlating the results from this Eurobarometer survey with the survey about satisfaction with democracy, the conclusions are as ambiguous as in the British case in the last chapter. Up until around 1986 there appears to be no obvious relationship between the graphs from the two surveys. Subsequent to that date, however, both survey register similar fluctuations in the graphs depicting optimism for the year ahead and satisfaction with democracy. Both decline from high plateaux in the late 1980s only to reach new heights in the wake of reunification. The 1990s are marked by two “waves” of deterioration followed by rallies at around the time of the general elections in 1994 and 1998.

While the perception of personal well-being certainly seems to have some influence on public satisfaction with German democracy, the evidence must remain partly

¹⁸⁴ Gabriel (97a), *op. cit.*, p.28

¹⁸⁵ Eurobarometer: Trends, *op. cit.*, p.229f

inconclusive. But the correlation with specific support for the political authorities as far as policy output is concerned cannot be denied. There is sound basis, therefore, for Goetz and Cullen's assumption of at least a weak proportional relationship between East Germany's economic fortunes and the level of acceptance of the Basic Law in the New Länder.¹⁸⁶

4.4 Conclusion

Two conclusions from the last two chapters are worth bearing in mind. First, at a general level the German and British political systems reveal some similarities. The notion of representative government is central to formal legitimacy in both countries, and the felt legitimacy these formal arrangements enjoy in Britain and Germany exhibits

few signs of a declining faith either in the legitimacy of democracy as an abstract principle, or in the way democracy works in particular countries, or in the major institutions of society."¹⁸⁷

Second, from a West European perspective the two political systems are very different from each other. Germany's constitutional philosophy is based on natural law jurisprudence and the European state tradition, to which the UK historically does not belong. As regards formal legitimacy, the German state is characterised by a vertical and horizontal diffusion of sovereignty and institutional pluralism, whereas the UK technically remains a unitary state whose sovereignty indivisibly rests in Parliament. German political culture is based on co-operation and consensus, while Britain has an adversarial, debate-oriented political culture. At the level of felt legitimacy the most striking difference concerns British and German conceptions of national identity. Britain's national identity is based on historical developments that set it apart from continental Europe, and on a fusion of national and parliamentary sovereignty. British identity faces increasing internal and external challenges, while, once the effects of reunification have been absorbed, Germany's national identity is likely to stabilise in the long-run. The latter continues to be strongly influenced by the country's traumatic

¹⁸⁶ Cullen and Goetz, *op. cit.*, p.164

¹⁸⁷ Max Kaase, Kenneth Newton and Elinor Scarbrough: "Beliefs in Government", *Politics*, vol.17, no.2, 1997, pp.135

historical experience which means that Germany's post-war identity rejects traditional expressions of nationalism in favour of a post-national commitment to European unification.

These contrasts between Britain and Germany mean that their formal and felt legitimacies differ in the degree to which they are compatible with European integration. Whereas the German political system achieves a high degree of compatibility, the formal and felt legitimacy of the UK does not exhibit a good fit with the character of the EU. The disparities in formal and felt legitimacy and the ensuing differences of compatibility with the EU are more pronounced in the case of Britain and Germany than between other large member states. France and Italy, for example, occupy intermediate position with regard to the compatibility of their formal and felt legitimacy with the EU.¹⁸⁸

The French and Italian political systems are both built on Roman law and the West European state tradition, but they lack Germany's emphasis on natural law jurisprudence and do not divide sovereignty vertically and horizontally to the same extent as in the Federal Republic.¹⁸⁹ Neither is a federal state, although both France and Italy have devolved powers to the regional level, and their state bureaucracies remain largely centralised. In France, political power is centralised in the executive which means that the courts and the national parliament play a more subordinate role than in Germany. While this has facilitated the institutional adaptation of the French political system to the challenge of EU membership, compatibility is to some extent hindered by a strong national identity.¹⁹⁰ There is a long-standing tradition, reaching back to the French revolution, of locating state sovereignty in the nation, which is conceived as *community of citizens* and the source of all law. By diluting this principle European integration has a potential for conflicting with the political and intellectual foundations of France's national identity.¹⁹¹

¹⁸⁸ Katzenstein (97), *op. cit.*, pp.41ff

¹⁸⁹ Dyson (80), *op. cit.*, pp.33-36, 109ff

¹⁹⁰ Bulmer (97), *op. cit.*, p.77f

¹⁹¹ Christian Lequesne: "France", in: Dietrich Rometsch and Wolfgang Wessels: The European Union and Member States - Towards Institutional Fusion?, (Manchester: Manchester University Press, 1995), p.185f

Italy represents the inverse case as far as compatibility with the EU is concerned. The Italian political system has greater horizontal checks and balances than France, and central government is in a comparatively weak position vis à vis the national parliament and the constitutional court. The resulting lack of central co-ordination and the slow pace of domestic institutional reform have meant that, Italy's formal legitimacy is less well adapted to, and has a slightly lower congruence with, the EU than France or Germany.¹⁹² For example, Italian courts have been comparatively slow to adapt to the new supranational legal order.¹⁹³ On the other hand, Italy's felt legitimacy reveals some parallels with Germany. In both countries national unification was achieved only in the second half of the nineteenth century, and the nation-building process culminated in extreme nationalism in the first half of the twentieth century. Military defeat in the Second World War gave rise to a Europeanised national identity where national pride and attachment to national sovereignty are low.¹⁹⁴

Both Italy and France therefore represent intermediate cases as far as the Europeanisation of their political systems is concerned. However, Italy differs fundamentally from all the other large member states because Italians tend to perceive the legitimacy of their domestic political system as severely deficient, resulting in very low levels of regime and output support by West European standards.¹⁹⁵ This makes it very difficult to determine to which extent Italian felt legitimacy for the EU is *positively* related to the EU-compatibility of its national political system and to which degree it is merely a *negative* function of domestic state failure and public alienation.¹⁹⁶

If, as this thesis argues, the legitimacy of the EU depends on the member state from whose perspective it is evaluated, this hypothesis is best tested by choosing as case

¹⁹² Marco Giuliani: "Italy", in: Dietrich Rometsch and Wolfgang Wessels: The European Union and Member States - Towards Institutional Fusion?, (Manchester: Manchester University Press, 1995), p.119

¹⁹³ Hix (99), op. cit., p.117

¹⁹⁴ Roger Griffin: "Italy", in: Roger Eatwell (ed.): European Political Cultures - Conflict or Convergence?, (London: Routledge, 1997), pp.139, 151

¹⁹⁵ Guido Martinotti and Sonia Stefanizzi: "Europeans and the Nation State", in: Oskar Niedermayer and Richard Sinnott (eds.): Public Opinion and Internationalised Governance, (Oxford: Oxford University Press, 1995), pp.170-75

¹⁹⁶ Ibid., p.178-82

studies two well-legitimised member states where disparities in formal and felt legitimacy are pronounced and have therefore caused different degrees of compatibility with European integration. Among the larger member states, Britain and Germany represent opposite ends on this criterion. The differences in the formal and felt legitimacy of Britain and Germany will therefore help to explain distinct national perspectives on the legitimacy of the EU to which the discussion now turns.

Chapter Five: Formal and Felt Legitimacy of the EU

5.1 Introduction

This chapter assesses the formal and felt legitimacy of the EU from the perspective of the Federal Republic and the United Kingdom. The first part analyses the EU's formal legitimacy, paying particular attention to the distinct interpretations of its constitutional philosophy by the ECJ, British and German courts. After an empirical analysis of the EU's felt legitimacy in the second section, the chapter concludes by discussing whether the EU suffers from a relative legitimacy deficit from a British or German perspective.

5.2.1 Formal Legitimacy: Constitutional Philosophy

The constitutional philosophy of the EU is difficult to determine. In the absence of a European constitution, recourse must be taken to the Treaties of Rome, on which the EC was constituted in 1957, and their subsequent amendments.¹ The Treaties identify the institutional structure of the Communities.² They enumerate the various legislative, administrative, regulative and judicial powers which enable EU institutions to translate the general principles of the Treaties into binding rules, some of which (regulations) are even directly applicable.³ Legislation is restricted in its scope to the list of competencies laid down in the Treaties which is predominantly confined to economic activities.⁴ The Treaties do not confer the power for EU institutions to determine which matters fall within their own competence, but they remain rather vague about the exact relationship with national constitutions. As the EU gradually evolved from an "ordinary" international organisation into a unique

¹ The most important amendments are the Single European Act of 1987, the Treaty on European Union of 1992, and the Treaty of Amsterdam of 1997. The TEU saw the introduction of two additional "pillars" next to the EC, namely a Common Foreign and Security Policy (CFSP) and a Justice and Home Affairs (JHA) pillar. These two pillars are still largely intergovernmental in character, and the subsequent discussion mainly concentrates on the dominating EC pillar.

² Art.4 and Art.137ff (Part Five) EC

³ Regulations, directives, decisions, recommendations and opinions, whereby the last two are of non-binding character. See Art. 189 EC

⁴ Art.3 EC

political system with ever expanding competencies, so its constitutional philosophy changed as well.

The central problem in determining its constitutional philosophy is to identify the ultimate sources of legitimacy in the EU. If regarded as a treaty organisation, the EU's legitimacy will ultimately flow from the member states. Alternatively, if its nature is closer to that of a state, it must develop its own legitimising principles. To use Hart's terminology, the EU appears to represent a case where the rule of recognition is uncertain and so are "the ultimate criteria used by courts in identifying valid rules of law."⁵ Because the EU's formal legitimacy is closely intertwined with that of its member states and embedded in their very different national constitutional structures, the interpretation of its formal legitimacy differs not only between the ECJ and national courts, but also among member states themselves. To clarify the EU's constitutional philosophy, the next section analyses the general judicial interpretation of the Treaties by their ultimate legal arbiters, the ECJ and the courts in Britain and Germany.

The European Court of Justice

The ECJ never directly concerned itself in any of its judgements with the constitutional philosophy underlying the EU, but one can draw some inferences from judicial precedents and the general jurisprudence of the Court. As regards the *status* of the EU's political system, the 1962 *Van Gend en Loos* case represents a landmark decision, since the ECJ held that the EC possesses its own separate system of law. The ECJ argued that

*"the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals."*⁶

⁵ Hart, *op. cit.*, p.148. As the discussion below will show, the uncertainty mainly pertains to the diversity of opinions in the academic debate. The courts, while shifting their interpretation over time, do normally adhere to a fairly clear rule of recognition at any one point in time.

⁶ Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) ECR I at 12

It also held that much EU legislation has *direct effect* by conferring rights or imposing obligations on individuals which national courts are bound to recognise and enforce. Just two years after *Van Gend en Loos* the Court reinforced its message by ruling that

*“the law stemming from the Treaty, an independent source of law, could not because of its special and original nature be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”*⁷

In its verdict, the Court in effect inferred from the Treaties an obligation on national law to recognise the supremacy of Community law. Some years later, the Court further clarified its position by emphasising that provisions of the Treaties and EC legislation

*“...not only by their entry into force render automatically inapplicable any conflicting provisions of current national law but...also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.”*⁸

In *Internationale Handelsgesellschaft* the ECJ went another step further by declaring that Community law overrides even fundamental rights of national constitutions or national constitutional principles.⁹ This precedent is complemented by the so-called “Simmenthal doctrine” according to which national legal systems are only compatible with Community law if they allow courts to refuse to apply subsequent inconsistent domestic legislation.¹⁰ Rather, a national court is under the duty to refuse

*“of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.”*¹¹

⁷ Case 6/64 *Costa v ENEL* (1964) ECR 585 at 586

⁸ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal S. p. A.* (1978) ECR 629 at 629-30

⁹ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECR 1125 at 1125-26

¹⁰ Collins, *op. cit.*, p.20

¹¹ Simmenthal, *op. cit.*, ECR 629 at 630

The ECJ thus perceives the EU as an independent supranational system of law which confers rights and imposes responsibilities on individuals and member states. The Court recognises the EU's roots in international law with the member states remaining the ultimately sovereign High Contracting Parties.¹² While the Union has a separate, independent body of law over which the ECJ enjoys ultimate jurisdiction and which is superior to all forms of national law, the EU is not based on a European *pouvoir constituant* as would be the case with a fully sovereign state.

However, the Court's jurisprudence appears to be veering towards the creation of an independent and distinct constitutional philosophy for the EU. The underlying political integrationist agenda, which is justified with reference to the teleological objectives of the Treaties, is indirectly acknowledged by some of its judges.¹³ Starting from the premise that, as an independent legal system, the EU must develop its own general legal principles, the Court has gradually created what amounts to a body of constitutional law and occasionally refers to the Treaties as a European constitution.¹⁴

This development has been particularly pronounced in the area of fundamental rights which the Court increasingly considers itself bound to protect.¹⁵ The TEU formalised this development by declaring that the EU shall respect fundamental rights as guaranteed by the European Convention, the constitutional traditions of the member states and "the general principles of Community law".¹⁶ The TA reinforces the EU's commitment to "the principles of liberty, democracy, respect for human rights and fundamental freedoms" and empowers the ECJ, together with the Council and the EP, to proceed against Union institutions or member states which are deemed in breach of these principles.¹⁷

Most recently, the European Council has set up a committee to draft a "European Charter of Fundamental Rights" for adoption at the conclusion of the current IGC

¹² Case 294/83 Parti Ecologiste, Les Verts v Parliament (1986) ECR 1339 at 1365

¹³ Fernand Schockweiler: "Die richterliche Kontrollfunktion: Umfang und Grenzen in Bezug auf den Europäischen Gerichtshof", Europarecht, vol.30, no.3, 1995, p.193

¹⁴ For example, the ECJ referred to the TEU as a "constitutional charter": Opinion 1/91 (1991) ECR I-6084

¹⁵ See for instance: Internationale Handelsgesellschaft, op. cit., ECR 1125, Case 4/73 Nold v Commission of the European Communities (1974) ECR 491

¹⁶ Art.F.2 TEU

¹⁷ Art.6,7 TA

towards the end of 2000.¹⁸ Although its precise legal status remains to be decided, the Charter is likely to accelerate the constitutionalisation of the Treaties and, by making it justiciable in the ECJ, transform the latter into a *de facto* constitutional court of the EU. The Charter may even become the *bill of rights* of a future European constitution. This interpretation would be confirmed if the proposed separation of the Treaties into a *constitutional core*, to be amended by unanimity, and more general provisions, to be amended by QMV, were to be adopted at the current IGC.¹⁹

Although there is at present no indication that the Court may soon be prepared to challenge the member states' ultimate authority over the Treaties, the above developments could result in a gradual transformation of the legal *grundnorm* of the EU. Eventually the ECJ would certainly be inclined to regard European sources of legitimacy, for example derived from the EP or a European bill of rights, on par with the legitimacy conferred on the Treaties by the High Contracting Parties. If that were to happen, the EU would have to replace its indirect democratic legitimisation through the member states with a distinct, self-generated form of popular sovereignty. The ECJ has started to prepare the ground for such a European-based source of (democratic) legitimacy since the 1960s. Mindful that the preamble to the Treaties refers to the *peoples* in the member states as well as their *governments*, the judges urged

*"that the nationals of the states brought together in the Community are called upon to co-operate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee."*²⁰

In another judgement the Court reinforced this view by claiming that the Treaties intend the EP

"to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the

¹⁸ "Necessary? The EU and Human Rights", *The Economist*, vol.354, no.8156, 5/2/2000, p.42

¹⁹ *Ibid.*, p.42

²⁰ Van Gend en Loos, *op. cit.*, ECR 1 at 12

*exercise of power through the intermediary of a representative assembly.*²¹

A few years later the Court claimed for itself the right to protect Parliament's prerogatives and ensure the inter-institutional balance is maintained.²² These examples illustrate that the judges ascribe a significant legitimising role to parliamentary democracy at the European level, although that role is not explicitly reflected in the text of the Treaties of Rome. The preamble to the new TEU merely speaks of the desire "to enhance further the democratic and efficient functioning of the institutions". While this leaves open whether parliamentary legitimacy has to be national or supranational in nature, the Court has made clear its preference for the latter by explicitly stressing the significance of the EP for the democratic legitimisation of the EU.

British Courts

British judges have devoted little time to the question of the EU's legitimacy. The notion has certainly never played a direct role in any of the court cases dealing with the EU. This is for mainly two reasons. British judges have no authority to pronounce upon the constitutionality of legislation. Most of the German cases discussed below would simply not have been admitted to British courts. Second, when reaching judgements, British courts confine their pronouncements to the case in question and rarely engage in continental-style deliberations on general principles of law with repercussions for future constitutional developments. Nevertheless, inferences about the judiciary's implicit view of the *constitutional philosophy* of the EU can be drawn from their interpretation of the *status* of the European legal system.

As argued in chapter three, the 1972 European Communities Act, which implemented the Treaties into British law, recognises the distinctness of the European legal system and gives direct legal force within the UK to past and future EU law. Legal disputes are to be decided by the ECJ, and in cases of conflict between EU law and an Act of Parliament the former is to prevail. While British courts soon recognised the

²¹ Case 139/79 Maizena GmbH v Council of the European Communities (1980) ECR 3393 at 3424

supremacy of Community law in principle, the validity of the *Simmenthal* doctrine remained contested, as demonstrated by the different judicial decisions made in the *Factortame* case.²³

However, even after *Factortame*, judges will only be able to declare legislation inapplicable if they are satisfied that Parliament has no intention to depart from the principles established by s 2 (1) and s 2 (4) of the 1972 European Communities Act. Should that condition not obtain, then judges appear to be required to give effect to subsequent United Kingdom legislation, even if it turns out to be inconsistent with EU law. Since such a case has not yet occurred the exact position English courts will take on this matter can only be predicted. Ultimately, therefore, the preservation of the doctrine of parliamentary sovereignty hinges on judicial behaviour. Orthodox constitutional theory certainly suggests the above solution. After all, it has rightly been pointed out that

*“the only theoretical basis for the notion that future inconsistent legislation could be held to be invalid would be that of a legal revolution, in the sense of a fundamental change in the legal order, or a change in the grundnorm.”*²⁴

Even short of such an open defiance of the supremacy of EU law, the practice of taking Parliament's intention into account when applying European law can be construed as contravening the *Simmenthal* principle.²⁵ Since the doctrine of parliamentary sovereignty remains the supreme rule by which United Kingdom courts identify valid law, whether British or European, British courts will continue to regard the EU as nothing more than a treaty organisation firmly rooted in international law.

This has significant implications for the interpretation of the EU's constitutional philosophy by British courts. The courts have consistently justified the powers exercised by the European political system with reference to the terms under which the United Kingdom acceded to the Community. Britain's membership was negotiated

²² *Case C-70/88 European Parliament v Council of the European Communities (1990) ECR 2067*

²³ See: *Chapter 3*, pp.99ff

²⁴ Collins, *op. cit.*, p.29, also: Joseph Weiler: “The Community System: The Dual Character of Supra-Nationalism”, *Yearbook of European Law*, vol.1, 1981, p.275

²⁵ Collins, *op. cit.*, p.39

and signed under the treaty-making prerogatives of the Crown, and the provisions of the Treaties were given legal effect by the 1972 European Communities Act. Each of these actions was, respectively, an exercise of the royal prerogative and of parliamentary sovereignty.²⁶ This orthodox position prevails for the time being:

“If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provisions in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.”²⁷

To conclude, from a British constitutional perspective the EU is a treaty-based political system of international law whose legitimacy must be derived from another legal system. In Britain this has occurred through Parliament by its passage of the 1972 Act. As the UK government remains one of the High Contracting Parties, and hence able to amend the Treaties, subject to parliamentary ratification, the question which legitimising principles apply *within* the EU is not justiciable in the courts and has therefore not been dealt with by them.²⁸ But any legitimising principles guiding the internal distribution of powers within the EU must remain subordinate to the indirect legitimation via the Council of Ministers and the Westminster Parliament.

The German Federal Constitutional Court

German courts have devoted more effort to the issue of the EU's legal status and its constitutional philosophy. Pronouncements of an empirical nature upon how the EU currently *is* legitimised were often embedded in the normative context of how it *must* be legitimised if it is to draw on its own, independent sources of legitimacy. In particular, the FCC spelled out the conditions for a European parliamentary democracy and the protection of fundamental rights by the EU.

The FCC held in 1967 that the EC, while not itself a state, was a new supranational and independent public authority clearly distinct from the state authority of the

²⁶ Blackburn, *op. cit.*, 2 All ER 1380 (CA)

²⁷ *Macarthy Ltd v Smith* (1979), 3 All ER 325 at 329 (CA)

member states which have transferred to it certain sovereign rights. This has been effected by the Treaties which “constitute some form of constitution of the Community”.²⁹ Secondary law of the EC constitutes a discrete legal order emanating from an autonomous source of law, since its norms derive neither from international, nor national law. While recognising the ECJ’s power of adjudicating European law, the FCC also paved the way for future conflicts by declaring an open question whether (and to what extent) it could *itself* review Community law against fundamental legal principles of the German constitution.³⁰

This open question was answered in the affirmative in 1974 when the FCC had to rule on the relationship between these two legal orders. The Court denied any automatic supremacy of either primary or secondary EC law over the fundamental structure of the Basic Law as protected by Art.79/3 BL.³¹ In particular, the FCC considered itself entitled to rule on the compatibility of Community law with these fundamental laws *as long as* the European legal system did not contain a Bill of Rights comparable in its quality to the protection of fundamental rights by the Basic Law.³²

This controversial decision amounted to an open defiance of the principles contained in *Internationale Handelsgesellschaft* and the *Simmenthal* case.³³ To solve this inconsistency, the FCC reappraised its former verdict in 1986 by inverting the conditionality under which the Court would become active. The FCC noted approvingly³⁴ that the ECJ now regarded itself bound to respect fundamental rights as one of the general principles of law³⁵ to be derived from the member states’ constitutional tradition.³⁶ The FCC concluded, with explicit reference to its 1974 decision, that these developments had raised the standard of protection for fundamental rights in the European Community to become equivalent to the

²⁸ On a similar point see: *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees Mogg* (1994), 1 All ER 457 at 469 (QBD DC)

²⁹ BVerfGE, 67, 293 at 296

³⁰ *Ibid.*, at 295-96

³¹ BVerfGE 74, 271 at 278-79

³² This is the so-called “Solange I” judgement, see: *Ibid.*, at 277-78

³³ *Simmenthal*, *op. cit.*, ECR 629 at 644

³⁴ BVerfGE 86, 339 at 379

³⁵ *Internationale Handelsgesellschaft*, *op. cit.*, ECR 1125 at 1125-26

³⁶ *Nold*, *op. cit.*, ECR 491 at 491

provisions of the Basic Law.³⁷ *As long as* this condition obtained, the FCC would refrain from adjudicating secondary EC law upon its compatibility with the German constitution.³⁸

This clarification was cast into renewed doubt in the 1993 “Maastricht judgement”. The Court argued the newly-founded EU had remained a “supranational organisation” while also styling it a “European federation of states.”³⁹ However, the Union is not a European state because, amongst other things, it lacks the power to determine the scope of its own competencies.⁴⁰ The FCC believes the foundation of a “United States of Europe” is politically not intended for the time being, and it therefore refused to speculate whether German membership in such a European state would be compatible with the Basic Law.⁴¹ Instead, it reaffirmed Germany’s sovereign position as one of the High Contracting Parties to the Treaties.

The Maastricht judgement takes a surprisingly assertive stance with respect to the relationship between the two legal orders. The Court reinterpreted its own 1986 decisions to the effect that both the ECJ and the FCC “co-operatively” protect fundamental rights, although the FCC will only act as a general guarantor of last resort.⁴² An even more significant usurpation of the ECJ’s prerogatives occurred when the Court deemed itself authorised to declare *ultra vires* any EU law which transcends the boundaries of European integration as demarcated by the Maastricht Treaty. According to the Court, such laws will not be covered by the German implementing legislation and hence be inapplicable in Germany.⁴³

In the Maastricht judgement, the Constitutional Court presented for the first time a detailed interpretation of the legitimising principles on which the EU is based. The judges argued the EU rests on a dual legitimacy. They held that, ultimately, legitimacy is provided by the national implementing legislation of the Treaties the repeal of

³⁷ BVerfGE 86, 339 at 378

³⁸ This has come to be known as “Solange II”, see: *Ibid.*, at 387

³⁹ BVerfGE 93, 155 at 181

⁴⁰ *Ibid.*, at 181

⁴¹ *Ibid.*, at 188f

⁴² *Ibid.*, at 175

⁴³ *Ibid.*, at 188

which would terminate Germany's membership of the EU.⁴⁴ The EP provides additional legitimacy for the Union, albeit only of a "supportive nature" subordinate to the national chains of legitimacy.⁴⁵ The reason for this subordination lies in the absence of the conditions necessary for European-wide popular sovereignty, namely a single European people with a reasonably high degree of socio-cultural homogeneity ("Staatsvolk"). A supranational confederation of nations such as the EU must therefore remain primarily legitimised through the peoples of the member states as represented in their national parliaments.⁴⁶

The Court noted that the continuing process of European integration might help to create the pre-legal conditions under which supranational constitutional democracy can effectively operate one day. They include a continuous free public discourse in which parties, organised interests and the media fully participate and which culminates in the formation of a public opinion expressing a particular political will. If the peoples of Europe gradually grow into a *demos*, thereby fulfilling the above conditions, the EU can be increasingly legitimised through the EP expressing a truly European public opinion. While the Court dismissed the plaintiffs' claim that majority decisions in the Council undermine the people-based democratic principle, it stressed the limits to further integration in the future as long as the member states are the main providers of legitimacy to the EU.⁴⁷

In conclusion, German courts have dealt comprehensively with the question of the constitutional philosophy of the EU. The FCC is willing to contemplate a transformation of the ultimate principles by which the EU is legitimised, but the judges tie their jurisprudential flexibility to very strict conditions. The most important of these is that any European legitimising principles have to resemble those of the Basic Law, in particular with respect to fundamental rights and democracy. German judges have been realistic in their assessment of the difficulties to meet these conditions. For the time being, therefore, they continue to regard the EU as an international treaty organisation which partly rests on a dual legitimacy.

⁴⁴ *Ibid.*, at 184, 190

⁴⁵ *Ibid.*, at 185f

⁴⁶ *Ibid.*, at 184

Summary

British and German courts have taken a different perspective on the past and future evolution of the legal status and the constitutional philosophy of the EU because their approach is conditioned by distinct national constitutional structures. British courts are willing to acknowledge the unique character of the EU as a discrete political system, but they continue to classify the EU as an essentially treaty-based organisation of international law which is legitimised through the member states. There has been a reluctance to contemplate a dual legitimacy of the EU because the British doctrine of parliamentary sovereignty is ultimately incompatible with the supremacy of EU law. A fundamental constitutional conflict could still erupt in the UK if future European integration were to weaken the sovereign legal position of the High Contracting Parties or the degree to which the EU is still based in international law, for instance by awarding the EU its own, independent sources of legitimacy.

Although the FCC's jurisprudence also treats the EU as an international organisation, Germany's formal legitimacy is more compatible with a development of the EU's constitutional philosophy towards its own legitimising principles. Because the German constitution is "integration-gearred", the FCC has shown itself willing to subscribe to a version of the dual legitimacy theory, according to which the EU draws its formal legitimacy partly from its own sources and partly from the member states. German courts have stressed the legitimising function of the EP and the role of the ECJ as guardian of the rule of law and fundamental rights. While the FCC has been more assertive than British courts in defending its own adjudicative competencies and protecting the core of the Basic Law, this has created only a *conditional* incompatibility between Germany's formal legitimacy and the EU. The future development of the EU's constitutional philosophy is constrained *as long as* member states remain the principal providers of democratic legitimacy and guarantors of fundamental rights. The planned adoption of a Charter of Fundamental Rights may therefore help to reduce this conditional incompatibility between the two legal systems.

⁴⁷ Ibid., at 183

Despite the FCC's struggle with the ECJ for ultimate jurisdictional supremacy and its insistence on classifying the EU as an international treaty organisation, German jurisprudence remains *in principle*, and subject to certain conditions, open to a future transformation of the EU constitutional philosophy. Compared with Britain, the German perspective is therefore arguably closer to, and more compatible with, the ECJ's own interpretation of the constitutional philosophy of the EU. The ECJ, whose jurisprudence has already greatly enhanced the status of EU law, acknowledges that the European legal system operates only *within the limits* imposed by the Treaties, but it has gradually sought to advance the constitutionalisation of the Treaties.⁴⁸

5.2.2 Formal Legitimacy: Constitutional Order and Constitutional Reality

The Legitimation of Executive Governance

The institutional structure of the EU is characterised by a horizontal and vertical diffusion of executive powers. The EU lacks one of the most important features customarily associated with states, namely *one* obvious agenda-setting and co-ordinating executive centre of government. The closest approximation to a core executive in the EU is the European Commission which is organised similar to domestic governments.⁴⁹ Its 20 members, including a President as *primus inter pares*, reach decisions by simple majority and are appointed for five-year terms by the member states.⁵⁰ Commissioners are legally obliged to be completely independent of their national governments and to act only in the interest of the EU.⁵¹ In practice, Commissioners tend to have made a political career in their respective home country before being appointed to Brussels which makes a radical detachment from their national political arena often difficult to accomplish. Since the Amsterdam Treaty, Commissioners must follow the political guidance of the President who decides on their appointment by common accord with the member states.⁵² Upon being appointed Commission President in 1999, Romano Prodi substantially extended the informal

⁴⁸ For a discussion, see: Weiler (99), *op. cit.*, pp.292-98

⁴⁹ Hix (99), *op. cit.*, p.32

⁵⁰ Art.158 EC

⁵¹ Art.157 EC

⁵² Art.214 and 219 TA

powers of the Presidency by demanding written promises from every Commissioner to resign on his request.⁵³

The Treaties award the Commission the exclusive right to develop policies and draft legislation.⁵⁴ The Council of Ministers and the EP can only *request* the Commission to propose legislation in a particular area, but cannot do the drafting or initiating themselves.⁵⁵ The Commission manages the EU budget, issues legislative instruments (on which the EP is not even consulted) and plays an important role in representing and negotiating for the EU externally, especially in conducting EU trade and co-operation negotiations.⁵⁶ The Commission also exercises important regulative and even judicial functions. Two of the most important policy areas within the EU, the CAP and the SEM, require an extensive degree of regulatory supervision which forms an increasingly prominent part of the Commission's duties with far-reaching economic and political consequences in the member states.⁵⁷ Despite the Commission's numerous powers and functions, the European policy process has often been dubbed *governance without government* because the Commission is for a number of reasons far less in control of this process than national governments are with regard to domestic policy-making.⁵⁸

First, the European Council has *de facto* gradually assumed the Commission's role as a policy-initiator and dispenser of policy-guidelines, especially on major policy initiatives which change the systemic character of the EU. Although the SEM was a Commission initiative, it could only be launched after the European Council had prompted and endorsed the publication of the White Paper on the Single Market.⁵⁹ As the highest authority of the EU, the European Council meets bi-annually and consists of each member state's head of government and foreign minister as well the President of

⁵³ "Prodi Imperator", *The Economist*, vol.352, no.8137, 18/9/1999, pp.56-58

⁵⁴ Art.155 EC. Legislation takes the form of either regulations and decisions (directly applicable in member states) or directives (which are only binding in "the result to be achieved").

⁵⁵ Art.152 and 138b EC, respectively. Between 1993 and 1998 the EP has only twice requested legislative initiatives, see: Martin Westlake: "The European Parliament's Emerging Powers of Appointment", *Journal of Common Market Studies*, vol.36, no.3, 1998, p.441

⁵⁶ Art.113 EC

⁵⁷ Jachtenfuchs and Kohler-Koch, *op. cit.*, p.26

⁵⁸ Rosenau and Czempiel, *op. cit.*,

⁵⁹ Armstrong and Bulmer (98), *op. cit.*, p.74

the Commission.⁶⁰ It is mainly an intergovernmental forum at the highest political level with the aim to enhance political co-ordination, to identify medium- and long-term policy-goals and to act as an informal “court of appeal” for policy arbitration among member states.⁶¹ The backing of the European Council is vital for the effective exercise of the Commission’s legislative powers, since the support of member states is needed for the successful adoption and implementation of EU legislation.⁶² Major political decisions are therefore increasingly being taken by the European Council, and its demands for particular policy proposals are usually being met by the Commission. Despite its great “political clout”, the powers of the European Council are hardly reflected in the very general and tenuous definition of its role. It has only become formally institutionalised with the SEA and the TEU which have given it a quasi-legal base outside the Community Treaties, thus escaping the full jurisdiction of the ECJ.⁶³

Second, the Commission lacks the administrative resources to formulate and initiate policies on its own. In exercising its legislative prerogatives, the Commission therefore depends on an extensive and important network of expert and consultative committees representing national civil servants and sectional interests.⁶⁴ These direct relationships with interlocutors in the member states and the clients of policies are generally known as *comitology*. As far as these are formalised at all, they can be roughly divided into two types of committees. *Expert committees* consist of national officials and experts in the area where legislation is proposed. Their members are nominated by national governments and some of them are constituted on an *ad hoc* basis. *Consultative committees* represent sectional interests, in particular from the agricultural sector. Such *policy networks* are an indispensable tool in the Commission’s efforts to muster sufficient support for legislation to pass all the complex hurdles of a policy-making process over which it has only limited control. The influence of these networks generally depends on the degree to which the Commission requires outside expertise and the extent to which it has to co-opt the affected interest groups in order to overcome resistance to its adoption.

⁶⁰ Art.D TEU

⁶¹ Simon Bulmer and Wolfgang Wessels: The European Council: Decision-Making in European Politics (London: Macmillan, 1987), pp.75-102

⁶² Armstrong and Bulmer (98), *op. cit.*, p.74

⁶³ Bulmer and Wessels, *op. cit.*, pp.118-20

⁶⁴ Neill Nugent: The Government and Politics of the European Union, (London: Macmillan, 3rd ed. 1994), pp.101-103

Third, at the end of the legislative cycle, the Commission enjoys responsibilities in the management, supervision and implementation of policies and legislation, but hardly implements policies directly. Most of the actual policy implementation is delegated to an elaborate network of national or even regional agencies.⁶⁵ Implementation therefore differs amongst member states, and it may often vary in terms of procedure and implementing agents even *within* member states, especially federal ones like Germany. These arrangements carry an inherent risk of policies not being applied reasonably uniformly across the EU, but for lack of financial and human resources the Commission must more or less fully rely on the array of national and subnational bodies to implement EU law for it. Because of the sheer complexity of EU law and an occasional reluctance to implement regulations with an adverse domestic effect, compliance with the Commission's orders for implementation cannot always be taken for granted.⁶⁶

Since the Commission has few means to enforce centrally the implementation of European legislation in the member states, let alone supervise enforcement, there has been a continuous increase in the number of reported infractions brought before the ECJ. Schmitter considers this "implementation deficit" an ever more important obstacle to the scope and efficiency of Community action as EU policies increasingly touch upon nationally sensitive political issues.⁶⁷ Such a portrayal seems to exaggerate the Commission's impotence. After all, the Commission acts as guardian of the legal frameworks according to Art.155 EC, in co-operation with the ECJ. In this capacity the Commission may bring member states before the Court for non-compliance with the Treaties provisions or failure to apply EU law.⁶⁸ Since Maastricht, the Commission may even recommend to the Court a specific financial penalty payable by the non-compliant member state, especially in the areas of competition policy and

⁶⁵ Wessels and Rometsch, *op. cit.*, pp.328-65

⁶⁶ For instance, in 1998 the French Parliament deliberately defied an EU directive on migratory birds. See: "Paris Vote Gives Brussels the Bird", *Financial Times*, 23/6/1998, p.3

⁶⁷ Philippe C. Schmitter: "Imagining the Future of the Euro-Polity with the Help of New Concepts", in: Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter and Wolfgang Streeck (eds.): *Governance in the European Union*, (London: Sage, 1996), p.139

⁶⁸ Art.169 EC

state aid for industry.⁶⁹ In the light of the enhanced judicial role of the Commission and the ECJ one can therefore expect legal action against infringements to increase.

There is no doubt that the Commission's role as a legal watchdog remains an insufficient substitute for an EU-wide policy-implementation mechanism. The Commission often lacks the resources effectively to investigate possible illegalities which may have been committed or covered up by national governments. Nevertheless, the Commission does have at its disposal an ultimate, if not always effective, sanction to ensure full implementation and application of EU law in the member states.

The Legitimation of the Legislative Process

Just as the EU lacks one centralised executive government, so the Union's legislative authority is diffused among different institutions. The European Parliament does not exercise the full range of powers vested in the legislatures of most EU member states, as the following examples demonstrate.

First, the EP has comparatively limited powers of executive supervision because the Commission does not depend on parliamentary support to the same extent as national governments do. The EP plays no formal role in the nomination of Commissioners who are chosen by the member states and whose political affiliations may not fully reflect the party-political balance in the EP. But it must be consulted on, and approve of, the appointment of a new President of the Commission, and the new College of Commissioners is collectively subject to parliamentary approval.⁷⁰ The appointment of a new Commission in 1994 saw the introduction of parliamentary hearings of individual prospective Commissioners - a practice since institutionalised in Art.214 TA. In addition, the EP can dismiss the entire College of Commissioners by carrying a motion of censure by a two-thirds majority.⁷¹ However, this power has never been successfully used so far, and it is still a long way from being comparable to the votes

⁶⁹ Nugent (94), *op. cit.*, pp.114-15

⁷⁰ Art.214 TA

⁷¹ Art.144 EC

of no-confidence common to national political systems.⁷² The most recent motion of censure was moved in January 1999 and recorded the highest vote ever in favour of censure (42% of MEP).⁷³ Despite serious allegations of fraud and mismanagement, the Commission initially refused to resign because it could argue that the censure motion had technically failed. Only the subsequent publication of a highly critical report by a Committee of Independent Experts made the Commission's position untenable, and it resigned collectively in March 1999.⁷⁴

The EP can also table written and oral questions to the Commission, and its standing committees, amongst them the Committee of Inquiry⁷⁵, have remits broad enough to exercise a supervisory function, albeit limited in scale by poor resources.⁷⁶ Furthermore, Art. 138e EC introduces a parliamentary ombudsman who can investigate allegations of maladministration brought by citizens. The EP must be consulted in the appointment of the President and the Executive Board of the ECB, and it has already established an informal tradition for public parliamentary hearings of candidates.⁷⁷ The ECB President delivers an annual report for debate in the EP which can also request the President or members of the Executive Board to appear before one of its committees.⁷⁸ Parliamentary scrutiny of the Council of Ministers or the European Council is marginal to non-existent and largely depends on the attitude of the country holding the presidency.⁷⁹ The EP's influence on decisions by the European Council remains "tangential", and it only receives a verbal report on each summit meeting by the President of the European Council.⁸⁰

Second, the EP has limited budgetary powers which it must share with the Council of Ministers. The Union's budget is drafted by the Commission after which the EP and the Council formally enjoy joined decision-making power for its adoption.⁸¹ The EP may table amendments to the budget, but this right is circumscribed for all

⁷² Martin Westlake: *A Modern Guide to the European Parliament*, (London: Pinter, 1994), p.115

⁷³ *The Resignation of the European Commission*, (London: House of Commons Research Paper 99/32, 1999), p.12

⁷⁴ *Ibid.*, p.9-14

⁷⁵ Art.138c TEU

⁷⁶ Nugent (94), *op. cit.*, p.184

⁷⁷ Art.112 TA. See also: Westlake (98), *op. cit.*, pp.434-37

⁷⁸ Art.113 TA

⁷⁹ Nugent (94), *op. cit.*, p.185

⁸⁰ Westlake (94), *op. cit.*, p.33

“compulsory expenditure” (principally the CAP) which makes up the vast bulk of the budget.⁸² The EP can reject the entire final draft of the budget only with an overall two-thirds majority, as occurred in 1979 and 1984.⁸³

Parliamentary influence on the budget has been somewhat increased by the introduction of five-yearly “financial perspectives” in 1988 which by convention require the EP’s endorsement.⁸⁴ The EP has also benefited from the publication of an annual report by the European Court of Auditors which operates autonomously from the other EU institutions. The ECA scrutinises EU finances and audits the accounts of all EU institutions as well as national, regional and local administrations involved in the management of EU funds.⁸⁵ The Commission must implement the budget within its approved scope, since the EU is not legally permitted to run a budget deficit. The accounts of the preceding financial year are then submitted to Council and EP which must both discharge the Commission for its implementation of the budget.⁸⁶ The increasing importance of this power was illustrated in December 1998 when the EP refused discharge of the Union’s budget because it felt the Commission had failed to dispel serious allegations of fraud.⁸⁷ The refusal to grant parliamentary discharge led to a high-profile official investigation into EU finances which ultimately resulted in the collective resignation of the Commission.

Third, the EP’s legislative powers are shared with the Council of Ministers in a bicameral system in which the Council remains the ultimate legislator.⁸⁸ Legislative proposals from the Commission are presented first to the Council which comprises ministerial representatives of the different policy-sectors from each of the EU’s fifteen member states.⁸⁹ Their decisions are prepared in detail by the Committee of Permanent Representatives (COREPER) which itself draws on the advice of various Council committees. Such an extended period of inter-governmental consultation and drafting has moulded a very consensual policy-making style in the Council, but it also

⁸¹ Art.203 EC

⁸² Westlake (94), *op. cit.*, p.123

⁸³ Art.203/8 EC

⁸⁴ Westlake (94), *op. cit.*, p.125ff

⁸⁵ Art.247,248 TA

⁸⁶ Art.206 EC

⁸⁷ HC Research Paper 99/32, *op. cit.*, p.11f

⁸⁸ Hix (99), *op. cit.*, p.61ff

⁸⁹ Art.146 EC

limits the ability of the EP to influence the Council's policy position in its formative stages.⁹⁰ By the time decisions are taken in the Council most disputes have already been settled so that Council votes are rarely taken even when the case has to be decided by majority rather than unanimity.⁹¹

After legislation has been initially passed by the Council, a number of different procedures apply for the involvement of the EP, which is directly elected by universal suffrage from all the member states for five-year terms.⁹² Originally, the EP only had to be consulted on a bill proposed by the Commission, but the Council as the ultimate legislator was under no constitutional obligation to take the Parliament's opinion into account.⁹³ Today, only few areas remain where this "consultation procedure" applies (most importantly in CAP and in the EU's second and third pillar). Yet it is worth noting that in some areas such as large parts of EMU or external trade agreements under Art.113 the EP is not consulted at all.⁹⁴ With respect to primary law (Treaties revisions) the EP's formal role is confined to non-binding consultation by the Council upon the convening of Intergovernmental Conferences.⁹⁵

The SEA introduced two constitutional innovations with regard to parliamentary legislative involvement, the "co-operation procedure" and the "legislative assent procedure". Since Amsterdam, the latter applies to the accession of new member states, association and trade agreements, breach of fundamental rights by member states, and structural funds. For legislation in these areas the assent by an absolute majority of MEPs is required.⁹⁶ In order to simplify legislative procedures, the Treaty of Amsterdam has reduced the application of the co-operation procedure principally to some areas of Economic and Monetary Policy.

Most decisions involving parliamentary co-operation are now being taken under the "co-decision" procedure first introduced in the Maastricht Treaty.⁹⁷ The Treaty of

⁹⁰ Bulmer (97), *op. cit.*, p.55

⁹¹ F. Hayes-Renshaw and Helen Wallace: *The Council of Ministers*, (London: Macmillan, 1997), pp.18-19

⁹² Art.138.1 EC

⁹³ Westlake (94), *op. cit.*, p.136

⁹⁴ *Ibid.*, pp.159f, 169-72

⁹⁵ Art.N1 TEU

⁹⁶ Westlake (94), *op. cit.*, p.151

⁹⁷ Art.189 TEU

Amsterdam has slightly simplified the co-decision procedure and roughly doubled the number of policy areas where it becomes applicable. Previously, co-decision was applicable to about a quarter of all European legislation, and the EP now expects half its legislative timetable to be consumed with co-decision procedures.⁹⁸ In the course of its three reading stages, the Council or Parliament can refer the bill under consideration to a “conciliation committee” made up of an equal numbers of members from each of the two bodies. If no agreement ensues, the EP can reject the proposal by an absolute majority of its members. Under both co-operation and co-decision, the Commission remains involved in the legislative process if its legislative proposal is amended by the EP.

This bewildering variety of institutional procedures as well as their perpetual adaptation makes the actual *influence* of the EP hardly amenable to any generalised quantification.⁹⁹ For instance, the strong convention of Council consensus, which has by and large defied the growth of qualified majority voting, stifles many attempts by the EP to influence legislation because it cannot exploit divisions among member states in the Council.¹⁰⁰ Yet the EP has successfully nurtured its inter-institutional relations which grant it an informal voice in the formal Council-Commission dialogue. Since 1992, EP committees have also been given the right to submit opinions on the Commission’s pre-legislative consultation documents, thus gaining some influence on policy initiation.¹⁰¹ The constant pressure for credibility and the high formal threshold for many voting procedures have produced a unique political culture of far-reaching cross-party consensus.¹⁰²

The success of inter-party co-operation has given rise to the argument that the EP exerts more *influence* on the law-making process in certain policy areas (measured in terms of amendments accepted, for instance) than national parliaments within their member states.¹⁰³ However, this view does not represent an academic consensus and

⁹⁸ Hix (99), *op. cit.*, p.88

⁹⁹ David Judge, David Earnshaw and Ngaire Cowan: “Ripples or Waves: The European Parliament in the EC Policy Process”, in: *Journal of European Public Policy*, vol.1, no.1, 1994, p.28

¹⁰⁰ *Ibid.*, p.44

¹⁰¹ *Ibid.*, pp.45-46

¹⁰² Westlake (94), *op. cit.*, pp.110-11

¹⁰³ Of all First Reading amendments by the EP up to 1997, the Council has accepted 41% under the co-operation procedure and 43% under the co-decision procedure, Hix (99), *op. cit.*, p.96

has to be treated as just one possible interpretation.¹⁰⁴ It has been equally argued that Council and Commission have been reluctant to make major qualitative concessions to their bills while buying off Parliamentary agreement by accepting a large number of less consequential amendments.¹⁰⁵

At the end of the legislative process, the Council alone has the power to enact legislative proposals.¹⁰⁶ Since the Amsterdam Treaty *Qualified Majority Voting* applies for most policy areas. It allocates votes in the Council according to the member state's size and requires 62 out of 87 votes for a decision to be adopted.¹⁰⁷ Unanimity is stipulated for various financial matters and all primary law-making (Treaties amendments), to much of the second and third pillar of the EU and to a number of policy areas in the first pillar, in particular taxation, some aspects of industrial policy, regional and social funds. Unanimity is also required for amendments of bills against the Commission's wishes under the co-decision procedure.

The Legitimation of Judicial Review

The various executive and legislative powers of EU institutions are subject to judicial review by the ECJ. It consists of one judge from each member state appointed "by common accord of the governments of the member states for a term of six years".¹⁰⁸ The Court can, amongst other things, judge whether member states fulfil their obligations under the Treaties (*infringement proceedings*)¹⁰⁹, and it can review the legality of Community legislation.¹¹⁰ But the largest category of cases that come before the Court are references for *preliminary ruling* from national courts. When adjudicating cases involving Community law, national courts sometimes must seek these references which require the ECJ to provide an authoritative and binding interpretation of certain aspects of primary or secondary EU law.¹¹¹ However, the ECJ

¹⁰⁴ For a survey, see: Judge, Earnshaw and Cowan, *op. cit.*, p.28

¹⁰⁵ Westlake (94), *op. cit.*, p.142

¹⁰⁶ Art.145 EC

¹⁰⁷ Art. 148 EC

¹⁰⁸ Art.167 EC

¹⁰⁹ Art.169, 170 EC

¹¹⁰ Art.173 EC

¹¹¹ Art.177 EC

has made clear that it has no jurisdiction to interpret or apply national law and does therefore not function as the highest appeal court for national legislation.¹¹²

Art. 173 EC entrusts the Court with the judicial review of EU legislation for which application can be made by a member state, the Council, the Commission or, where its prerogative is concerned, the EP. Even natural or legal persons may apply for annulment, although only on a basis largely restricted to economic matters.¹¹³ The Court is empowered to declare acts void¹¹⁴, and the Treaties imply that in its ruling the Court may refer to general principles of law where relevant.¹¹⁵ The Court of Justice therefore decided to develop its own body of legal principles from which it can draw in its rulings.¹¹⁶

So far, the Court has for instance applied the principles of proportionality, non-discrimination, adherence to legality and respect for procedural and fundamental human rights.¹¹⁷ The ECJ has also tried to fill open-textured spaces in the Treaties “by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member states”.¹¹⁸ The Court empowered itself to take into account the spirit, the general scheme and the wording of those provisions when adjudicating the Treaties.¹¹⁹ This greatly enhances its powers to establish new legal principles. A good early example which reflects the ethos of the Court as a pivotal integrationist actor is the interpretation of Art.88 EC as providing “the ultima ratio enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of the member states”.¹²⁰

As a result of its jurisprudence, the Court has come to play a much more central role in the political system of the EU than formally envisaged in the Treaties. Because EU

¹¹² Joint Cases 36, 37, 38 and 40/59 Präsident Ruhrkohlen Verkaufsgesellschaft mbH et al. v High Authority of the European Coal and Steel Community (1960) ECR 423 at 423

¹¹³ Art.173 EC

¹¹⁴ Art.174 EC

¹¹⁵ Art.164, 173, 215 EC

¹¹⁶ Präsident, op. cit., ECR 423 at 423

¹¹⁷ Nugent (94), op. cit., p.216

¹¹⁸ Joint Cases 7/56 and 3 to 7/56 Dineke Algera et al. v Common Assembly of the European Coal and Steel Community (1957) ECR 39

¹¹⁹ Van Gend en Loos, op. cit., ECR 1 at 12

¹²⁰ Case 25/59 Government of the Kingdom of the Netherlands v High Authority of the European Coal and Steel Community (1960) ECR 355 at 374

law is often ambiguous and incomplete, the rulings of the Court have not only clarified existing legislation, but also effectively created new law. This has occurred most noticeably with respect to EU policy competencies and the inter-institutional balance of powers. One of the best-known examples for the Court's political importance is the *Cassis de Dijon* judgement in 1979.¹²¹ Based on the prohibition of quantitative restrictions on imports (art.30 EC), the ECJ created the principle of mutual recognition of product standards across the EU which subsequently became one of the basic principles in establishing the Single Market.

The ECJ has therefore become an essential institutional and political innovator, since the *open texture* of EU law enabled it to adopt a very broad remit in its interpretation of primary and secondary Community law. As discussed above, the ECJ's jurisprudence has also contributed to enhancing the Court's own status by making it effectively a constitutional court for the EU, and it has aided the gradual constitutionalisation of the Treaties themselves - two developments that will be reinforced by the proposed adoption of a European Charter of Fundamental Rights.¹²²

Political Culture

The evolutionary character of the EU has made for an institutional structure and decision-making procedures which are fluid and dynamic over time.¹²³ The border between legal constitutional rules and informal political practices is frequently imprecise and many powers are shared between institutions. The diffusion of political authority between the Commission, the Council of Ministers, the EP and the European Council, is often blurred or overlapping and not necessarily fully reflected in the formal provisions.¹²⁴ Of equal importance are the EU's many non-constitutional, informal political arrangements, its norms and political culture which require any analysis of the formal legitimacy of the EU to pay particular attention to *constitutional reality*.¹²⁵

¹²¹ Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (1979) ECR649

¹²² See p.185f above.

¹²³ Helen Wallace (96b), *op. cit.*, pp.40ff

¹²⁴ *Ibid.*, pp.41ff

¹²⁵ Armstrong and Bulmer (98), *op. cit.*, p.68

For instance, formal amendments of the Treaties to extend the use of QMV do not necessarily signal a departure from the *practice* of searching for unanimous consent and solidarity in the *actual* voting procedure of the Council. QMV is often merely used as a threat against obstructionist national governments, and significant minorities are rarely overruled in the Council.¹²⁶ Similarly, broadly proportional national electoral systems and the frequent requirement for absolute majorities to amend and veto legislation have contributed to widespread cross-party co-operation in the EP and a consensual rather than confrontational style of political debate. In both the EP and the Council national interests are often “clothed” in European rhetoric, and there is a general reluctance among all EU institutions to challenge in any fundamental way the existing policy inheritance (*acquis communautaire*) of the EU.¹²⁷

There are at least two important reasons for the EU’s highly consensual political culture. First, consensual policy-making helps to build mutual trust among political actors within a multi-national political system. The need for trust-building also helps to explain the predominantly legal and rule-governed character of (particularly) regulatory policy-making, which contrasts for example with the British tradition of voluntary self-regulation.¹²⁸ Second, the multi-level character of EU governance requires a broad-based consensus in order to ensure the successful co-operation of all the institutions throughout the various stages of the policy-making process. For instance, if member states are outvoted in the Council they may seek to obstruct the national implementation and compliance with the EU law in question.

Another feature of the political culture of the EU is the (partly institutionalised) integration of outside interests and technical expertise into the policy-making process. This approach is partly necessitated by the small size of the EU’s administrative apparatus, but it also reflects a general normative commitment to economic and social cohesion. The clearest institutional example of this neo-corporatist tradition is the Economic and Social Committee which represents organised employers, workers and

¹²⁶ Nugent (94), *op. cit.*, p.142-48

¹²⁷ Bulmer (97), *op. cit.*, p.57

¹²⁸ Armstrong and Bulmer (98), *op. cit.*, p.68

interest groups and has to be consulted on proposed legislation where the Treaties so provides.¹²⁹

The Commission has also been keen to co-operate closely with subnational governments for the administration and disbursement of *structural funds*. This dialogue is aided by a whole range of informal channels as well as the Consultative Council of Regional and Local Authorities attached to the Commission.¹³⁰ The TEU institutionalised this “subnational mobilisation”¹³¹ within the EU by establishing a Committee of the Regions, whose members consist of representatives of regional and local bodies of the member states.¹³² But it is easy to overestimate this development, since the Treaty of Amsterdam, despite intensive lobbying, did not expand the CoR’s powers which are strictly confined to advisory and consultative functions. Even Hooghe concedes that influence is mostly restricted to the rather small field of regional policy, and the impact of subnational government on the political process of the EU fluctuates in proportion with the power of regions within the domestic political system.¹³³

5.2.3 Comparative Evaluation of the Formal Legitimacy of the EU

The above discussion of the main characteristics of the EU’s formal legitimacy can be summarised as follows. First, the EU is marked by institutional complexity and a strong *horizontal* diffusion of powers. Instead of a central government capable of policy leadership and co-ordination, there are two executive organs (Commission and European Council) and two legislative bodies (EP and Council of Ministers) which must co-operate in the exercise of their sometimes overlapping powers. The ECJ has gradually developed its strong powers of judicial review and established new jurisprudential doctrines and precedents in areas where the Treaties are vague or even silent. Its future role in adjudicating the proposed Charter of Fundamental Rights will accelerate the ECJ’s transformation into a de-facto constitutional court of the Union.

¹²⁹ Art.198 EC

¹³⁰ Liesbet Hooghe: “Subnational Mobilisation in the European Union”, *West European Politics*, vol.18, no.3, 1995, p.181

¹³¹ *Ibid.*, p.177

¹³² Art.198a,c EC

¹³³ For a critical assessment of the CoR’s representative character, see: Lisbet Hooghe, *op. cit.*, pp.175-98, esp. p.191f

Second, there is also a strong *vertical* diffusion of powers. There are few policy areas where the EU enjoys exclusive competence and its budgetary and administrative resources are very limited. Policy-making displays the characteristics of “co-operative federalism” because the Commission depends on member states participation at all stages of the policy-making process (preparation, legislation, implementation).¹³⁴ This form of multi-level governance and the predominance of regulatory policy both privilege the executive and hampers democratic control by parliamentary bodies. Two innovations of the Maastricht Treaty, the principle of subsidiarity and the Committee of the Regions, enhance the federal separation of powers (horizontally in the case of the CoR and vertically in the case of subsidiarity), but they need to mature a little longer before their legitimising capacity can be assessed more accurately.

Third, the formal legitimacy of the EU is *not* based on the principle of representative government. The Commission as the EU’s main executive organ is sustained by the legislature to a very limited extent only, and it certainly does not emanate from it. Indeed, there does not exist a “government” in the traditional sense of the word. While the EP does have a genuine legislative role in most cases, it still does not carry the “full constitutional authority” assigned to parliaments in the member states.¹³⁵ With the Commission as the initiator and implementor of legislation, the Council (while under increasing constraints from the EP) remains the ultimate legislative organ of the EU. The Parliament cannot by itself make laws or impose taxes and its strongest legislative power is the veto.

Fourth, at an informal level the EU is characterised by a very consensual policy-making style. Decision-making in the Council is marked by a search for broad agreement and solidarity, even when QMV is provided for. Significant minorities are rarely outvoted, not least in order to ensure subsequent national compliance with EU legislation. The political culture of the EP is characterised by a consensual rather than adversarial style of political debate and the practice of frequent co-operation among the various party groups. ECOSOC and the Commission’s network of advisory committees represent a weak example of a corporatist model of legitimacy. They are

¹³⁴ For the parallels and differences to the German federal system, see: Scharpf (88) *op. cit.*, pp.239-78

designed to co-opt all interests involved into a legislative process still heavily dominated by economic issues such as the Single Market with the aim of achieving broad-based support for the policies adopted.

A comparison of these four core characteristics of the EU's formal legitimacy with the legitimising principles of the British and German political systems confirms that the EU has a much closer "constitutional fit" with Germany than with Britain.¹³⁶ Both political systems are characterised by versions of co-operative federalism, a strong horizontal and vertical diffusion of political powers, a powerful judiciary and a legalistic, consensual and depoliticised political culture. This stands in marked contrast to the UK whose political system is characterised by the unitary doctrine of parliamentary sovereignty, a strong central executive, weak judicial and subnational power centres and an non-legalistic and adversarial political culture. As argued in chapters three and four, these differences result in varying degrees of compatibility between the formal legitimacy of the EU and national constitutional structures. EU membership poses country-specific constitutional challenges which are at a fundamental level more severe for the UK than for the FRG.

But there is also one important feature which distinguishes the formal legitimacy of the EU from that of its member states: the EU is not a representative democracy. This gains significance because chapters three and four have recorded high levels of public support for the principle of democracy. Only democratic political systems can command felt legitimacy in contemporary West European societies. But the options for solving this problem depend on the country-specific evaluations of the EU's constitutional philosophy. As discussed above, from a British perspective the EU is primarily legitimised indirectly through its member states. A development of the EU into a representative democracy with its own sources of legitimacy would weaken its character as a treaty-based international organisation and undermine the sovereign legal status of the member states. It would therefore be incompatible with the central doctrine of Britain's formal legitimacy which stipulates that the EU's *ultimate* democratic legitimacy derives from the sovereign Westminster Parliament.

¹³⁵ Nugent (94), *op. cit.*, p.178

German courts, on the other hand, have argued that the EU rests on a dual legitimacy. A democratisation of the EU would potentially represent less of a challenge to Germany's formal legitimacy because it can, subject to certain conditions of the FCC being met, accommodate a diffusion of sovereignty to supranational institutions. To conclude, both Britain and Germany are primarily legitimised by the principle of representative government, but national perspectives on the lack of democratic legitimation at the European level are shaped by distinct constitutional traditions and their degree of compatibility with the supranational political system of the EU. These factors also help to explain national perspectives on the felt legitimacy of the EU to which the discussion now turns.

5.3 Felt Legitimacy

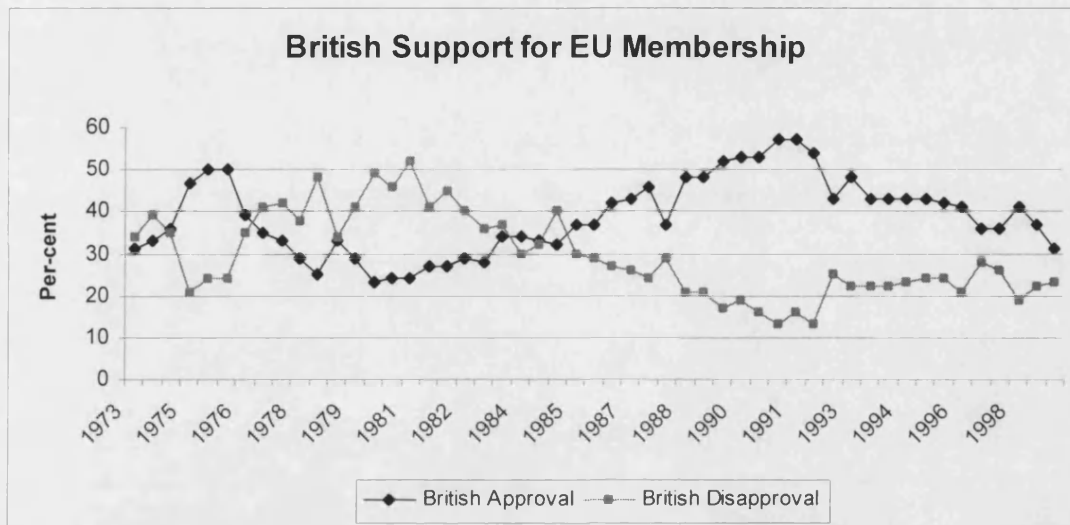
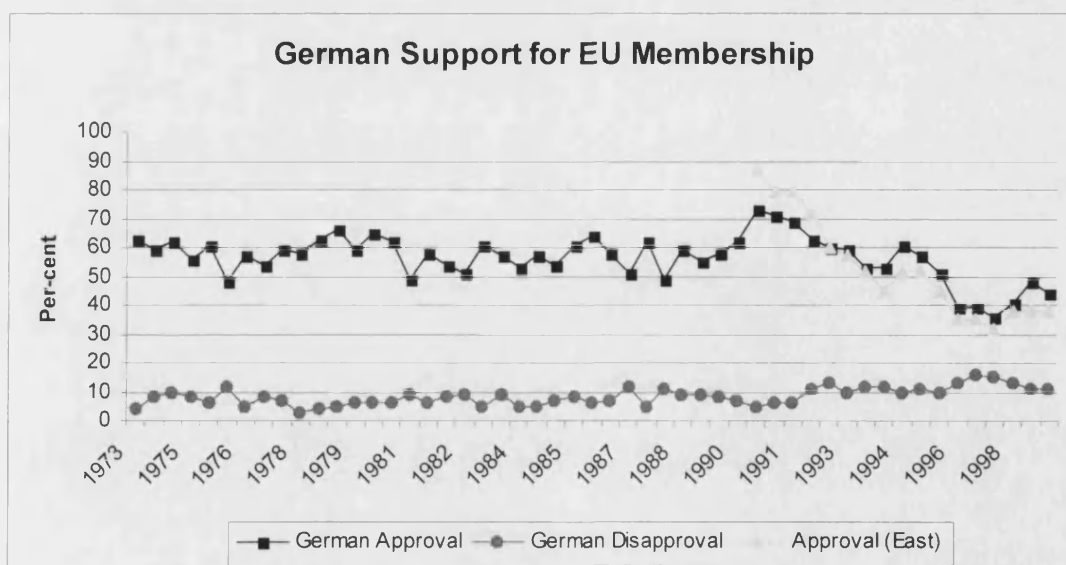
The analysis of felt legitimacy in the EU must draw an initial distinction between public support for international co-operation in Europe generally and public support for any particular aspects of the EU, such as its political regime, its political authorities or its political community.¹³⁷ Rather than criticising for example the lack of democracy in the EU, people may reject the supranational system as a whole. General support for the EU as an international political system therefore depends on attitudes towards the *vertical* balance of powers between the supranational and national political systems. Here citizens choose between two different levels of political action, namely international co-operation on one side or individual national action on the other.

5.3.1 General Support for the Political System of the EU

Two Eurobarometer surveys are particularly well suited to measure general support for international co-operation within the framework of the EU. The first one asks respondents whether, generally speaking, they think their country's membership in the EU is a good thing, a bad thing or neither good nor bad. The data for Britain and Germany are depicted separately below (figs.5.1 and 5.2). It remains disputed among scholars whether this survey measures diffuse or specific support for the EU. Some

¹³⁶ Bulmer (97), *op. cit.*, pp.61-78

maintain that citizens engage in calculated appraisal of the costs and benefits that membership entails, which would suggest the survey measures specific output support for the EU.¹³⁸ Others argue that citizens' responses reflect diffuse support towards European integration in general without any clear idea as to why membership is good or bad. This discussion agrees with the latter view because the survey question is loosely phrased and does not make any explicit reference to the benefits derived from membership.¹³⁹

Fig.5.1¹⁴⁰Fig.5.2¹⁴¹

¹³⁷ Niedermayer (91), *op. cit.*, p.325f

¹³⁸ For a brief overview of the different arguments see: *Ibid.*, p.329

¹³⁹ *Ibid.*, p.329

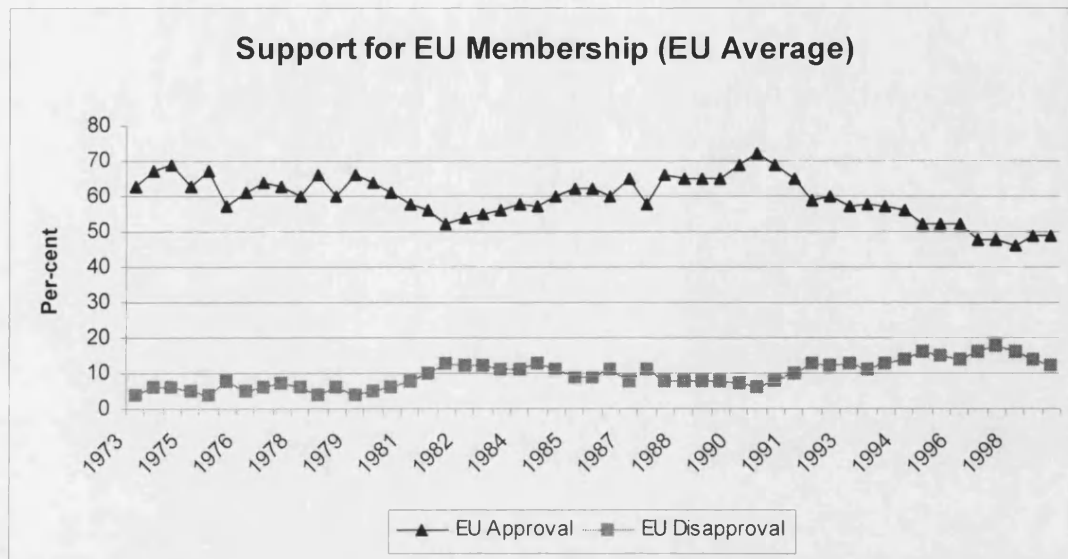
¹⁴⁰ Eurobarometer: Trends, *op. cit.*, pp.73-86, and subsequent issues.

¹⁴¹ *Ibid.*, pp.73-86, and subsequent issues.

Interpreting the above data, one can instantly identify a significant gap between British and German levels of support for EU membership. The number of europhile Germans consistently exceeds the number of those who believe membership is a bad thing, whereas the same does not apply for the United Kingdom. German support lies roughly fifteen percentage points above the British level throughout the data series. However, since 1987 British opponents of the EU have been consistently outnumbered by those who believe British membership in the EU is a good thing. Both countries reach the climax in their levels of EU support just prior to the conclusion of the Maastricht Treaty in 1991. At that time German support tops 70% whereas British support never exceeds 60%. For both countries the margin of supporters over opponents has narrowed in the course of the 1990s, reaching on occasions less than 20 percentage points in the Federal Republic and a mere 5-10 points in the United Kingdom. Since 1996 support for EU membership has sunk below 50% in Germany, but, unlike in Britain, this decline in support has not led to a significant rise in the numbers of people opposing membership. German support for EU membership has evaporated most dramatically in the East which has witnessed a decline by almost sixty per-cent over the course of this decade.

The 1990s have witnessed a general decline in support for membership across Europe to below 50%. But both Britain and Germany deviate from the EU-wide average in opposite directions, although the difference is smaller in the German case where the most noticeable positive deviation from the European average is the lower number of opponents to EU membership (see fig.5.3). Among other large member states, French support fluctuates closely around the European average, exceeding it slightly during the 1980s and sinking below it during the 90s. Italian support, although declining in the 1990s, is consistently ahead of the EU average by between ten to fifteen percentage points which makes Italians are the strongest supporters of membership among the group of large EU countries.¹⁴²

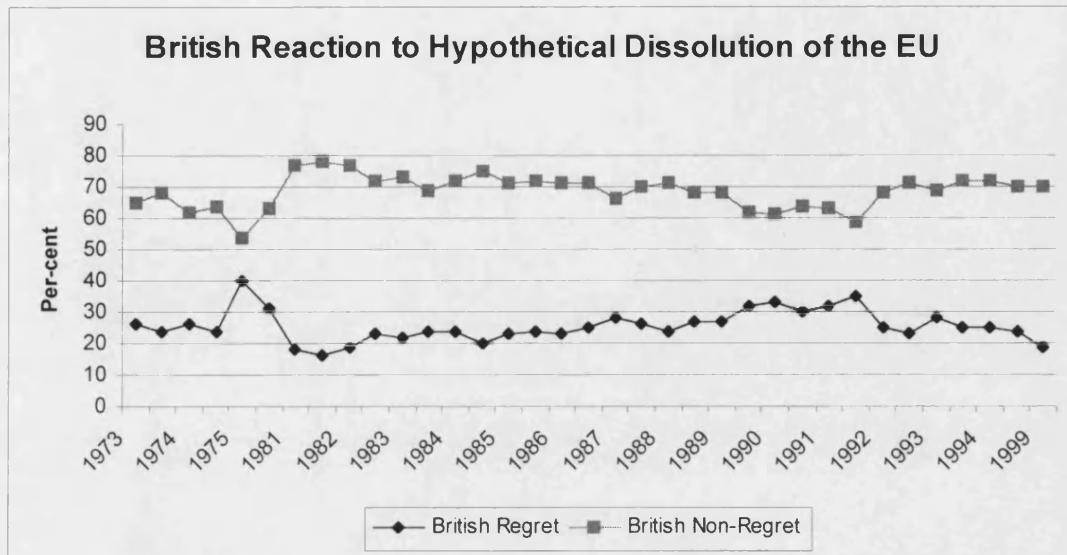
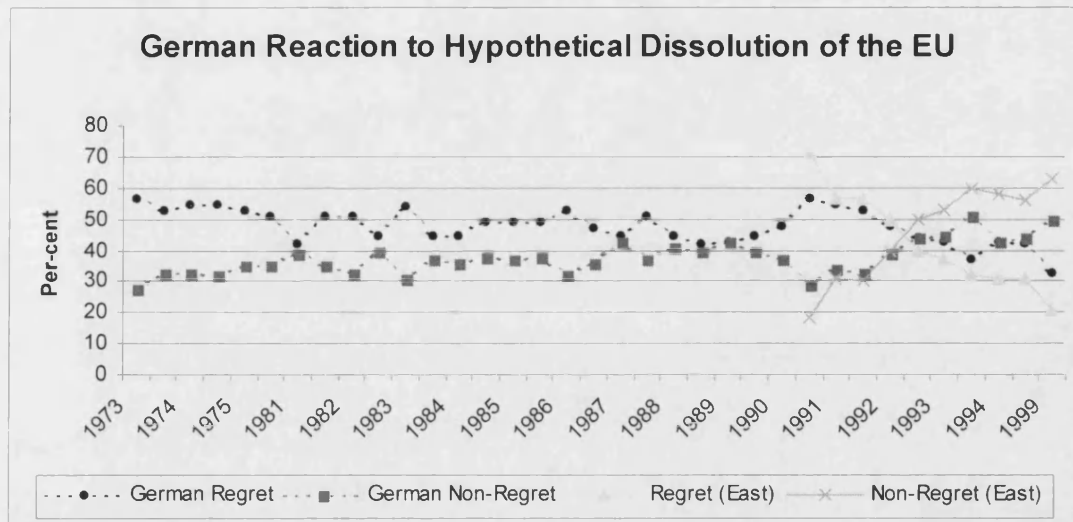
¹⁴² For long-term EU average and country trends see: Eurobarometer: Standard Eurobarometer no.50, (Brussels: European Commission, 1999), pp.27-29

Fig.5.3¹⁴³

A useful way to determine the underlying intensity of public support for EU membership is to cross-check the accuracy of these data with another Eurobarometer survey which Niedermayer considers a good reflection of public diffuse support towards European integration in general.¹⁴⁴ This time, respondents were requested to imagine they were told tomorrow that the EU had been scrapped. They were being asked whether this news would make them “very sorry”, “relieved” or whether they would react “indifferently”. The results are depicted in the graphs below (fig.5.4 and fig.5.5).

¹⁴³ *Ibid.*

¹⁴⁴ Niedermayer (91), *op. cit.*, p.329

Fig.5.4¹⁴⁵Fig.5.5¹⁴⁶

When extrapolating the strength of diffuse support for European integration from this set of data, the picture looks markedly different from the first Eurobarometer survey. Respondents expressing indifference or even relief at the hypothetical dissolution of the EU have been grouped in one graph (non-regret), since only respondents who regret the EU's dissolution can be considered committed in their support to the EU. Turning to British attitudes first, a consistent majority would be either indifferent or even relieved to hear that the EU had been scrapped. Only by the time of the late 1980s does the number of people reacting indifferently to this hypothetical news noticeably exceed those feeling relief. Even then roughly as many people would be

¹⁴⁵ Eurobarometer: Trends, *op. cit.*, pp.101-111, and subsequent issues.

¹⁴⁶ *Ibid.*, pp.101-111, and subsequent issues.

relieved as there are people who would regret hearing about the EU's demise. Most recently, the number of Britons expressing regret has fallen below 20%, while almost a quarter of Britons would be very relieved.¹⁴⁷

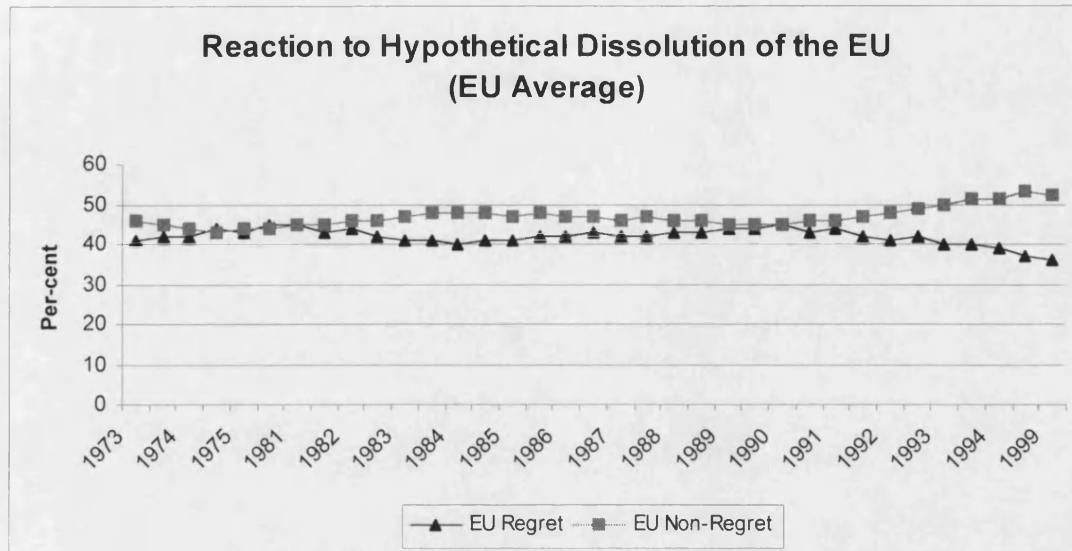
By contrast, the number of Germans feeling either relief or indifference has rarely exceeded the percentage of respondents who would feel very sorry if the EU ceased to exist, although this has changed in the second half of the 1990s. Recent years have witnessed a shift away from indifference about the EU's continued existence towards a noticeable increase in people expressing relief if the EU were scrapped. This trend is especially pronounced in Eastern Germany where as many people would be relieved as would feel very sorry (21%). Whereas in 1992 41% of Germans recorded their regret, 33% were indifferent, and 15% signalled relief about the imaginary dissolution of the EU, these numbers changed to 33%, 34% and 16% in 1998.¹⁴⁸

This relatively recent trend of increasing indifference, or even hostility, towards the EU is also reflected in data for the European average, whose levels of regret and non-regret had been roughly equally strong during the 70s and 80s. Again, Britain and German deviate from this average in opposite directions by recording consistently higher than average levels of regret (FRG) or non-regret (UK) over the entire time span. Among the other major member states, French and Italian opinion fluctuates closely around the European average, but during the course of the 1990s the number of Italians who would regret a dissolution of the EU has risen to more than ten percentage points above the European average.¹⁴⁹

¹⁴⁷ Eurobarometer no.50, *op. cit.*, p.B24

¹⁴⁸ *Ibid.*, p.B24

¹⁴⁹ For long-term EU average and country trends see: *Ibid.*, p.38, B17

Fig.5.6¹⁵⁰

An overall evaluation of the *first* Eurobarometer survey reveals that in both Britain and Germany diffuse support for EU membership remains volatile and has weakened over the last decade. This is particularly true for East Germany where the initial enthusiasm for the EU has disappeared rapidly. The hypothesis about relatively unsettled and hence superficial levels of public support for the EU is confirmed by the *second* Eurobarometer survey which measures the intensity of this support.¹⁵¹ There have been clear signs of a “renationalisation” of public opinion in most member states since the early 1990s whose most striking features are the emergence of strengthened opposition to the EU rather than indifference.¹⁵²

But what stands out are the *differences* in public attitudes between Britain and Germany. In the UK support for EU membership is consistently weaker and of lower intensity than in other large member states, whereas Germans support is stronger and more intense than on the European average. As suggested in chapters three and four, these differences in the level of diffuse EU support can to some extent be traced to the degree of élite consensus on European integration.¹⁵³ General élite support for EU membership is significantly lower in Britain than in Germany, Italy or France, and the cleavage among political parties and the media in the UK has resulted in continued

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, p.44

¹⁵² Oskar Niedermayer: “Trends and Contrasts” in Oskar Niedermayer and Richard Sinnott (eds.): *Public Opinion and Internationalised Governance*, (Oxford: Oxford University Press, 1995a), pp.69-71

¹⁵³ See: *Chapter 3*, p.107f, *Chapter 4*, p.159

and widespread political mobilisation both for and against European integration.¹⁵⁴ By contrast, Germany has one of the highest levels of élite support for European integration among the major member states.¹⁵⁵ The strong élite consensus among political parties and the media in favour of EU membership, and the lack of any significant counter-mobilisation, has left greater scope for an active legitimisation of the EU which is reflected in stronger German mass support for European integration.

While élite attitudes towards the EU contribute towards, and amplify, national variations in mass support for the EU, they do not fully explain the *sources* of these country-specific differences. Consequently, levels of both élite and mass support need to be analysed in terms of a more detailed discussion which disaggregates felt legitimacy into its three components, starting with the political regime of the EU.

5.3.2 Political Regime

While a distinction between the three different sub-categories of the political regime, namely constitutional philosophy, constitutional order and constitutional reality is again useful to make, there is no need to discuss at any length public attitudes towards the constitutional philosophy component. The last two chapters have shown the British and the German public almost unanimously endorse the abstract idea of democracy as a constitutional philosophy. A slightly smaller, but still overwhelming majority in both countries also considers democracy always to be the best form of government. It seems safe to assume that, at such a high level of generality, these beliefs can be extended to the European political system, although respondents were probably formulating their attitudes with member states in mind. One can therefore validly argue that even with regard to the EU, German and British citizens favour democracy as its central constitutional philosophy.

However, the first part of this chapter has also shown that democracy, or more specifically representative government, is not a central concept by which the EU is formally legitimised. This suggests that the German and British public favour a constitutional philosophy different from the one operating in the EU. This hypothesis

¹⁵⁴ Bernard Wessels, *op. cit.*, pp.140ff, 153

is confirmed by a range of surveys which indicate that German and the British citizens do not believe the EU's formal legitimacy conforms to their ideal of a representative democracy. In 1989 only 6% of Britons and 20% of Germans considered the way the EC worked "completely democratic", while 17% in Germany and 20% in the UK thought the EC was to a very little or no extent democratic.¹⁵⁶ Nonetheless, nearly half the respondents (UK: 46%, FRG: 51%) considered the EC to some extent democratic, so no definite conclusions can be reached on this evidence alone. Another survey from 1992 reveals that only 7% of British respondents (15% of Germans) felt that citizens had sufficient democratic influence in EU decision-making, while overwhelming majorities (UK: 84%, FRG: 69%) reached the opposite conclusion.¹⁵⁷

These findings are exacerbated by the fact that Europeans tend to have an inflated conception of the powers of the EP because they equate its functions and powers with those of national parliaments.¹⁵⁸ Despite the different wording in the two Eurobarometers above, there seems to be evidence for a disillusionment with the democratic quality of the EU between 1989 and 1992. Since public opinion on the role of the different European institutions also is rather uninformed, the extensive media coverage about the EU's institutional deficiencies in the wake of the Maastricht debate may have contributed to this increasingly critical assessment.¹⁵⁹

The extension of the EP's powers in the wake of the Maastricht and Amsterdam Treaties does not seem to have transformed public attitudes in any substantial way. A plurality of Germans and Britons still agree that the EP has insufficient control over the European Commission and EU officials in general.¹⁶⁰ However, attention must be drawn to the large number of respondents from both countries (more than a fifth throughout) who could not decide how to answer either of these questions which again indicates a lack of public knowledge about EU institutions.

¹⁵⁵ *Ibid.*, pp.141-43

¹⁵⁶ Eurobarometer: StandardEurobarometer no. 31 a, (Brussels: European Commission, 1989), p.B15

¹⁵⁷ Eurobarometer: StandardEurobarometer no.38, (Brussels: European Commission, 1992), p.B29

¹⁵⁸ Oskar Niedermayer and Richard Sinnott: "Democratic Legitimacy and the European Parliament", in: Oskar Niedermayer and Richard Sinnott (eds.): Public Opinion and Internationalised Governance, (Oxford: Oxford University Press, 1995), p.288-294

¹⁵⁹ *Ibid.*, pp.286-92

¹⁶⁰ Eurobarometer no.42, op. cit., p.B27

A closer look at some of the other Eurobarometer surveys reveals important country-specific differences with regard to the issue of democracy in Europe. 50% of Germans, but only a third of British respondents approved of the additional EP powers granted by the Maastricht Treaty (5% and 26% respectively disapproved). In summer 1999, 35% of Germans, compared with 28% of Britons, demanded greater powers for the EP.¹⁶¹ A cross-reference of these data with how respondents have answered related survey questions explains why the British are more reluctant to endorse more powers for the EP. The public's desired role for the EP depends considerably on how people feel about the EU in general. For instance, only 35% of those Europeans who feel their country has not benefited from EU membership wish to strengthen the powers of the EP, whereas 55% of respondents who believe EU membership has been beneficial wish to see a stronger Parliament. Similarly, 56% of Europeans who also feel their country's membership in the EU has been a good thing are in favour of more EP powers, but only 26% of those agree who think their country's membership has been bad.¹⁶² Since UK respondents are generally more critical regarding the value and the benefit of their country's membership in the EU, they tend to be less favourably inclined towards proposals to widen the competencies of the EP.

This does not yet sufficiently explain why Britons show nearly the same enthusiasm as Germans (FRG:73%, UK:70%) for the proposal that the President and the members of the European Commission should resign if they lose the support of the majority of MEPs. Clearly, both Britons and Germans are concerned about the lack of democratic accountability in the EU, and 90% and 83% respectively considered it very or fairly important to reform the way the EU works at the 1997 IGC.¹⁶³ Yet the desired solutions differ between respondents from the two countries. For example, barely a majority amongst Germans (51%) and only 45% of Britons are prepared to put the EP on an equal footing with the Council in all matters of EU legislation, taxation and expenditure.¹⁶⁴ Even Germans, therefore, seem to be less enthusiastic supporters of the EP when such support requires a relative loss of influence for the representatives from each member state in the Council. British opposition to supranational democracy is

¹⁶¹ Eurobarometer no.51, *op. cit.*, p.B61. However, 25% of Germans and 36% of Britons were unable to opine on the issue.

¹⁶² *Ibid.*, p.73

¹⁶³ Eurobarometer: British Public Opinion, *op. cit.*, p.24

¹⁶⁴ Eurobarometer: Standard Eurobarometer no.45, (Brussels: European Commission, 1996), p.B56f

more consistent, however. When asked to indicate their preferences for the voting procedure in the Council, a majority in the United Kingdom (53%) desires more unanimous decision-making with the possibility for member states to wield their veto. Amongst Germans, only 35% favour this option, whereas a slim majority of 51% argue for even greater use of qualified majority voting in the Council.¹⁶⁵

These survey results suggest the following interpretation. There is little diffuse support for the political regime of the EU, primarily because Britons and Germans are dissatisfied with its (lack of) democracy (see fig.5.8 below). But the analysis of chapters three and four suggests that the preferred solutions to the “democratic deficit” differ among member states. Germany’s formal legitimacy and national identity are “integration-gearred” because they can accommodate the diffusion of sovereignty to a supranational EU. Germans exhibit strong diffuse support for European integration in general, and they are therefore inclined to make the EP the central democratic institution of the Union. They are at least partially prepared to acknowledge that such a reform will reduce the influence of the Council and hence weaken the EU’s indirect legitimisation through the member states.

Their generally more euro-sceptic British neighbours are less keen on such a supranational solution to the “democratic deficit”. Democracy is primarily associated with Westminster, and the notion of the sovereignty of Parliament has played an important role in the formation of Britain’s national identity. Consequently, Britons generally prefer to democratise the EU by strengthening national chains of legitimisation, thus protecting parliamentary sovereignty. When given the direct choice British respondents prefer to give more powers to national parliaments (55%) rather than to the EP (29%). Only 36% of Germans would favour such a course of action.¹⁶⁶ Whereas Germans are ambiguous about surrendering their country’s right of veto in the Council (49% in favour, 42% opposed), Britons are adamantly opposed to losing the national veto by a margin of two to one.¹⁶⁷ A majority of Germans would support

¹⁶⁵ Eurobarometer: British Public Opinion, *op. cit.*, p.48

¹⁶⁶ *Ibid.*, p.28

¹⁶⁷ *Europeion no.11*, (Brussels: European Commission, 1997), p.36

the formation of a European government responsible to the EP (24% are opposed), but a plurality of Britons remains opposed to it (43%).¹⁶⁸

Again, Britain and Germany represent opposite ends in the range of attitudes among the larger member states (see fig.5.7).

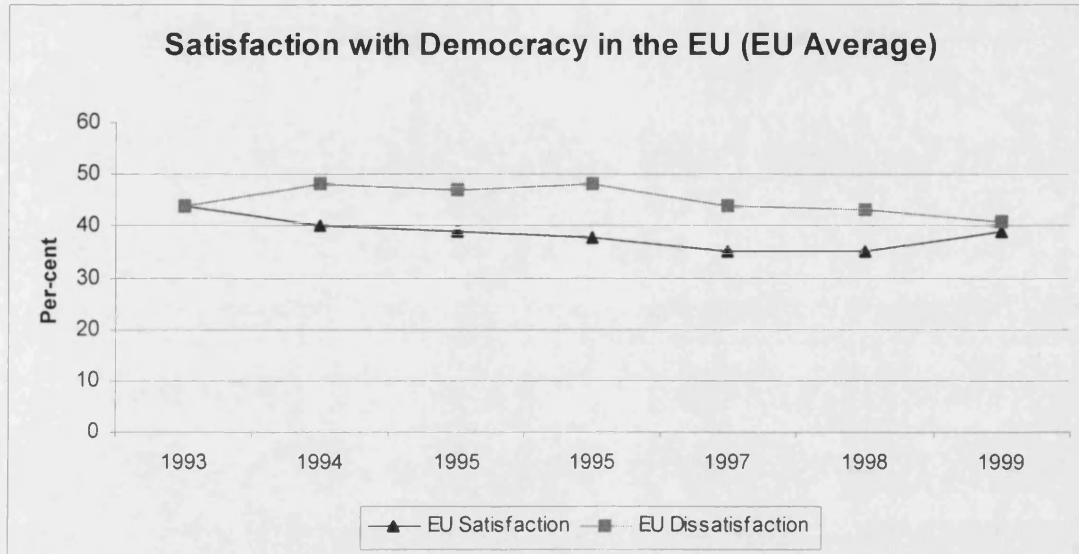


Fig.5.7¹⁶⁹

On average, Europeans are almost equally divided over their country's right of veto and on the question of whether more power should be given to national parliaments or the EP. While French opinion is close to the European average on the second question, there is an above-average concern with retaining the national veto in the Council, which probably reflects a country-specific concern with national sovereignty. Italy, on the other hand, is the member state with the largest majority in favour of empowering the EP rather than their national parliament, and 59% of Italians support more majority voting in the Council.¹⁷⁰ The Italian data can be best explained as an indirect function of low levels of felt legitimacy for the domestic political system.¹⁷¹ Only about a third of Italians are satisfied with the way democracy works in their country, significantly below the level in France (59%) and the European average (60%). Indeed, Italy is the only member state where citizens are more satisfied with European democracy (43%, just as in France) than with their national democratic

¹⁶⁸ Eurobarometer: *Standard Eurobarometer no.46*, (Brussels: European Commission, 1997), p.B26f

¹⁶⁹ For long-term EU average and country trends see: Eurobarometer no.50, *op. cit.*, pp.38ff, B17ff

¹⁷⁰ Eurobarometer: *British Public Opinion*, *op. cit.*, pp.28, 48

¹⁷¹ Beetham and Lord, *op. cit.*, p.86

institutions (35%).¹⁷² The corresponding data for British and German satisfaction with democracy in the EU are depicted below (fig.5.8).

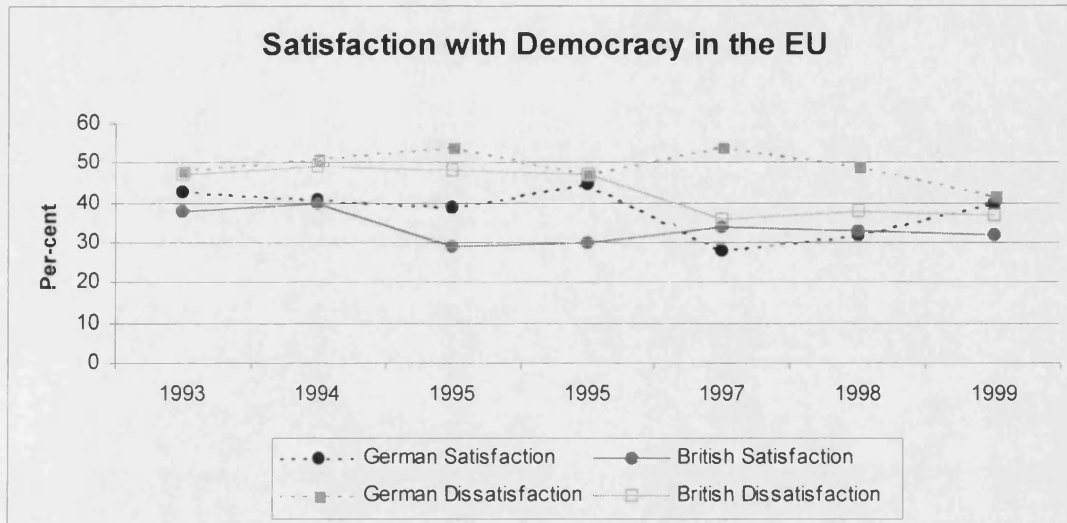


Fig.5.8¹⁷³

Two features are striking about these data which reaffirm the findings of the surveys discussed above. First, throughout the entire data series Germans and Britons are noticeably less satisfied with the way democracy works in the EU than they are with the way their national democracies work.¹⁷⁴ Second, the level of dissatisfaction almost consistently exceeds the level of satisfaction with European democracy among Germans and Britons. If this survey represented the summarised attitudes towards the political regime of the EU, then its felt legitimacy must be very weak. It is therefore worthwhile to examine a few qualitative indicators of diffuse regime support.

Anti-system parties which oppose EU membership exist in both countries, but only in Britain have they any political significance. In the 1999 EP elections the UK Independence Party won 7% of the vote and secured three seats in Strasbourg, while in Germany no anti-European party secured more than 4% of the national vote.¹⁷⁵ The UK also has the greatest polarisation of party attitudes towards the EU among the major member states, which is a reflection of the continued élite cleavage among Britain's political parties and the media.¹⁷⁶ This helps to explain why political

¹⁷² Eurobarometer no.51, *op. cit.*, p.B6f

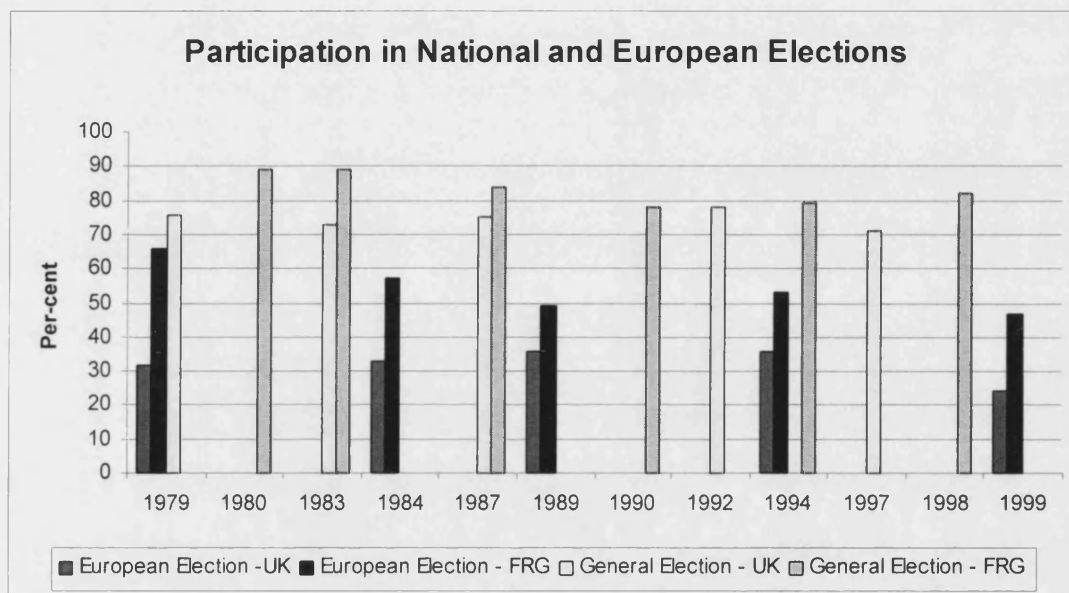
¹⁷³ Eurobarometer: *Standard Eurobarometer no.41*, (Brussels: European Commission, 1994), p.A11

¹⁷⁴ See *Chapter 3*, p.110 and *Chapter 4*, p.142

¹⁷⁵ Source: *House of Commons Library*

¹⁷⁶ Bernard Wessels, *op. cit.*, p.152f

mobilisation against further European integration helped the Conservatives win the largest share of the British vote in the 1999 EP elections. However, these results are based on a historically low voter turnout, as fig.5.9 illustrates below. European elections exhibit significantly and consistently lower voter participation than national general elections do, and turnout rates have also declined over time to reach a historic low in Britain and Germany in 1999. Less than half of the Germany electorate and less than a quarter of the British one exercised their right to vote at the last EP election. Similarly, average voter turnout across Europe declined from 63% in 1979 to just 49% in 1999, the lowest turnout ever.¹⁷⁷

Fig.5.9¹⁷⁸

Most people probably considered the elections irrelevant, which would explain why British and German respondents both consider their parties' programmes on national (rather than European) issues the most important factor in their decision how to vote.¹⁷⁹ Among people who decided not to vote 55% of Germans and 52% of Britons said they were not interested in European elections, although a majority in both countries acknowledges the importance of the EP's role in the EU (FRG: 60%, UK: 54%).¹⁸⁰ But few Germans and Britons feel they can rely on the EP to represent their interests (fig.5.10).

¹⁷⁷ Source: [House of Commons Library](#)

¹⁷⁸ Source: [House of Commons Library](#)

¹⁷⁹ Eurobarometer no.51, *op. cit.*, p.B56f

The number of Germans and Britons who feel they can rely on the EP or the Commission is on average between ten and twenty percentage points below the figure recorded for national governments and parliaments. It rarely exceeds 35% of respondents. It is particularly noteworthy that Germans tend to regard European institutions as even less reliable than Britons do, which is largely explained by the particular distrust displayed by East German respondents.¹⁸¹

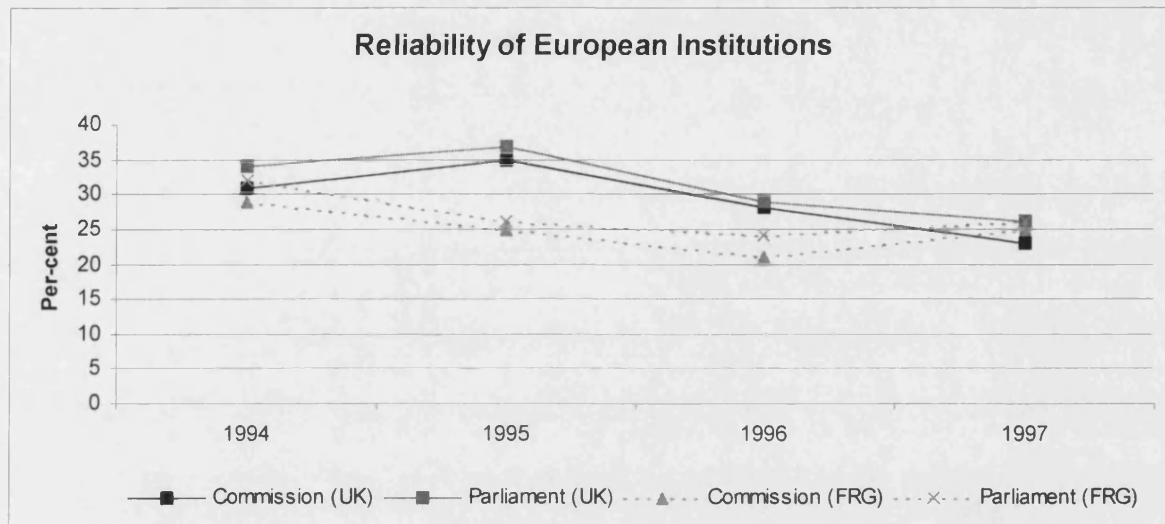


Fig.5.10¹⁸²

Do these quantitative and qualitative data signify a lack of diffuse support for the political regime of the EU? Three further factors have to be considered before this interpretation can be confirmed. First, it is sometimes argued that the protection of fundamental rights could become a second pillar next to democracy on which the Union's formal legitimacy rests. But making the ECJ a the guardian of a new Charter of Fundamental Rights will do little to bolster the felt legitimacy of the EU as a whole, at least in some member states. A plurality of Britons (36%), but only 27% of Germans, believe the ECJ has already too much rather than too little power. Consequently, 40% of Britons feel the court's right to rule on controversial cases should be reduced, whereas only 32% of Germans agree. These cross-national differences can be explained with reference to the discussion in chapters three and four. The UK has a less judicialised political culture than the Federal Republic and lacks a domestic constitutional court. ECJ judgements, and their interpretations by British courts, are therefore more likely to be perceived as (undesirable) challenges to

¹⁸⁰ *Ibid.*, p.B58f, B60

¹⁸¹ Eurobarometer no.42, *op. cit.*, p.B28, and subsequent issues.

the sovereign law-making powers of Parliament, as could be seen in the public controversy surrounding the Factortame case.

While Germans seem more supportive of the principle of judicial review by powerful courts, their support for the ECJ is far more conditional than the legitimacy accorded to the FCC. For example, a remarkable 56% of Germans and 58% of Britons agree strongly or to some extent with the statement that “if the ECJ started making a lot of decisions that most people disagree with, it might be better to do away with the Court altogether.”¹⁸³ While the Court is unlikely ever to become so insensitive to public opinion, making the ECJ the guardian over a European Charter of Rights will certainly increase public awareness of the court’s powers. Such a reform is also likely to confront the ECJ with more controversial issues to adjudicate, thus polarising public opinion about its role.

Second, it is important to return once more to the diagram illustrating satisfaction with the way democracy works in the EU. Just as in the previous two chapters, one must ascertain to which degree respondents were confused about the object of support they were interviewed about. Niedermayer and Sinnott fear that respondents may inadvertently have assessed how democracy works in general, thus confounding the national with the European political arena.¹⁸⁴ Fluctuations in the level of satisfaction with European democracy must therefore be compared with similar fluctuations at the national level. Such a comparison yields no obvious correspondence between German and British evaluations of European democracy and their own national democracies.¹⁸⁵

To recall the results of the last two chapters: British satisfaction remains stable over the first three years for which the surveys overlap, before leaping upwards in 1998. Its German equivalent is characterised by a gradual decline during the 1990s before rising sharply in 1999. It follows that the results of neither of these two domestic surveys correspond with the data collected for the European level. There is little sign that the survey question has elicited evaluations of national rather than European democracy.

¹⁸² *Ibid.*, p.B28, and subsequent issues.

¹⁸³ Eurobarometer: *Standard Eurobarometer no.40*, (Brussels: European Commission, 1993), p.A74f

¹⁸⁴ Niedermayer and Sinnott, *op. cit.*, p.286

Third, the wording of the question about satisfaction with democracy in the EU (“how democracy *works*”) may have caused answers to be influenced by specific output support for the political authorities of the EU.¹⁸⁶

5.3.3 Political Authorities

A possible influence on satisfaction levels from considerations of specific output support can be best revealed by contrasting satisfaction with EU democracy with a Eurobarometer survey recording the extent to which respondents feel their own country has benefited from membership in the EU. First the British result (fig.5.11). As one would expect, there seems to be some correlation between domestic and European specific output support. Citizens who believe Britain has benefited from its membership in the EU begin to outnumber their more sceptical compatriots towards the end of the economic boom in the second half of the 1980s, only for this trend to be reversed with the onset of the domestic recession of the early nineties. Of late, EU membership is again perceived increasingly beneficial up to a point where both opinions are equally represented in the British public.

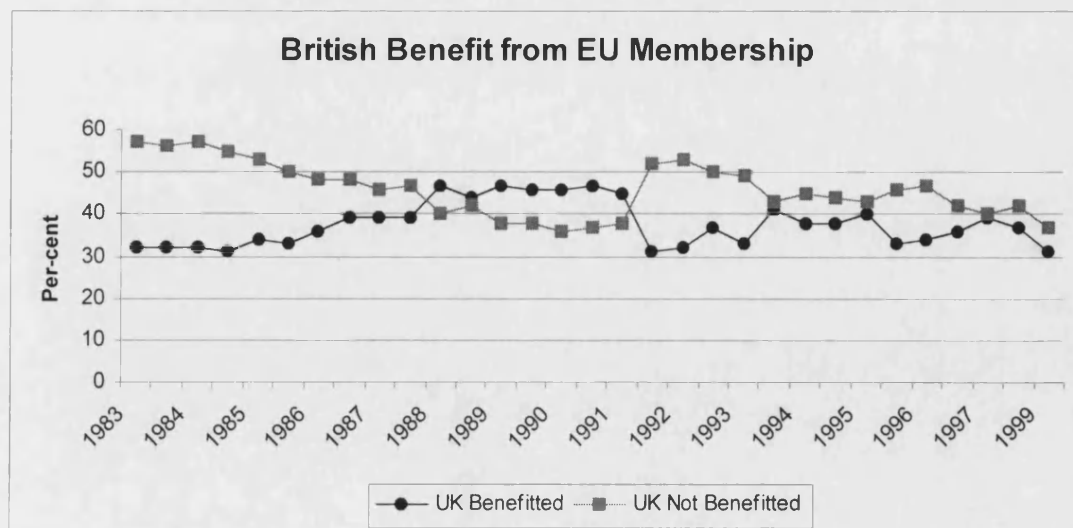


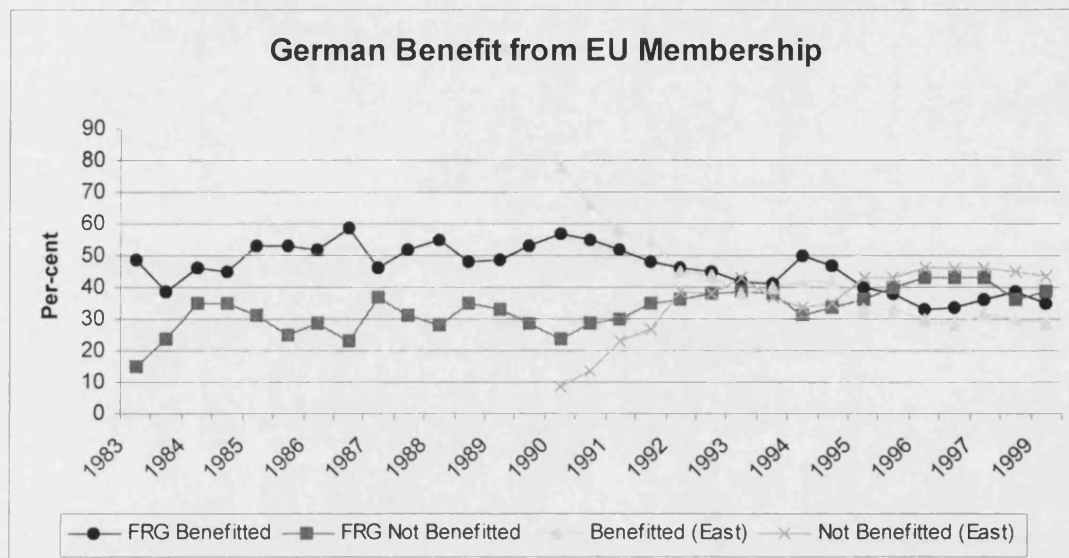
Fig.5.11¹⁸⁷

¹⁸⁵ Compare with Chapter 3, p.110 and Chapter 4, p.142

¹⁸⁶ Chapter 3, p.109

¹⁸⁷ Eurobarometer: Trends, *op. cit.*, p.96f, and subsequent issues.

However, there seems to be no direct correspondence with the graph depicting British satisfaction with democracy in the EU. The ten per-cent decline in satisfaction levels between 1994 and 1995 precedes a similar decline in the number of Britons who perceive membership as beneficial in the second half of 1995. That means the latter cannot be causally responsible for the decline in satisfaction levels. What about the corresponding German data (fig.5.12)?

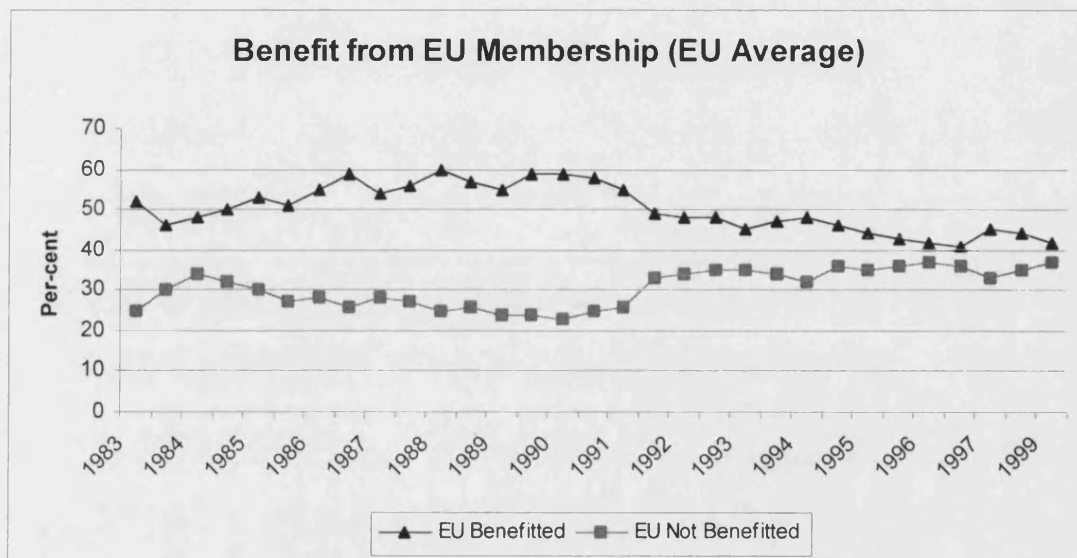
Fig.5.12¹⁸⁸

Here the influence of domestic factors in the evaluation of German benefits from membership is most pronounced in the Eastern part of the country. Starting with inflated expectations about how beneficial the rapidly negotiated accession to full EU membership would be, East German opinion has swung violently towards pessimism as its economic situation gradually deteriorated. Over the period from the beginning of 1990 to the end of 1993 the number of East Germans who considered EU membership beneficial has declined from 78% to 38%.¹⁸⁹ The temporary surge in beneficial evaluations around the year 1994 again coincides with an improvement of the economic situation, particularly in Western Germany. This short-lived period just precedes, and could therefore have influenced, a similar temporary rise in German satisfaction with democracy in the EU at around 1995/96.

A direct comparison of German and British perceptions of the benefits from EU membership again reveals important country-specific differences (see fig.5.13). Until

¹⁸⁸ *Ibid.*, p.91f, and subsequent issues.

the mid-1990s German output support is on balance positive and consistently stronger than in Britain where in most years a plurality of respondents believed the UK had not benefited from membership. Also, fluctuations in the level of output support seem to follow different cycles in the two countries. Compared with other large member states, Britain and (to a lesser extent) Germany deviate from the average in opposite directions, although the rapid decline in East German output support pushes the level for the whole of Germany below the European average for the first time in the mid-1990s. French attitudes are marginally above the European average during the 80s and fall slightly below the average during the early 90s, whereas Italian output support gradually declines towards the average after having exceeded it by up to fifteen percentage points during the 1980s.¹⁹⁰

Fig.5.13¹⁹¹

One possible explanation for the differences in output support between Britain and Germany emphasises distinct structural and cultural factors in the UK, such as the centralisation of powers on the Government and the absence of a consensual, gradualist policy-making style. These factors enable a comparatively swift and comprehensive implementation of new political ideas and belief systems, as for example the neo-liberalism of the Thatcher years. As a consequence, “the UK may be

¹⁸⁹ *Ibid.*, p.92

¹⁹⁰ For long-term EU average and country trends see: Eurobarometer no.50, *op. cit.*, pp.27-29

¹⁹¹ *Ibid.*

institutionally predisposed to holding beliefs and values out of synchronisation with its EU partners”.¹⁹²

Such differences in economic ideology have caused variations in specific support for particular EU policies right from the beginning of Britain’s membership. The best known example is of course the CAP whose protectionist and producer-oriented policies contrast with Britain’s policy heritage and preference for lower consumer prices and a more market-based approach to agriculture.¹⁹³ The CAP still absorbs around 42% of the entire EU budget, making it by far the biggest single spending programme. But the UK derives comparatively little financial benefit from this policy because Britain’s agricultural industry represents a much smaller share of GDP and employment than in Germany, France or the Mediterranean countries. Widespread British hostility towards the CAP has fuelled a long-running political dispute over the size of national contributions to the EU budgets, culminating in the budget rebate negotiated in 1984, and has negatively affected public perceptions of the benefits of EU membership.¹⁹⁴ Among the large member states, the UK ranks as the country with the lowest level of public support for the CAP, and 54% of Britons feel the EU “is doing a bad job in the area of agriculture.”¹⁹⁵ France, Germany and Italy, on the other hand, have recorded above-average levels of public support for the CAP.

More recently, EMU stands out as the major policy innovation of the late 1990s. On the eve of its commencement, German public scepticism towards the project was finally receding, not least in response to an extended period of active élite legitimisation of the Single Currency. A majority of Germans support the introduction of the EURO (57%), while 33% still remain opposed.¹⁹⁶ German support for the Single Currency does not exceed the EU average, partly because the *Deutschmark*, which symbolises Germany’s post-war economic recovery, has been exchanged against a new currency without proven track record. EMU support in France (65%) is close to the European average (61%), but Italians are most committed to the Single Currency (84%) among the big member states, arguably reflecting the weak and inflation-prone performance

¹⁹² Armstrong and Bulmer (95), *op. cit.*, p.258

¹⁹³ Bulmer (92), *op. cit.*, p.20

¹⁹⁴ Nugent (92), *op. cit.*, pp.187, 191

¹⁹⁵ Eurobarometer: British Public Opinion, *op. cit.*, pp.16, 29

¹⁹⁶ Eurobarometer no.51, *op. cit.*, p.B42

of the Italian *lira*. The UK, which has an opt-out from membership in the single currency, again deviates negatively from the European trend. The lack of economic convergence with the *Euro-zone*, a perception of the national currency as a symbol of economic sovereignty and the persisting élite cleavage over both the EURO and European integration all contribute towards strong public opposition to EMU (55%), although the number of supporters (28%) has fluctuated in the last years.¹⁹⁷

Another well-known EU policy is the Single European Market which came into existence at the beginning of 1993. Its emphasis on economic liberalisation and deregulation has been much closer aligned with Britain's domestic policy ethos, and British public opinion has been more positively oriented towards the SEM than French or Italian publics. The launch of the SEM was accompanied by a surge in the positive British evaluation of EU membership, and for a number of years approval of the Single Market was even stronger in Britain than in Germany.¹⁹⁸ But the number of respondents considering the Single Market a good thing has declined in both countries in the years up to 1992, especially again in East Germany, and it did not exceed 40% in either country in the two polls conducted in the "recessionist" year 1992.

The roughly cyclical fluctuations in specific support and the build-up of expectations towards, and subsequent disappointment with, the Maastricht Treaty also help to explain variation in specific support for the incumbents of political offices. The European Commission as the most prominent institution of the EU has enjoyed a peak of favourable public impression in 1990 in both Britain (54%) and Germany (50%). Yet the number of people holding such a positive opinion about the Commission had dwindled to between only a quarter and a third of the British and German public in 1993.¹⁹⁹

Country-specific fluctuations in the levels of support, which can also be observed in figs.5.11 and 5.12, are probably best explained in terms of distinct domestic economic cycles. This hypothesis is confirmed by revisiting the "feel-good factor" surveys from chapters three and four. In the 1980s, public economic optimism about the year ahead

¹⁹⁷ *Ibid.*, p.B42

¹⁹⁸ Eurobarometer: Trends, *op. cit.*, pp.96f, 199, 204

¹⁹⁹ *Ibid.*, pp.221-26

rebounds earlier and less strongly in Germany (1983) than in the UK (1985), whereas the reverse timing can be observed after the economic recession of the early 1990s.²⁰⁰ Whereas Britons regain their economic optimism during 1996, the German feel-good factor remains subdued right up to 1998. In 1997 Eurobarometer asked citizens for the last time whether the Single Market made them feel hopeful or fearful. Reflecting the different positions in their respective economic cycle, British respondents were more upbeat than their German neighbours, with 51% (FRG: 42%) either very or rather hopeful and only 36% (FRG: 41%) rather or very fearful.

5.3.4 Political Community

Public diffuse support for the European political community can be analysed with the help of a whole range of survey indicators. One way of measuring the level of support is to examine the degree of public attachment towards the EU.²⁰¹ A series of Eurobarometer surveys compares national levels of attachment towards the various layers of government (town, region, country, EU). When respondents were asked to rank their attachments, Europe scored the lowest preference in the EU average. In all member states “country” and “town” were either first or second preference among at least two-thirds of respondents. While in Germany a plurality of people chose “town” ahead of “country” as their first preference, most Britons felt primarily attached to their country, followed by region and town.²⁰² When a similar Eurobarometer survey on attachment was conducted in 1996, the situation had hardly changed. 86% of Germans and 87% of Britons felt very or fairly attached to their own country, but a clear majority of Germans (56%) and Britons (68%) felt not very, or not at all attached to the EU.²⁰³

Closely related to attachment is the crucial question of trust in the people that make up one’s political community. Based on a wealth of statistical data, Niedermayer has devised a trust scale ranging from 0 (no trust) to 3 (complete trust) with 1.5 denoting the mid-point above which, on average, people within a political community can be

²⁰⁰ *Ibid.*, pp.229-234

²⁰¹ Sophie Duchesne and André-Paul Frogner: “Is there a European Identity?”, in: Oskar Niedermayer and Richard Sinnott (eds.): *Public Opinion and Internationalised Governance*, (Oxford: Oxford University Press, 1995), p.195

²⁰² *Ibid.*, p.195-97

said to trust each other.²⁰⁴ Based on the nine member states that had joined the EC prior to its Southern enlargement, the study revealed an average level of trust in the respondents' own people of 2.39 compared with an overall level of mutual trust towards the people of other EC states reaching 1.75 in 1990.²⁰⁵ In that year both Germans and Britain displayed a mean level of trust in other Europeans of 1.8.

Interestingly, EC-wide trust in other Europeans seems to have increased steadily from a rather low point of 1.55 in 1976 that came within a whisker of the lower threshold at which mistrust prevails over trust. Niedermayer concludes that increasing levels of mutual trust reveal an emerging, but weak sense of community among the peoples of the European Community. Yet, this conclusion is in need of some qualification, as he himself acknowledges.²⁰⁶ The data available to him are too old to take account of the (negative) public reaction to the Maastricht Treaty, and there is little evidence of a generation gap in attitudes, whose existence might have been indicative of future continued improvements in the levels of mutual trust.²⁰⁷

Duchesne and Frogner even diagnose a decline in European identity, measured in terms of how often it occurred to respondents that they were European citizens as well as nationals of their own country. Over the course of the 1980s the number of Germans to whom it occurred "sometimes" or "often" that they were citizens of Europe declined, and the same happened in Britain between 1988 and 1991. On the other hand, the proportion of Germans who "never" consider themselves European citizens rose from 31% in 1982 to a remarkable 58% in 1992, while consistently more than 60% of Britons lacked a feeling of European citizenship.²⁰⁸ Throughout the years, the level of European identity is by far the lowest of all the major Eurobarometer indicators of EU support discussed in this chapter.²⁰⁹ Duchesne and Frogner argue

²⁰³ Eurobarometer: Standard Eurobarometer no.44, (Brussels: European Commission, 1996), pp.B92-94

²⁰⁴ Oskar Niedermayer: "Trust and Sense of Community", in: Oskar Niedermayer and Richard Sinnott (eds.): Public Opinion and Internationalised Governance, (Oxford: Oxford University Press, 1995b), p.232

²⁰⁵ Ibid., p.237

²⁰⁶ Ibid., p.244

²⁰⁷ Ibid., p.241

²⁰⁸ Duchesne and Frogner, op. cit., p.199

²⁰⁹ Ibid., p.198

that these results disprove the widespread assumption that the sense of European identity depends on, and increases with, the length of EU membership.²¹⁰

Statistical evidence for the hypothesis that the emergence of a European identity depends on generational factors is also contradictory. With increasing age, respondents are more likely to identify as nationals only, and fewer elderly respondents feel British or German first and European second.²¹¹ However, Duchesne and Frogner conclude from their study of the period 1983-91 that “age is not perceptibly related to feelings about European identity” and belongingness.²¹² Indeed, even in recent surveys the number of people who feel primarily or even exclusively European remains small right across the different age groups.²¹³ Moreover, the temporal surge in *Europeanness* across member states in the wake of the Maastricht debate in 1991 suggests that answers were to some degree affected merely by the amount of press coverage, thus overstating the degree of genuine affective feelings of being European.²¹⁴

Although Britons and Germans, just like the citizens of most other member states, lack a clear sense of European identity, there are once again important country-specific differences worth noting. In the 1999 Eurobarometer survey on national and European identity, 46% of Germans identified themselves only with their own nationality, compared to 62% of Britons. The contrast becomes even stronger when Eastern and Western Germany are counted separately because the proportion of respondents who feel exclusively German is far higher in Eastern Germany (57%) than in the West (43%). While the West German result is identical to the European average, the French (35%) and particularly the Italians (29%) have an below-average propensity to identify themselves exclusively with their own nationality.²¹⁵

Since the legitimacy of the EU is perceived from the domestic context of each member state, the above differences in identification with Europe must be analysed from the perspective of Britain’s and Germany’s national identity as discussed in

²¹⁰ *Ibid.*, p.201

²¹¹ Eurobarometer no.50, *op. cit.*, p.B39

²¹² Duchesne and Frogner, *op. cit.*, pp.210-213

²¹³ Eurobarometer no.50, *op. cit.*, p.B40

²¹⁴ *Ibid.*, p.201

chapters three and four. The two key factors are the strength of national identity or pride and its compatibility with a European identity. As chapter four argued, for historical reasons levels of national pride are low in Germany, and its post-war national identity has incorporated a European dimension which facilitates the emergence of a European identity in the FRG. However, the weaker socialisation into this post-war identity makes East Germans less likely than their Western compatriots to subscribe to a “post-national” German identity, which is reflected in a less idealistic commitment to the EU and higher levels of national pride.²¹⁶

In the UK, national identity has historically been defined against the *hostile Other* and is partly based on the (con-)fusion between parliamentary and national sovereignty. Consequently, Britain’s national identity cannot easily accommodate identification with the EU which is perceived as threatening rather than complementing “Britishness”. Despite a renaissance of pre-British identities and ethnic as well as generational change, levels of national pride remain high and the traditional sense of British identity still resonates strongly.²¹⁷ For example, only 3% of Scots and 5% of Welsh citizens identify *least* with Britain, but 31% and 24% respectively identify *least* with the EU. Positive identification with the EU and the European flag is even lower in Scotland and Wales than it is in England.²¹⁸ Britons as a whole feel no closer to fellow Europeans from the Continent than to people from the Commonwealth, according to a survey quoted by Nugent.²¹⁹ Interestingly, there is evidence for an above-(EU)average correlation between party identification and Europeanness which suggests that Britain’s élite cleavage on the EU, and the polarised political mobilisation it produces, may contribute to lower identification with Europe in the UK.²²⁰

Statistical research by Duchesne and Frogner confirms the hypothesis that the relationship between national and European identity differs among member states. They detect a positive relationship between a *lack* of national pride and feeling European which would explain higher levels of identification with Europe in Western

²¹⁵ Eurobarometer no.50, *op. cit.*, p.B39

²¹⁶ See: *Chapter 4*, pp.161ff

²¹⁷ See: *Chapter 3*, pp.120ff

²¹⁸ MORI (9/99), *op. cit.*, p.3

²¹⁹ Nugent (92), *op. cit.*, p.193

Germany and Italy, where more people lack national pride than in Eastern Germany and in Britain.²²¹ But even among countries where national pride is strong, such as France or Britain, its compatibility with a supranational identity varies. In Britain the variables measuring national pride and Europeanness are negatively related.²²² This explains why 42% of Germans, but more than two-thirds of Britons (68%), fear for the loss of their national identity and culture if European integration continues.²²³ Another 28% of Germans and 37% of Britons even fear that their own country will not exist any longer if European integration continues.²²⁴

By contrast, the variables for national pride and European identity exhibit a positive correlation in France.²²⁵ Post-war French national identity has sought to combine strong and widespread national pride with a commitment to maintaining *la gloire de la France* through Europe.²²⁶ However, as the EU becomes increasingly supranational and begins to challenge the sovereignty of its member states, some conflicts between the two levels of identification begin to arise. Despite slightly higher levels of Europeanness than in Germany, French respondents are more concerned than Germans about the loss of their national identity (49%) and language (54%, FRG: 41%).²²⁷

Another factor hindering higher levels of attachment to, and identification with the EU may be the cultural barriers between its member states, most clearly reflected in the great number of different languages spoken within the EU. Once again, the data vary considerably between member states. Almost a third of the German population (32%) is unable to converse in any foreign language, but that number roughly doubles in the cases of France (55%), the UK and Italy (each 65%).²²⁸ Yet the failure of a sense of political community to emerge in the EU is not entirely to blame on the linguistic incompetence amongst its citizens. The lack of an accessible and deeply rooted cultural identity seems to be equally important. In 1999, 44% of Germans and 57% of

²²⁰ Duchesne and Frogner, *op. cit.*, p.216

²²¹ *Ibid.*, p.204, 222f

²²² *Ibid.*, p.208

²²³ Eurobarometer no.51, *op. cit.*, p.B31

²²⁴ Eurobarometer: *Standard Eurobarometer no.47*, (Brussels: European Commission, 1997), p.B28f

²²⁵ Duchesne and Frogner, *op. cit.*, p.203

²²⁶ Beetham and Lord, *op. cit.*, p.50

²²⁷ Eurobarometer no.51, *op. cit.*, p.B31

²²⁸ Eurobarometer no.41, *op. cit.*, p.A39

Britons thought there was no European cultural identity shared by all citizens of the EU (France: 53%, Italy: 45%).²²⁹ Interestingly, answers to this survey were hardly influenced by generational factors, thus ruling out the interpretation that younger people are much more likely to perceive a common European identity than their elders.²³⁰

By increasing the EU's cultural and linguistic diversity, the forthcoming Eastern enlargement may dilute, rather than strengthen, the public perception of a common identity in Europe. When calculating the average level of support for the admission of all twelve applicant countries, 44% of Britons but only 34% of Germans support enlargement (29% and 22% respectively "do not know").²³¹ These differences once again reflect country-specific factors. Greater geographical proximity to the applicant countries makes Germans particularly worried about rising unemployment as a result of enlargement (46%), especially in East Germany (58%) where support for enlargement is also lower than in the West. Britons, on the other hand, are more concerned about their country losing influence within an enlarged EU (51%), possibly reflecting a fear about the likely demise of the national veto as a result of enlargement.²³² Finally, respondents from both countries worry equally about the loss of EU funds to their own country (UK: 49%, FRG: 51%) and the need for further reform of EU institutions (UK: 54%, FRG: 49%).

5.4 Conclusion: The Legitimacy Deficit of the European Union

This chapter has shown how the formal and felt legitimacy of the EU is contingent upon the member states from whose perspective it is evaluated. The first part has demonstrated that the formal legitimacy of the EU has a much better constitutional fit with Germany than with Britain which has implications for the compatibility of national constitutional orders with European integration. Despite an on-going dispute about the competencies of the FCC, especially with respect to the core of the Basic Law, Germany's formal legitimacy can accommodate the diffusion of sovereignty to a

²²⁹ Eurobarometer no.50, *op. cit.*, p.B41

²³⁰ *Ibid.*, p.B41

²³¹ *Ibid.*, p.89 These figures disguise large variations in support for enlargement to particular countries. For details, see: *Ibid.*, p.B62

²³² *Ibid.*, p.B59

supranational EU. By contrast, Britain's constitutional doctrine of parliamentary sovereignty is at a fundamental level incompatible with the formal legitimacy of the EU.

The different constitutional impact of EU membership also shapes national approaches to the problem that the EU has only partially adopted the legitimising principle of representative government. Democratic legitimation lies at the core of Britain's and Germany's formal legitimacy and enjoys near-unanimous felt legitimacy across Europe. Whereas from a British constitutional perspective, democratic legitimacy for the EU must be provided primarily through the member states, German courts have argued that the EU rests on a dual legitimacy, opening the possibility of a democratic legitimation at the European level.

These differences are equally reflected at the level of felt legitimacy where for all modes and objects of support British levels of support for the EU are almost consistently lower than in Germany. This has been amplified by the prevailing élite cleavage in the UK where political parties and the media continue to mobilise mass opinion both in favour and against European integration. By contrast, high levels of élite support for the EU, which are reflected in a broad political consensus among parties and the media, have facilitated the active legitimation of the EU in the Federal Republic. However, the *origins* of country-specific variations in both élite and mass support for the EU can only be explained by analysing the disaggregated components of felt legitimacy.

Diffuse support for the *political regime* is low among both Britons and Germans because they consider the EU undemocratic and feel they cannot rely on its institutions to represent their interests. But their preferred solutions to this problem differ. Germans are willing to contemplate further institutional integration with the aim of strengthening the EU's own sources of democratic legitimacy. Widespread support for empowering the EP is not constrained by a fusion of democracy with parliamentary sovereignty, as in the UK. Britons oppose strengthening the EP at the expense of the Council and instead prefer to give more powers to national parliaments.

Specific support for the *political authorities* fluctuates to a considerable extent in line with the distinct economic cycles in both countries and as a reflection of national policy preferences. British support for the Single Market is sometimes even stronger than in the Federal Republic and has temporarily raised the perception of EU membership as beneficial to the UK. However, widespread British opposition to some EU policies, such as the CAP or EMU, have meant that specific output support is on average lower in the UK than in Germany.

Diffuse support for the *political community* is also weaker in the UK than in the FRG. High levels of national pride and a strong national identity which is less compatible with European integration than in Germany mean that significantly fewer Britons than Germans identify themselves as (at least partly) European. Many Britons perceive the EU as a threat to their national identity, and two-thirds of the population cannot speak any other European languages. By contrast, Germany's post-war national identity is partly built on a normative commitment to European integration, and Germans are more likely than Britons to speak other EU languages and perceive a European cultural identity.

Germany and Britain have been particularly interesting and suitable case studies to illustrate one of the central arguments of this thesis - that the legitimacy of the EU is contingent on its member states. Both countries have a well-legitimised domestic political system, but their distinct national perspectives on the formal and felt legitimacy of the EU represent opposite deviations from the European average. This is because Germany's formal and felt legitimacy is highly compatible with EU membership, whereas Britain's compatibility is lower than in any other large member state. France's formal and felt legitimacy shows a medium degree of compatibility close to the European average. Italy represents an exceptional case because its domestic political system suffers from a severe legitimacy deficit of its own. This has caused above-average levels of support for the EU, despite the below-average constitutional fit of Italy's formal legitimacy with EU membership. Although the unusual case of Italy confirms the central argument of this thesis, the choice of Britain and Germany as case studies was intended to demonstrate that the formal and felt

legitimacy of the EU can vary considerably even among countries which are themselves both well legitimised.

However, this chapter has also shown that the EU suffers from a legitimacy deficit, despite country-specific differences in its *nature* and *severity*, relative to the well-legitimised domestic political systems of *both* Britain and Germany. At the level of formal legitimacy, lingering or dormant incompatibilities might one day erupt into larger constitutional conflicts. Even if the EU should win such a hypothetical competition for constitutional supremacy, high diffuse support for national constitutional orders could mean that such an outcome will enjoy little felt legitimacy. In cases of constitutional conflict between member states and the EU public attachment to the former is likely to be stronger.

The weakest component of felt legitimacy is the underdeveloped *sense of political community* amongst the peoples of the EU. Neither Britons nor Germans feel particularly attached to the EU or identify themselves as Europeans. There is much less trust amongst the people from different member states than there is within countries. This is at least partly caused by the lack of a common cultural identity and significant linguistic barriers across Europe.

Both Germans and Britons support a legitimising ideology, representative democracy, which differs from the constitutional philosophy and constitutional order of EU. This difference does not remain unnoticed - hence the very low diffuse support for the political regime of the EU.²³³ The weakness of *diffuse support* for the EU means that its felt legitimacy depends heavily on public attitudes about the benefits from EU policies and membership in general. In the long-run, a high level of specific support will spill over into diffuse regime support, thus enhancing the felt legitimacy of the political regime. For much of the 1990s this spill-over was suspended because a plurality of Germans and Britons considered EU membership unbeneficial for their country. To conclude, the EU suffers from a legitimacy deficit relative to the political systems of Britain and Germany, but the *nature* and *severity* of this deficit differs considerably between these two countries.

²³³ Niedermayer and Sinnott, *op. cit.*, p.286

Chapter Six: Strategies for Solving the Legitimacy Deficit of the EU

6.1 Introduction

The thesis opened by presenting two research questions. At the end of the preceding chapter, the first research question - whether the EU suffers from a legitimacy deficit - has been answered in the affirmative and the precise nature of this deficit was defined. That leaves the second question to be answered: Is the legitimacy deficit susceptible of resolution?

Addressing this question shifts the emphasis from analysing *legitimacy* to assessing the potential for political leadership to influence the dynamics of *legitimation*.¹ Just as the first chapter discussed different *diagnoses* of the EU's legitimacy deficit, this chapter examines the legitimation potential of five possible *remedial* strategies which Europe's political élites could pursue (containment, constitutionalism, incrementalism, new governance and communitarianism).² These strategies vary widely in their solutions and target different components of the dual concept of legitimacy. The diagram below illustrates how the five remedial strategies relate to each other and to the dual concept of legitimacy (fig. 6.1).

The chapter offers two criteria, a *pertinence* and a *feasibility* criterion, to provide benchmarks for measuring the potential for success of different strategies aimed at remedying the legitimacy deficit. The pertinence criterion assesses whether remedial strategies adequately address the exact nature of the legitimacy deficit. Using the dual concept of legitimacy, the last chapter diagnosed that diffuse support for the EU's political community is the weakest component of legitimacy. On average, nearly every second European does not feel any *sense of community* with the EU, either *social* or *political*. This lack of a European identity is the greatest obstacle to overcoming the legitimacy deficit, ranking even above low support for the EU's

¹ See: Chapter 2, pp.82ff

² These broadly correspond with the five different academic approaches to analysing the EU's legitimacy discussed in the first chapter.

political regime. The pertinence criterion for any successful remedial strategy must therefore be its ability to enhance diffuse support for Europe's political community.

That does not require remedial strategies to address the lack of a European identity directly, as communitarianism does. Constitutionalist and incrementalists both claim that their respective approaches (institutionalism and functionalism) generate sufficient felt legitimacy within *other* components of the dual concept to spill over into a sense of political community. This chapter evaluates whether there can be such indirect functionalist or institutionalist spill-overs from output performance or institutional engineering, or whether the problem requires straightforward identity-building.

The pertinence criterion must also take account of the country-specific nature of the legitimacy deficit. Although there is some normative consensus across Europe about what constitutes a legitimate political system (for instance, that it must conform to the principles of representative democracy), member states often adopt quite different views of how the political regime, the political community and the political authorities should be organised in order to enjoy felt legitimacy. Potential solutions must therefore be designed with particular member states in mind, while ensuring that remedies for one member state do not aggravate the legitimacy deficit in others.

The feasibility criterion evaluates the extent to which the proposed remedies are supported by the political élites in Brussels and the member states. The feasibility criterion recognises the importance of the two-fold role of political élites for the legitimisation of the EU. First, the value of a particular reform strategy will be greatly diminished if it is capable of solving the legitimacy deficit in theory, but is unlikely ever to be acceptable to the political actors who alone have the power to implement it. Second, political élites play an important role in mobilising public support for a political system.³ The legitimacy deficit cannot be remedied unless political élites pursue active legitimisation strategies. Because the EU depends on legitimacy, political élites have to make an effort to secure it. If a remedial strategy does not enjoy the

³ See: [Chapter 2](#), pp.82ff

broad backing of Europe's political élites, it will fail the feasibility criterion for solving the legitimacy deficit.⁴

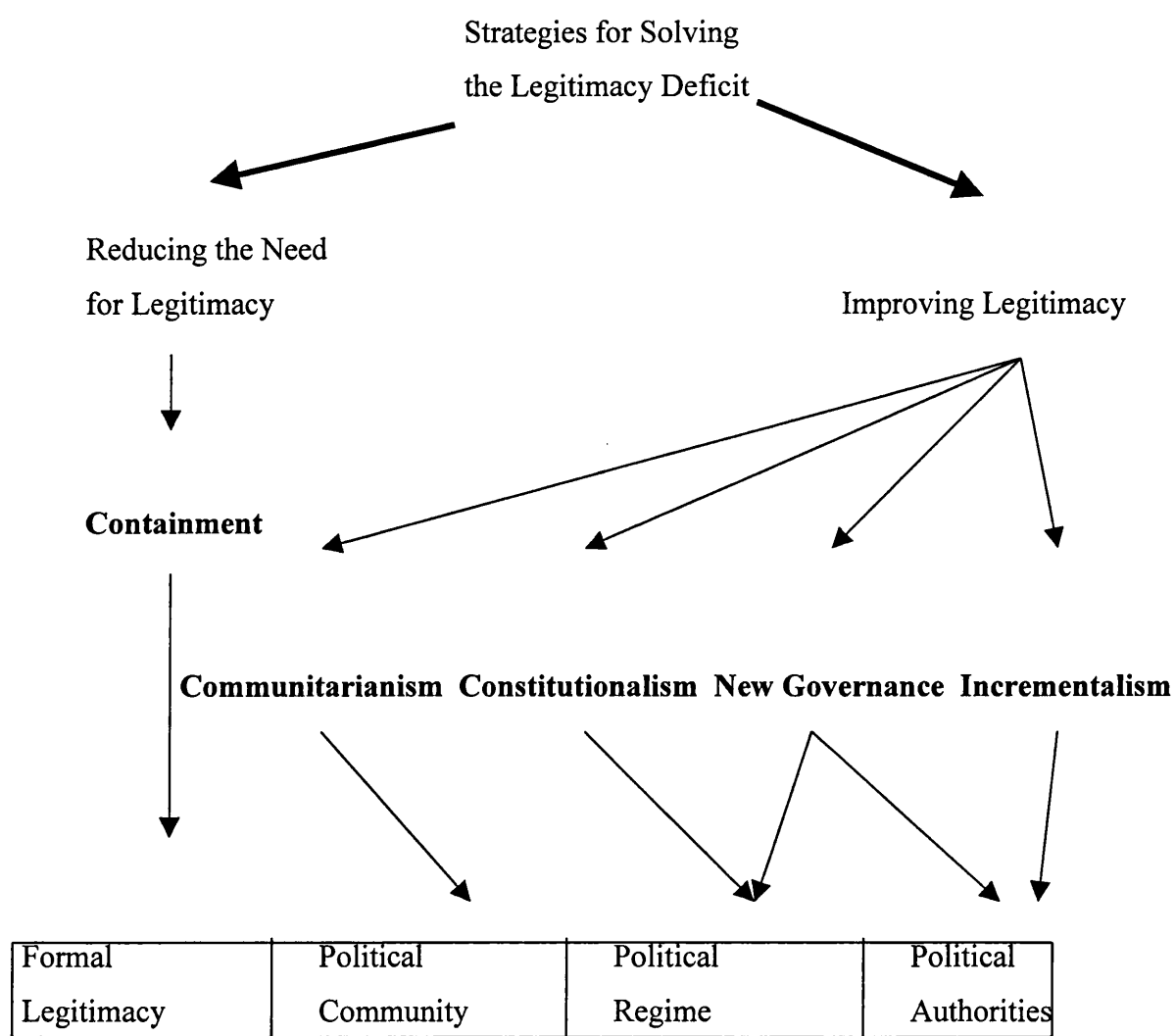


Fig.6.1

Strategies for reform are initially faced with a fundamental choice as symbolised by the bold arrows in the upper part of fig.6.1. *Either* attempts are made to enhance the legitimacy of the EU, *or* alternatively the European political system itself is scaled back, thus reducing the need for its legitimation. The choice between these opposite

⁴ Note that the feasibility criterion has been designed primarily to indicate *whether*, rather than *why*, political élites support particular legitimisation strategies. The latter question is more concerned with the preferences and constraints of the various political actors in the integration process a detailed examination of which goes beyond the scope of this thesis. See for example: Moravcsik, *op. cit.*

alternatives depends on different normative premises about European integration. In the absence of a underlying commitment to “ever closer Union”, one might decide that a partial reversal of European integration to pre-Amsterdam or even pre-Maastricht levels is the best and quickest way of ensuring that the EU no longer suffers from “legitimacy overstretch.” However, those for whom a politically integrated Europe constitutes a valuable end in itself will treat the legitimacy problem merely as a difficulty on the way to achieving this end.

This fundamental choice is rarely clearly identified in the academic literature, yet normative attitudes towards European integration underlie and shape the different individual approaches to the legitimacy deficit. As has become apparent in the first chapter, the great majority of participants in the debate are positively oriented towards the EU. When choosing a remedial strategy they prefer to improve the legitimacy of the EU rather than reducing its need for legitimacy. The next four approaches to reform are therefore broadly based on the premise that European integration is a desirable end in itself coupled with an underlying endorsement of “ever closer Union” or, at least, the status quo.

6.2 Incrementalism

6.2.1 The Approach

Incrementalism essentially entails a continuation of current political practice. The Treaties of Rome are periodically modified by gradually increasing the powers of the EP, the policy areas for which the EU has responsibility and the geographical size of the Union. Conceptually, incrementalism proceeds as a twin-track strategy. It accepts the constitutionalist tenet that felt legitimacy for the political regime can only be increased by democratising the EU, but it slows down this process in order to make it politically more acceptable and to avoid overstretching Europe’s fragile *sense of political community*.

Its attraction lies in the fact that, unlike constitutionalism, it is not premised on the existence of a demos. Incrementalism acknowledges that a common European identity will take a long time to develop. As a substitute for constitutionalising the EU,

incrementalists seek to maximise specific output support because they hope this will spill over into the other components of felt legitimacy. The strategy of legitimising the EU primarily through the policy output it produces, coupled with gradual institutional reforms, is closely associated with the academic school of neo-functionalism, and this has traditionally been the predominant political approach to the problem.

To meet the pertinence criterion, incrementalism has to prove two things. First, because its functionalist analytic perspective does not address low diffuse support for Europe's political community directly, it has to compensate this drawback by generating high and durable specific support for the political authorities. Second, the specific output support thus created must demonstrably spill over into a sense of political community. Incrementalism must prove that the generation of high output support is an adequate alternative to communitarianism or constitutionalism. Finally, incrementalism must meet the feasibility criterion of standing a realistic chance of being adopted as a strategy by Europe's political élites.

6.2.2 Can Incrementalism Generate Stable Output Support?

For a long time European policy-makers have closely followed the neo-functionalist paradigm which assumed the creation of efficient European institutions generating maximal economic welfare and prosperity would spill over into higher diffuse support. Past political action has primarily focused on enhancing specific support for the political authorities, in other words the utilitarian evaluation of policy outputs. Undoubtedly one of the most prominent examples of such an output-oriented approach is the Single Market project designed to enable the free movement of goods, people, services and capital across the Union.

The assumption that the Single Market has been very successful in generating specific support for the EU was borne out by the empirical evidence discussed in chapter five. As a policy, the Single Market seems to have had a positive effect on national output evaluations of the European political authorities. It is often viewed more positively in both countries than the overall balance of benefits from membership.⁵ This is

⁵ Eurobarometer no.45, *op. cit.*, p.B2f, B16f

particularly true for the UK where the emergence of the Single Market project coincides with a positive breakthrough in support for EU membership in general. Since British attitudes towards the EU tend to be largely utilitarian, positive output support for particular policies plays a comparatively greater role in raising felt legitimacy for the EU than in Germany where a greater degree of underlying diffuse support for European integration can be found.

As the impact of EU policies becomes more noticeable, public support for them varies increasingly among individual member states. The phase of “negative” integration culminating in the Single Market may still have generated specific output support across the EU, but the recent tendency has been towards “positive” integration via substantive European policy-making.⁶ This has resulted in more visible and more contentious policy outputs which may no longer command broad specific support across the political spectrum, thus reducing the potential for spill-overs into diffuse support.⁷ Positive integration opens a general left-right policy cleavage at EU level which may break up the solidarity amongst integrationists on the pro-anti EU cleavage.⁸ In other cases, geographical cleavages may emerge. One example would be the structural and regional funds designed to complement the SEM whose potential for raising regional output support has been hampered by increasing political controversy about their budget and regional allocation across member states.⁹

Positive integration also confronts different national models of welfare states and capitalism, such as the “Rheinish” or the “Anglo-Saxon” models operating in Germany and Britain respectively.¹⁰ These problems are generally ignored by those who argue that a fully-fledged European social policy could help to legitimise the EU by fostering “social inclusion”.¹¹ On the contrary, the imposition of a centralised European social policy would undermine unique national traditions and value

⁶ Fritz W. Scharpf: “Negative and Positive Integration in the Political Economy of European Welfare States”, in: Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter and Wolfgang Streeck (eds.): Governance in the European Union, (London: Sage, 1996), pp.15-39

⁷ “European Business Groups Oppose Tax Harmony Calls”, Financial Times, 1/3/1999, p.20

⁸ Hix (99), op. cit., pp.158-63

⁹ Agustí Bosch and Kenneth Newton: “Economic Calculus or Familiarity Breeds Content?”, in: Oskar Niedermayer and Richard Sinnott (eds.): Public Opinion and Internationalised Governance, (Oxford: Oxford University Press, 1995), pp.81-88

¹⁰ Beetham and Lord, op. cit., p.106f

¹¹ For example: Garcia, op. cit., pp.9, 17-19, Beetham and Lord, op. cit., pp.104-112

judgements about what constitutes equitable and affordable welfare policies in each member states.¹²

For instance, policy initiatives on employment and taxation, may well have opposite national effects on support for the European political authorities. While largely popular in Germany, the current proposals for positive integration may have a delegitimising effect on the EU in Britain. Not only the policies themselves, but also the vertical redistribution of additional powers towards Brussels tend to be very contentious in the UK.¹³ For example, a narrow majority of Britons agrees with key policies from the EU Social Chapter, but 59% believe the EU has no right to impose them upon Britain.¹⁴ Incrementalism ignores that the legitimising potential of positive integration is hampered by the variety of national views about what constitutes desirable (or legitimate) policy outputs.¹⁵

This problem is most clearly illustrated in the case of EMU which has sometimes been perceived as the natural corollary to the Single Market. As chapter five has demonstrated, support for EMU membership varies considerably among member states, although it was initially opposed by a majority of both Britons as well as Germans. In both countries opposition to EMU has focused only partly on doubts about the economic benefits of the Single Currency. This suggests that the recent gradual shift in German public opinion towards supporting EMU is less attributable to a more positive perception of its economic benefits than to the ability of Germany's political élites to mount a successful legitimisation campaign. Active legitimisation by political leadership will be more difficult to achieve in the UK where an élite cleavage over EMU persists. To which extent future economic *success* of the single currency could mitigate widespread mass and élite opposition in Britain and even contribute to the generation of specific support for the EU as a whole remains to be seen.

It is similarly difficult to anticipate whether low specific support as a consequence of an *unsuccessful* operation could be restricted to EMU alone rather than causing a negative backlash against the EU in general. In the absence of a European demos,

¹² Majone (99), *op. cit.*, p.20f

¹³ "Working Time Law Sparks Row", *Financial Times*, 11/2/1999, p.1

¹⁴ MORI: *British Public Opinion*, vol.19, no.10, 1996, p.5

citizens feel little trans-European social responsibility and solidarity which could be activated in the event of asymmetric economic shocks in the “Euro-zone”.¹⁶ It seems only safe to predict that EMU represents a gamble for EU legitimacy, since current levels of specific support may well change radically for the better or worse.¹⁷ The effect of EMU on specific output support will also vary among member states according to how much they are perceived to benefit or suffer economically vis à vis the other participating countries.

Finally, a potentially significant future source of specific output support could emerge if the CFSP were to transform the EU into a security provider in its own right. The Amsterdam Treaty reflects this ambition by introducing majority voting on policy implementation in the CFSP pillar and creating the post of Secretary-General of the Council to act as High Representative responsible for the common policy.¹⁸ The 1999 EU summit in Cologne agreed to integrate the WEU into the EU to enable the Union to carry out peace-keeping, crisis management and humanitarian tasks, while Europe’s strategic security would remain rooted in NATO.¹⁹

However, the recent Balkan crises have demonstrated the constraints on the potential for CFSP (or the WEU) to generate noticeable output support for the EU. In terms of military operations, it was often confined to co-ordinating EU policy that was then executed by NATO and the UN.²⁰ Recent reforms notwithstanding, the EU still suffers from a “capability - expectations gap” because it lacks the institutional resources and political legitimacy to assume an active role in pursuing a foreign and defence policy for Europe.²¹ As regards resources, the EU would need autonomous military forces to be able to operate independently of NATO. Despite recent policy initiatives like the “St Malo agreement”, such a development still seems some way off

¹⁵ Helen Wallace (97), *op. cit.*, p.227f

¹⁶ Helen Wallace (97), *op. cit.*, p.226

¹⁷ Timothy Garton-Ash: “Europe’s Endangered Liberal Order”, *Foreign Affairs*, vol.77, no.2, 1998, p.58f

¹⁸ Articles 11-28, Title V, TA

¹⁹ “Defence Co-operation Agreed”, *Financial Times*, 4/6/1999, p.3

²⁰ Beetham and Lord, *op. cit.*, p.103

²¹ Christopher Hill: “The Capability - Expectations Gap, or Conceptualising Europe’s International Role”, *Journal of Common Market Studies*, vol.3, no.3, 1993, pp.305-28

and may be resisted by some member states, either because of their military neutrality or because they fear the potential of creating a rival rather than a partner for NATO.²²

As regards felt legitimacy, the creation of European armed forces implies the shift of a core function of states, namely the provision of external security to its citizens, to the EU. In the event of an external threat to Europe's security, the security function could serve as a potentially powerful legitimisation for the EU itself, rallying EU citizens behind a unifying cause.²³ But this potential is premised on prior public legitimisation of the EU as the appropriate source of military authority (as opposed to, or together with, NATO). Unless the peoples of Europe accept that the EU should be a security provider in the first place, and unless they display sufficient mutual trust and solidarity, the creation of a single European army may be a divisive rather than unifying endeavour. The last chapter has shown the EU arguably still lacks the necessary sense of political community and general public support to realise the legitimising potential from a transfer of the provision of external security to the EU.²⁴

6.2.3 Can Incrementalism Enhance Community or Regime Support?

These predicaments are indicative of the theoretical flaws of neo-functionalism discussed in chapter one. Decades of ever increasing economic and political integration have failed to "spill over" into a sustainable European sense of identity. The functionalist "myth" of depoliticised modernity and universal rationalism is incapable on its own of creating a viable sense of political community because political legitimacy has not "adapted according to the economic and political calculations made by functionalists."²⁵ This lack of diffuse support for the EU cannot simply be compensated for with further positive policy integration.²⁶ Far from forging a European identity, positive integration and redistributive policies are even

²² On the development of the St Malo agreement see for example: "France and Germany in Defence Talks", *Financial Times*, 29/5/99, p.2

²³ William Wallace (90), *op. cit.*, p.105

²⁴ Anthony Smith (92), *op. cit.*, p.73

²⁵ Lene Hansen and Michael Williams: "The Myths of Europe: Legitimacy, Community and the Crisis of the EU", *Journal of Common Market Studies*, vol.37, no.2, 1999, p.245

²⁶ See media coverage of confidential Commission report: "EU Mania for Laws Turns off its Citizens", *The Guardian*, 4/8/1999, p.12

predicated upon a demos because they rely heavily on a sense of mutual social responsibility between the peoples of Europe.²⁷

The EU cannot be legitimised through specific support alone because specific support is by its very nature volatile. Support for the widely popular Single Market can fluctuate considerably with changes in the overall economic climate, as witnessed in Britain in the early nineties and Eastern Germany in the years since unification. Even more sobering is the example of the closure of the Renault car factory at Vilvoorde in Belgium in spring 1997. The transfer of production to France was widely perceived as unfair and generated temporary anti-EU sentiment in Belgium.²⁸ By autumn 1997, only 36% of the normally staunchly pro-European Belgians thought their country benefited from EU membership, as opposed to 41% who believed Belgium did not benefit. Compared to autumn 1995, support for membership plummeted by fourteen percentage points to 42%.²⁹ Satisfaction with democracy in the EU fell by twenty-one percentage points, perhaps because 58% of Belgians had no trust in EU institutions.³⁰ Significantly, there was also a marked decline in the number of Belgians identifying themselves as partly or wholly European, with more respondents regarding themselves as exclusively Belgian.³¹

If output support is by definition unstable, and if it does not to any significant degree translate into a sense of political community, incrementalism must focus on the two remaining components of the dual concept: the political regime and formal legitimacy. Yet one of the greatest weaknesses of incrementalism is its lack of a clear vision for the final institutional shape and status of the EU. A rather eclectic and impromptu approach towards legitimising the EU prevails which is to some extent inherent in the notion of seeking incremental reform based on consensus among the member states. Although politically expedient, the periodical tinkering with the Treaties of Rome can at times produce incoherent reforms that leave EU institutions in a constitutional half-way house where short-term considerations and political

²⁷ Majone (99), *op. cit.*, p.20f

²⁸ Beetham and Lord, *op. cit.*, p.110

²⁹ Eurobarometer no.44, *op. cit.*, p.B8,

Eurobarometer: *Standard Eurobarometer no.48*, (Brussels: European Commission, 1998), p.B28

³⁰ *Ibid.*, p.B2, B4

³¹ Eurobarometer no.47, *op. cit.*, p.B74

compromise shape their future almost as much as a consistent constitutional strategy. The recent events surrounding the issue of EU fraud serve as a good case in point.

Upon publication of a Court of Auditors report into financial irregularities relating to the 1996 EU budget, the public expected the EP to call the Commission to account.³² The EP formally possesses the constitutional powers to do so, but it could never hope to muster the necessary two-thirds majority. None of the national parliaments in the member states faces quite such a high numerical threshold for removing a failing executive. It appears inconsistent to equip the EP with the censure instrument, thus raising public expectations about executive accountability to the legislature, but then putting in place almost insurmountable obstacles to its application.

It could be argued that the Commission is not a European government, and its relationship with the EP remains hybrid for that reason. As long as the Commission acts as a European civil service rather than a parliamentary government, the censure motion remains difficult to defend on principle. That is presumably the reason why, once the censure motion failed, the inquiry into EU fraud was removed from the EP committee which had started the investigation and transferred instead to an impromptu "Committee of Experts".³³ But the creation of a new body with no apparent connection to the existing institutional framework of the EU is ill-conceived because it blunts parliamentary scrutiny powers over the Commission. In conclusion, the confusion and apparent inconsistency surrounding recent political developments can be attributed to the unresolved question about the proper roles of European institutions. By its very nature, incremental reform cannot resolve these deep-seated problems regarding the current hybrid distribution of powers in the EU.

If incrementalism cannot deliver significant improvements in public diffuse support for the political regime, it might at least soften the emerging incompatibilities between the European and national systems of formal legitimacy. The slow pace of reform should enable national political systems to adapt their formal legitimacy accordingly, and it allows national judiciaries to render legal doctrines compatible with the formal legitimising principles of the Treaties as interpreted by the ECJ.

³² HC Research Paper 99/32, *op. cit.*, p.11-14

³³ *Ibid.*, p.13

Whereas constitutionalism amounts to a head-on confrontation with the formal legitimacy of the member states (such as the doctrine of parliamentary sovereignty in Britain or the fundamental provisions of the Basic Law in Germany), incrementalism leaves room for a compromise. Since chapters three and four have shown British and German systems of formal legitimacy to enjoy high levels of felt legitimacy, any overt challenge to them may well provoke a public backlash in the shape of lower support for the EU.

However, constitutional conflicts will arise even with an incremental approach to reform, as the discussion of the British “Factortame” case and various FCC cases in the last chapter has demonstrated. Enduring decades of recurring constitutional battles over emerging incompatibilities between the European and national systems of formal legitimacy may arguably have a worse impact on public support for the EU than settling the relationship conclusively once and for all. An incrementalist strategy does not result in a marked improvement on public regime support or a better compatibility of formal legitimacies.

6.2.4 Summary

Incrementalism only passes one of the two criteria for solving the legitimacy deficit. The biggest advantage of an incremental strategy lies in its pragmatism about the realistic options for reform available in the current political climate in Europe. The monopoly over primary (Treaty) law is held by the member states which must reach a unanimous compromise on the basis of sometimes very different, country-specific preferences for EU reform. Given a widespread unwillingness among European governments to contemplate sacrificing political influence and power for the sake of a radical democratisation of the Union, incrementalism remains almost the only politically feasible strategy for improving EU legitimacy. It therefore passes the feasibility criterion and could be termed “constitutionalism by stealth”.

However, incrementalism fails the pertinence criterion. First, the gradualist approach to institutional reforms advocated by incrementalists does not offer a coherent institutional vision for the EU which would meet public expectations for democratic

government in Europe.³⁴ Second, the strategy of enhancing the EU's legitimacy primarily by way of spill-overs from specific output support has diminishing returns of scale and no longer provides an effective remedy against the legitimacy deficit. The more EU policies shift from negative to positive integration, thereby increasing their visible political impact, the more their ability to generate specific support for the EU varies among member states. Positive integration is also politically more contentious along the left-right cleavage within member states. Third, incrementalism misjudges the dynamics of identity-formation because positive spill-over from policy outputs and gradual institutional reform are insufficient to generate a European identity whose absence lies at the heart of the legitimacy deficit.

Such a pessimistic conclusion is borne out by historical evidence. After all, incrementalism has been pursued for decades by Europe's political leaders, but the legitimacy deficit has persisted. Chapter five has detected no indisputable evidence of strongly growing felt legitimacy in Germany and Britain over recent years which could validate the incremental approach. For obvious reasons, incremental reforms can only produce incremental improvements, which is why this strategy fails to pass the pertinence criterion for solving the legitimacy deficit. Maybe a more radical strategy is needed to tackle the EU's legitimacy deficit, such as constitutionalism.

6.3 Constitutionalism

6.3.1 The Approach

To summarise from chapter one, constitutionalists believe low felt legitimacy is mainly a consequence of public dissatisfaction with the political regime of the EU, in particular its perceived lack of representative democracy. They correctly identify this as the constitutional philosophy nearly unanimously favoured among the peoples of Europe. Public dissatisfaction, constitutionalists argue, arose from the growing discrepancies between the institutional structure of an intergovernmental international organisation and a degree of integration which has made the EU resemble a state in terms of the political powers and policy responsibilities it has acquired. If a new

³⁴ Helen Wallace (97), *op. cit.*, p.218f, 233

democratic institutional structure were to reflect that transformation, the old discrepancies would disappear. The public would become confident, reflected in higher diffuse support for the European political regime, that the EU operates under a form of government which they consider legitimate. Consequently, traditional constitutionalist solutions entail an adaptation of the key ingredients of liberal democracy, such as parliamentary government, separation of powers and the protection of human rights, to the EU.³⁵ Many conceive of the Commission as the nucleus for a European government responsible to a two-chamber parliament consisting of the EP and the Council.³⁶

Constitutionalism employs an institutionalist analysis both for its diagnosis of the problem as well as its solution. The EU's institutional structure is regarded as the main reason for the legitimacy deficit. The deficit can be remedied through institutional engineering by democratising the EU. Raising the political profile and electoral importance of the EP would help to generate a pan-European political discourse which in turn would contribute to a *sense of political community* among the peoples of Europe. Institutional reform will therefore produce a spill-over into the identity component of felt legitimacy, since it removes the structural obstacles which have so far impeded the growth of a strong sense of European political community.

Can the constitutionalist strategy achieve its aims, and does it offer a workable solution to the legitimacy deficit? Since constitutionalism does not address low community support directly, it must prove three things to fulfil the pertinence criterion. First, it needs to show that its strategy does really enhance diffuse regime support, and second that such institutional engineering will spill over into diffuse community support as well. Third, constitutionalism must offer an institutional design which is considered legitimate across the different member states. Last not least, constitutionalists have to demonstrate the political viability of their reform strategy in order to meet the feasibility criterion.

³⁵ For instance: Weidenfeld (95), *op. cit.*, Raworth, *op. cit.*, pp.16-33

³⁶ See for example: Weidenfeld (94), *op. cit.*

6.3.2 Can Constitutionalism Enhance Regime Support?

The analytical confusion between democracy and legitimacy criticised in chapter one resurfaces in the practical institutional reforms proposed by constitutionalists. They rarely take much interest in the details of the constitutional structure to be designed and tend to overlook the political and institutional implications this will create. By failing to consider the wider institutional balance, constitutionalists have unwittingly drawn attention to the complexities and side-effects associated with implementing their strategy.

For instance, very few scholars have considered the vertical balance of powers between the national and the European level. Concerned about the centralising effects of the creation of a European parliamentary government, some have proposed a clear vertical allocation of competencies to be enshrined in the Treaties.³⁷ Recalling historical instances of federal states facing creeping centralisation, such as the United States or post-war Germany, Scharpf remains sceptical about the effectiveness of such a legally entrenched vertical separation of powers. Even America's one-time doctrine of "dual federalism", which was designed to protect State's reserve powers, ultimately collapsed under the difficulties of balancing the demands of a united economic market against the autonomous powers of the States.³⁸

The only effective barrier against the centralising consequences of a European *parliamentarisation* might be a political culture of judicial respect for the autonomous policy-making powers of the national and the European institutions.³⁹ To create such a jurisprudential doctrine will be difficult, as Scharpf acknowledges, and whether it could be preserved in the long-run must appear even more doubtful from a comparative historical perspective. Apart from the occasional rhetorical commitment to subsidiarity, few constitutionalists acknowledge the danger of centralisation inherent in their strategy for solving the legitimacy deficit.

³⁷ Lepsius, *op. cit.*, p.36, Wieland, *op. cit.*, pp.445-52

³⁸ Fritz W. Scharpf: "Kann es in Europa eine stabile föderale Balance geben? (Thesen), in: Rudolf Wildenmann (ed.): Staatswerdung Europas? Optionen für eine Europäische Union, (Baden-Baden: Nomos, 1991), p.422

³⁹ *Ibid.*, p.424

Others have concentrated on problems related to the horizontal distribution of powers at the European level. Based on her argument that the lack of transparency is one of the core problems of EU legitimacy, Lodge calls for an end to the secrecy surrounding Council of Ministers meetings which prevents the EP from having greater influence on the legislative process.⁴⁰ The Council has recently started to open up some of its proceedings, and the Amsterdam Treaty has established a general right of access to EP, Council and Commission documents. This goes some way towards addressing this “transparency deficit”.⁴¹ Although more far-reaching reforms remain desirable (such as further simplification of the decision-making rules for EP, Commission and Council), European multi-level governance will for structural reasons probably always remain rather opaque to the average European citizen. The prospect of a flexible multi-speed Europe only complicates the picture further. That makes the issue of proper accountability of European institutions all the more salient.

Bogdanor and Woodcock have emphasised the need for improved democratic accountability of the Council and the Commission, for instance by having the latter directly elected and by introducing EU-wide referenda.⁴² But their proposals are not based on a proper overall institutional design. Bogdanor and Woodcock seem unsure about whether they favour a presidential or a parliamentary system for Europe, since they also wish to strengthen the scrutiny powers of both the European and national parliaments.⁴³ Such confusion is indicative of the rarity with which the strengths and weaknesses of the various constitutional options are properly discussed.

Few reformers account for the fact that the Commission is not a unitary actor. Christiansen identifies a “parliamentary”, a “technocratic” and a “diplomatic” Commission.⁴⁴ What would happen to the civil service functions of the Commission if it were to become a governmental executive body? A democratisation of the EU would also jeopardise the Commission’s current role as an independent mediator among national interests which enjoys high felt legitimacy by some of the smaller

⁴⁰ Lodge (94), *op. cit.*, pp.345-56

⁴¹ Art.255 TA

⁴² Bogdanor and Woodcock, *op. cit.*, p.489

⁴³ *Ibid.*, p.484

⁴⁴ Thomas Christiansen: “Legitimacy Dilemmas of Supranational Governance”, in: Albert Weale and Michael Nentwich (eds.): *Political Theory and the European Union - Legitimacy, Constitutional Choice and Citizenship*, (London: Routledge, 1998), p.109

member states.⁴⁵ It seems equally doubtful whether the national quota system could survive which currently allocates Commissioner posts and which safeguards national representation. The inevitable reduction in the number of Commissioners prior to Eastern enlargement will further undermine the notion that every member state should be represented by a Commissioner. But replacing the principle of territorial representation in the Commission with popular representation is problematic because Europe can only become a “nationalities state” (rather than a nation state) whose nations are each in a structural minority and hence in need of constitutional protection.⁴⁶ Smaller member states might experience a negative legitimacy backlash if they were rarely able to secure representation in a European government.

These considerations raise another rarely addressed question. Could such minority protection be better ensured with a presidential or with a parliamentary system? The answer depends on the ability of institutions to contain the potential for ideological and communal polarisation which could endanger public support for integration itself. Beetham and Lord argue in favour of a presidential model which would give the EP additional financial and law-making powers, but would deny it the powers of government formation. Freed from executive domination, the EP could concentrate on representing the EU’s diverse interests and communities.⁴⁷

But that would not solve the question of how a European government could be held to account. Hix supports the idea of a directly elected European executive on the grounds that the politicisation of executive power resulting from “presidential” elections of the Commission is a necessary prerequisite of political accountability.⁴⁸ He believes that under a parliamentary system national parties and governments would retain their ability to impose their wishes on the EP in the executive selection process.⁴⁹

⁴⁵ Dehousse, *op. cit.*, p.129

⁴⁶ Lepsius, *op. cit.*, p.36

⁴⁷ Beetham and Lord, *op. cit.*, p.79f

⁴⁸ Simon Hix: “Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?”, *European Integration Online Papers*, vol.1, no.21, 1997, <http://eiop.or.at/eiop/texte/1997-021a.htm>, p.10

⁴⁹ *Ibid.*, p.6

Three objections can be raised against a presidential system at EU level. First, a presidential system is (with the exception of France, perhaps) alien to modern West European constitutional tradition and its felt legitimacy hence questionable. Second, parliamentary government would not only mirror more closely national models of formal legitimacy, it could also ensure political accountability. It would require Commissioners to sit in the EP on whose confidence they depend. Commission President Prodi's newly won right to dismiss Commissioners has already been interpreted as a first step towards prime-ministerial government.⁵⁰ Such a parliamentary system would necessitate changes to Art.213.2 TA which prohibits Commissioners from engaging "in any other occupation, whether gainful or not." Third, the radical politicisation that Hix hopes to achieve with a presidential model has potentially detrimental consequences for centre-periphery relations in a federation like the EU which is based on a double legitimacy.⁵¹ By diminishing representation of the political sub-units, a presidential system would undermine national legitimising chains more radically than a parliamentary form of government.

A more general problem is that current diffuse support for the EU's political community would probably be too weak to cope with the tensions that the introduction of *any* form of majoritarian representative democracy might unleash. Constitutionalist will of course refer to the spill-over effects of institutional reform on diffuse community support. This argument is considered in more detail below, but a strong European identity may well have to precede these institutional reforms rather than result from them. One solution might be to couple parliamentary democracy with what Dehousse calls an "alarm bell mechanism" whereby a significant minority of states could block legislative proposals which could be shown to threaten their vital interests.⁵²

Finally, there remains the question over how the democratisation of Europe is to proceed, once its content has been agreed on. The 1994 Draft Constitution by the EP proposed that the EP and national parliaments should prepare a detailed constitutional blueprint for submission to the 1996 Intergovernmental Conference. Upon adoption,

⁵⁰ "The New Team for Europe", *The Economist*, vol.352, no.8128, 17/7/1999, p.33

⁵¹ Dehousse, *op. cit.*, p.119

⁵² *Ibid.*, p.133

the constitution would come into force when ratified by “a majority of member states representing four-fifths of the total population.”⁵³

Others prefer a more radical approach. Appealing for a new European constitution to receive “democratic baptism”, Weale rejects the traditional method of Treaty revision by the High Contracting Parties on the grounds of not representing the broader “public interests” of the peoples of Europe.⁵⁴ Modelled on the constitutional convention in Philadelphia in 1787, he suggests that representatives for such an assembly should be drawn from the member states, subnational government and the EP. Ratification would occur through a series of national referenda or a single pan-European referendum.⁵⁵ Apart from considerable legal difficulties with constitution-making, such as transforming an international treaty organisation into a sovereign federation, even the less radical EP proposal remains utopian in the current political climate.

As long as Europe’s political élites remain reluctant to endorse the constitutionalist agenda, such a debate would fail to assume the public dimension necessary for a broad societal participation in the constitution building process.⁵⁶ Although Weale somewhat defiantly refuses to be “bound by the supposed realities of the present situation”⁵⁷, he should not assume institutional altruism on the part of established institutional interests in Europe. It is unrealistic to expect a European constitution to emerge with less than unanimous agreement of all the member states. These considerations cast doubt over the ability of constitutionalist strategies to pass the feasibility criterion, as will be discussed in greater detail below.

Despite adopting a more differentiated view of the institutional reforms necessary to reduce Europe’s legitimacy deficit, even the more sophisticated versions of constitutionalism simply devise a system of democracy in the abstract. They ignore

⁵³ European Parliament: “Resolution on the Constitution of the European Union”, Official Journal of the European Communities, A3-0064/94, p.156, 166

⁵⁴ Albert Weale: “Democratic Legitimacy and the Constitution of Europe”, in: Richard Bellamy, Vittorio Bufacchi and Dario Castiglione (eds.): Democracy and Constitutional Culture in the Union of Europe, (London: Lothian Foundation Press, 1995), p.90

⁵⁵ Ibid., p.92f

⁵⁶ Lary A. Siedentop: “The Birmingham Summit: Where are our Madisons?”, Financial Times, 16/10/1992, p.21

⁵⁷ Weale (95), op. cit., p.93

the contingency of Europe's formal and felt legitimacy on the member states' national perspective to which the discussion now turns.

6.3.3 Constitutionalism Ignores National Differences

This contingency is the second important reason why constitutionalism is unlikely to enhance diffuse regime support for the EU. Some of the reforms appear to be counter-productive as far as their national legitimising potential is concerned. For example, the above discussion about the respective merits of a presidential versus a parliamentary model for electing the Commission pays little attention to how executive powers are formally legitimised within each of the member states. This illustrates the importance of a comparative study of the EU's legitimacy.

For instance, the comparison with national systems of formal and felt legitimacy reveals that, with the exception of France, the presidential system of government is alien to most national political systems. In Britain and Germany its adoption would constitute a break with constitutional tradition and might thus receive lower felt legitimacy in these two countries than a parliamentary solution which would make a "European government" responsible to the EP. On the other hand, to model a European government on the British and (similar) German concept of ministerial responsibility with ministers being drawn from parliament would conflict with French and Dutch systems of formal legitimacy that bar members of the government from holding parliamentary seats.

More serious variations in the legitimising potential of constitutionalism can be found *between* Britain and Germany. The last chapter revealed that a majority of Britons and Germans consider the EU insufficiently democratic and believe they cannot rely on the EP to represent their interests adequately.⁵⁸ But the same analysis also revealed greater British reluctance to strengthen the EP at the expense of the Council or national parliaments. It follows that constitutionalist reforms might be able to increase German diffuse support for the political regime, but will have exactly the opposite effect in the UK. They would not only be rejected on the grounds of creating some

⁵⁸ Chapter 5, p.224

kind of European federal government (which 65% of Britons oppose)⁵⁹, but also because a full-blown parliamentarisation of the EU would undermine the Council whose role in the formal and felt legitimisation of the EU is far more important in the UK than it is in the Federal Republic.⁶⁰ Such a reform might not only reduce diffuse regime support for the EU in Britain, it may also accentuate the ultimate incompatibility of the British and the European systems of formal legitimacy.

However, current incompatibilities between the European and national systems of formal legitimacy might be overcome by determined constitutional reform within each member state. For instance, chapter three argued that the constitutional reforms pursued by the 1997 Labour Government amount to a *Europeanisation* of Britain's formal legitimacy which would entrench "continental" legitimising principle on the status of law and the courts.⁶¹ *In principle*, therefore, the existence of fifteen (and soon even more) different national systems of formal legitimacy should be no obstacle to the emergence of a European formal legitimacy with which each of them becomes reasonably compatible in the long-run.

This presupposes a considerable degree of flexibility and determination on the part of political élites in the member states who must seek to adapt their national legitimising principles to make them "euro-compatible". This has been easier to achieve in the FRG than in the UK because Germany's formal legitimacy is already institutionally programmed towards European integration. Moreover, a broad élite consensus in favour of "ever closer Union" will facilitate the political legitimisation of any necessary future adjustments of Germany's constitutional structure. By contrast, Britain's formal legitimacy has had a low constitutional fit with the EU which means it still requires far more radical adjustment in order to become fully compatible with supranational integration. An adversarial political culture and an important élite cleavage over European integration both complicate the political legitimisation of such an adjustment. As chapter three suggested, if the necessary reforms are widely perceived as an alien intrusion into established national constitutional orders, there may be a public backlash of lower diffuse support for the national regime *as well as*

⁵⁹ MORI: *British Public Opinion*, vol.21, no.5, 1998, p.6

⁶⁰ Chapter 5, p.209

⁶¹ Chapter 3, p.117f

lower felt legitimacy for the EU.⁶² Constitutionalist rarely acknowledge this degree to which the EU's formal and felt legitimacy is interlocked with that of its member states. As a result, constitutionalist proposals for reform are not tailored to country-specific legitimacy "weaknesses".

To summarise, most constitutionalists do not conduct a thorough constitutional debate which acknowledges the full implications of their proposals. They rarely offer a comprehensive review of the side-effects their reforms will cause for other aspects of the political regime (or other components of felt legitimacy). Constitutionalism similarly neglects to consider how national variations in the legitimacy deficit of the EU require solutions to be tailored to each member state. For these reasons, the legitimising potential for diffuse EU *regime* support that existing constitutionalist strategies could provide must at least appear questionable. But the key to alleviating the EU's legitimacy deficit depends on the potential of constitutionalism to generate a European *identity*. This potential will be assessed in next.

6.3.4 Can Constitutionalism Enhance Community Support ?

The question whether institutional engineering can generate a strong sense of political community gains additional importance given that constitutionalism aims to transform the EU into a representative democracy. There is currently no European *demos* which the EP could validly claim to represent and which would warrant its institutional elevation next to, or even above the Council.⁶³ As long as primary loyalties in most member states continue to lie with national identities and the EU remains at least partly legitimised indirectly through the member states, the viability of constitutionalism must remain in doubt. Any legitimacy improvement achieved by democratising the EU runs the risk of being eroded in the absence of sufficient social attachment and a strong feeling of identity towards the EU.⁶⁴ In the absence of a European *demos*, constitutionalism may even exacerbate the legitimacy deficit.⁶⁵

⁶² Chapter 3, p.118f

⁶³ Rudolf Hrbek: "Federal Balance and the Problem of Democratic Legitimacy in the European Union", *Aussenwirtschaft*, vol.50, no.1, 1995, p.64

⁶⁴ Fritz W. Scharpf: *Governing in Europe - Effective and Democratic?*, (Oxford: Oxford University Press, 1999), p.88

Eastward enlargement of the EU will throw this dilemma into sharp relief. On the one hand, the need for a demos will increase because in a Union with around twenty members more decisions must be taken by majority than at present.⁶⁶ On the other hand, the constitutionalist dilemma (the need for mature democratic institutions versus an insufficiently low degree of diffuse support for the European political community) is likely to become most accentuated in the new Eastern member states. Notwithstanding their genuine cultural reorientation towards the West, their overwhelming desire to accede to the EU is mostly driven by functionalist motives, most importantly full access to the Single Market and the political stability which membership will bring to the region of Central and Eastern Europe as a whole. The region's prolonged struggle against outside domination has reinforced public attachment to national identities which may not be easily compatible with attempts to forge a European identity. This means that for the EU as a whole the staged process of enlargement creates a Union composed of member states whose *sense of political community* is very unequally developed.

Wallace and Smith agree that Eastern enlargement “will make it more difficult to foster a sufficiently strong sense of community to provide popular consent for a more integrated EU”, but they nonetheless argue in favour of empowering the EP.⁶⁷ Indeed, most constitutionalists believe that presence of democratic institutions will itself contribute to the emergence of a European demos. Which causal connections must obtain for the institutional reforms advocated by constitutionalism to translate into a sense of political community? Is the communitarian charge against the constitutional approach (that it ignores the dependence of the regime on the community component of felt legitimacy) really justified?

Constitutionalists argue that reforming the institutional structure of the EU into a parliamentary democracy will have two effects. First, granting additional powers to the EP will enhance the political significance of the assembly. If the EP can effectively determine the composition and general political direction of a future European administration, the pressure and incentives for greater intra-party cohesion

⁶⁵ Scharpf (94), *op. cit.*, p.293, Weiler (92), *op. cit.*, p.411

⁶⁶ Heather Grabbe and Kirsty Hughes: Eastward Enlargement of the European Union, (London: The Royal Institute of International Affairs, 1998), p.46f

as well as inter-party competition will be enhanced.⁶⁸ Constitutionalist reforms will thus create the momentum for a truly European party system to develop whose participants are ideologically and structurally less dependent on the national parties from which they emerged.⁶⁹

As a second effect, such a pan-European party system, by making more effective use of the additional parliamentary powers to be granted, would place the European political debate at the centre of public and media attention and generate higher turnouts in European elections. These developments may in turn persuade voters to shift their loyalties from the national to the European arena.⁷⁰ Institutional engineering can thus help create what Neunreither has termed “transmission structures.” These encompass political organisations, interest groups and the media, and they ensure a permanent dialogue between political decision-makers and their citizens.⁷¹ Neunreither maintains that transmission structures are an essential prerequisite for a European demos which in turn helps to legitimise the substantial decision-making powers invested in the EU.⁷²

If institutional engineering could create these transmission structures, constitutionalism would successfully address the problem of low diffuse support for Europe’s political community. Two causalities must obtain for this argument to hold. First, there must be a causal relationship between the constitutional importance of the EP and public interest in its deliberations (measured most visibly in terms of voter participation in European elections). Second, the political transmission structures thus created must themselves generate a European demos.

Postulating the first of these two causal relationships, Reif famously labelled European elections “second-order” national elections on the grounds that they are, unlike (national parliamentary) first-order elections, not primarily concerned with

⁶⁷ Wallace and Smith, *op. cit.*, p.153f

⁶⁸ Neunreither, *op. cit.*, p.109

⁶⁹ Hix (97), *op. cit.*, pp.7-10

⁷⁰ Michael Greven: “Political Parties between National Identity and Eurofication”, in: Brian Nelson, David Roberts and Walter Veit (eds.): *The Idea of Europe*, (Oxford: Berg, 1992), pp.75-95

⁷¹ *Ibid.*, p.101

⁷² *Ibid.*, p.106ff

power distribution and government formation.⁷³ Second-order elections, which also include local elections, are characterised by low levels of electoral participation and low-profile campaigns. According to Reif's theory, European elections have a second-order status *precisely because* no significant political power is at stake.

While Reif's theory has been widely considered plausible, it has not remained unchallenged.⁷⁴ It is sometimes argued that European politics is largely technical in nature and therefore not easily susceptible to ideological divisions along party-political lines.⁷⁵ Even the transmission structures themselves differ from their national equivalents, as the predominance of multi-level network structures testifies.⁷⁶ Others maintain that linguistic barriers militate against attempts to elevate European elections to first-order status because democracy requires full linguistic competence to participate in the political dialogue.⁷⁷ Belgium and Switzerland may prove multilingual democracies possible, but these countries have far fewer languages each and their populations display far greater linguistic competence. As the last chapter has demonstrated, significant linguistic barriers still exist in the EU for the time being.⁷⁸

Even if Reif's argument is accepted in principle, it has to remain an untested hypothesis as long as EP elections are empirically characterised by his second-order criteria. Since the last chapter has shown that EU citizens have an inflated view of the EP's powers, election turnouts might even decline if voters learnt that the EP is even less powerful than they imagined. Moreover, the EP's growing importance and influence should have caused a gradual shift towards first-order status for European election, but such a shift has not occurred. Voter turnout has been in continuous decline in the European average over the past two decades.⁷⁹ Despite their argument that the EU has made some progress towards a "Europe des partis" (notably in terms of party discipline amongst the EP's transnational party groups), Hix and Lord have to

⁷³ Reif and Schmitt, *op. cit.*, pp.3-44

⁷⁴ For a recent critique see: Jean Blondel, Richard Sinnot and Palle Svensson: People and Parliament in the European Union, (Oxford: Clarendon Press, 1998), esp. pp.242-57

⁷⁵ *Ibid.*, p.254

⁷⁶ Helen Wallace: "Politics and Policy in the EU: The Challenge of Governance", in: Helen Wallace and William Wallace (eds.): Policy-Making in the European Union, (Oxford: Oxford University Press, 1996), p.31

⁷⁷ Lepsius, *op. cit.*, p.27

⁷⁸ Chapter 5, p.202

⁷⁹ Julie Smith: "The 1994 European Election: Twelve into One Won't Go", Jack Hayward (ed.): The Crisis of Representation in Europe, (London: Frank Cass, 1995), pp.210-215

admit that “EP elections have contributed little to the legitimacy of EU parties.”⁸⁰ One problem may be that the prevailing second-order status of European election may be self-reinforcing. Each additional election reinforces ingrained public assumptions about their lack of importance and thwarts the evolution of electoral participation and public knowledge about Europe’s representative structures.⁸¹

The second causality assumes that elevating European elections to first-order status will translate into rising diffuse support for the political community. Hix and Lord suggest that, as a nascent political system, the EU has developed *institutionally* to a point where political parties rather than national identities align European citizens.⁸² The emergence of transnational European parties is merely hindered by the current institutional structure. Because European elections are not about winning government office, parties compete largely on national issues.⁸³

But political identities cannot simply be created by institutional design, and the emergence of a “Europe des partis” is not simply obscured by scholars who analyse the EU from an inappropriate IR perspective, as Hix and Lord seem to believe.⁸⁴ Even on one of their own criteria for a European party system - the degree of party discipline among the transnational party families - the reverse causality asserts itself. In the various motions of censure against the Commission in spring 1999 voting patterns among MEPs frequently defied party lines. Instead, parliamentarians were influenced at least as much by a cultural north-south divide in attitudes towards the alleged failings of the Commission, or quite simply by national loyalties towards “their own” Commissioner.⁸⁵

Arguably the EP remains in the grip of national parties and domestic policy goals because genuinely pan-European parties lack electoral appeal in a transnational and multilingual union of fifteen demoi and 370 million people. The frequent reference to multilingual democracies like Switzerland is misleading, since they are based on

⁸⁰ Simon Hix and Christopher Lord: Political Parties in the European Union, (London: Macmillan, 1997), p.210,213

⁸¹ Beetham and Lord, op. cit., p.78

⁸² Hix and Lord, op. cit., p.200-03

⁸³ Hix (97), op. cit., p.9

⁸⁴ Hix and Lord, op. cit., p.202f

fewer languages and deeply entrenched political identities. The EU rather mirrors countries with a divided political community, such as Belgium, whose party systems typically fragment into separate parties for each distinct community.

While representative democracy does not presuppose a “European ethnos” with a deeply entrenched structure of social or even ethnic identity, one can validly argue that the EU lacks sufficient social cement and cultural homogeneity to enable a majoritarian democracy to function successfully.⁸⁶ In their absence, the implementation of the constitutionalist agenda, far from creating a *sense of political community*, may well have the opposite effect of destroying it. As long as the question about the appropriate degree of European integration remains an important ideological cleavage in the EU, a premature politicisation of its institutions will only undermine the fragile popular consent to its rule.⁸⁷ Far from being the natural product of a European party system, a strong sense of European identity must logically precede it.⁸⁸ The causal connection between institutions and identity works in the opposite way to the one postulated by constitutionalism: *if* people no longer identify with their national interest, *then* there may be pressure for pan-European democratic institutions.

The relationship between Europe’s political regime and its political community may even be circular: “the politics of identity shape the EU’s political system and the EU’s political system has its own consequences for patterns of European identity.”⁸⁹ Easton similarly argues that “the facts of sharing political processes, participating in interdependent political roles and partaking in the same communication network will in themselves contribute to perpetuating the need to do so.”⁹⁰ But he also stresses that, unless supplemented with a *communal ideology*, pressures of output failure or severe cleavages may quickly override such political interdependence.⁹¹ The communitarian challenge still stands: constitutionalists fail to acknowledge that their remedy to the

⁸⁵ “The Slow March To Greater Bonding”, *The Economist*, vol.350, no.8109, 6/3/1999, p.47, also: Peel, *op. cit.*, p.26

⁸⁶ Albert Weale: “Between Representation and Constitutionalism in the European Union”, in: Albert Weale and Michael Nentwich (eds.): *Political Theory and the European Union - Legitimacy, Constitutional Choice and Citizenship*, (London: Routledge, 1998), p.52. Also: Grimm (94), *op. cit.*, p.38ff

⁸⁷ Blondel, Sinnot and Svensson, *op. cit.*, p.254

⁸⁸ Weale (98), *op. cit.*, p.50

⁸⁹ Beetham and Lord, *op. cit.*, p.56

⁹⁰ Easton (65), *op. cit.*, p.327

⁹¹ *Ibid.*, p.327ff

legitimacy deficit is contingent on the prior existence of strong diffuse support for the political community.

In conclusion, institutional engineering fails to spill over into creating a European demos which could remedy the legitimacy deficit. Even if one accepts the (contested) assumption that the introduction of parliamentary government will generate a European party system, such a system might endanger rather than improve levels of felt legitimacy. At most, institutional reform will be a necessary, but not a sufficient condition for the emergence of a European identity. To quote Beetham and Lord:

*“Many political systems have been pieced together from multicultural communities. The question is not whether such an approach is possible, but of how to create the right mix between institutional order, social compromise and political culture as to ground a successful identity, rather than a dysfunctional one.”*⁹²

Constitutionalists fail to understand that

*“...the second-order pattern goes deeper than the assignment of political powers to this or that level of democratic competition. It has to do with cultural features that limit the formation of a European demos.”*⁹³

6.3.5 Is Constitutionalism Politically Feasible?

That leaves the political viability of the constitutionalist strategy for reform to be considered. Past policies affecting the political regime component of legitimacy have so far failed to generate a dramatic impact on diffuse support. Constitutionalists would blame this failure on European governments which have always shunned the kind of radical institutional reform advocated by constitutionalism. Whenever the EP tabled proposals for a wholesale constitutional reform (for instance the 1984 “Draft Treaty Establishing the European Union”⁹⁴ or the 1994 “Resolution on the

⁹² Beetham and Lord, *op. cit.*, p.40

⁹³ *Ibid.*, p.78f

⁹⁴ European Parliament: Draft Treaty Establishing the European Union, (Luxembourg: Directorate General for Information and Public Relations, 1984)

Constitution of the European Union”⁹⁵), its recommendations were generally politely ignored and filed away.⁹⁶

Although the Draft Treaty and the Resolution remained blueprints, they provided a reference point against which the degree of the democratic deficit of the actual institutional arrangements could be measured and from which subsequent Treaty reforms took inspiration. Under pressure from national electorates dissatisfied with the status quo and increasingly aware of the causal link between democratisation and public acceptance of European integration, Europe’s political leaders started to embrace the constitutionalist paradigm in the late 1970s. Albeit substantial, the institutional reforms undertaken so far fell well short of the institutional design envisaged by the EP.

While such meagre impact on diffuse support for the European political regime can at least partly be explained away by the timidity of past political reforms, the lack of reformist zeal among many of Europe’s political leaders suggests another obstacle to the constitutional agenda for reform. If fully implemented, a European parliamentary democracy would significantly alter the balance of power between the Union and its member states at the expense of the latter. It would presumably also put this relationship on an entirely different legal footing, whereby the High Contracting Parties would cease to be the EU’s collective constitutional sovereigns.

Such a departure from the treaty-based origins of European integration would signify a radical diminution of member state sovereignty. Few governments seem currently prepared to sacrifice their influence over European politics “merely” to make the EU more legitimate, although important country-specific differences are again perceptible.⁹⁷ The German government is at least rhetorically committed to *political union*, and Foreign Minister Fischer has recently advocated a constitutionalist approach towards further integration, but these proposals have found little support in

⁹⁵ European Parliament: “Resolution on the Constitution of the European Union”, Official Journal of the European Communities, A3-0064/94, pp.155-170

⁹⁶ For a discussion of the latter see: Ernst-Ulrich Petersmann: “How Can the European Union be Constitutionalised? The European Parliament’s 1994 Proposal for a Constitution for the European Union”, Aussenwirtschaft, vol.50, no.1, 1995, pp.171-220

⁹⁷ Scharpf (91), op. cit., p.417

most other member states, including France.⁹⁸ The British government in particular remains opposed to a constitutionalisation of the EU.⁹⁹ This position mirrors the greater degree of opposition to further institutional integration among British élite and mass opinion than among Germans.¹⁰⁰ At the élite level over the past decades a significant section of the British media and at least one of the two main political parties has been hostile towards the idea of solving the legitimacy deficit by means of a constitutionalisation of the EU.¹⁰¹ If constitutionalism does not enjoy support among Europe's current political leaders, its political implementation remains unrealistic for the time being.¹⁰² Yet constitutionalists rarely provide realistic strategies for overcoming potential hostility to their ideas amongst member states whose *unanimous* support must be secured and backed up by substantial national constitutional changes.¹⁰³ In short, constitutionalism fails the feasibility criterion for solving the legitimacy deficit.

6.3.6 Summary

Of the two criteria for measuring successful legitimising strategies constitutionalism superficially fulfils the pertinence criterion. It advocates changes to Europe's political regime (primarily the introduction of a parliamentary democracy) which enjoy a high degree of felt legitimacy across the peoples of Europe. However, at a more detailed level most existing constitutionalist theories fail to offer a coherent and detailed overall institutional design. They also overlook the contingency of the EU's legitimacy on the perspective of its member states. As a legitimising strategy, constitutionalism is likely to be more effective in Germany than in the UK, where the creation of a European government would not enjoy much diffuse support, not least because it would conflict with Britain's formal legitimacy. Constitutionalism thus

⁹⁸ "Joschka Fischer, Germany's Flighty Foreign Minister", *The Economist*, vol. 355, no.8171, 20/5/2000, p.68, Joschka Fischer: *Speech to the European Parliament*, 12/1/1999, (http://www.auswaertiges-amt.de/6_archiv/2/r/R990112a.htm). See also: "Schröder Aims to Use Euro in Drive for Political Union", *Financial Times*, 31/8/99

⁹⁹ Prime Minister Blair remains "hesitant about trying to draw up a new constitution for the whole of Europe and the right hon. Gentleman would find that other countries would also be hesitant", House of Commons: *Parliamentary Debates*, 17th of March, 1999, Hansard, vol.327, no.56, col.1118

¹⁰⁰ *Chapter 5*, pp.210ff

¹⁰¹ Bernard Wessels, *op. cit.*, p.143

¹⁰² "Greece's Constitutional Study Fails to Impress", *Financial Times*, 22/12/1993, p.2

ignores the significant variations in national political values and traditions about how political systems should be legitimised.

These failings raise a question mark over whether constitutionalism could even raise diffuse regime support. More significantly, constitutionalism misjudges the dynamics of legitimation because it wrongly assumes that a strong European identity can be created simply by means of institutional engineering. It therefore fails the pertinence criterion for solving the legitimacy deficit. Given the varying objectives of political élites in the member states, constitutionalism may currently prove politically unrealistic to implement, thus failing the second, feasibility criterion. This does not mean that constitutionalism must be written off entirely as a strategy for solving the legitimacy deficit. If its vision for Europe's future institutional design gained some more coherence and became more sensitive to national legitimising traditions, it might still play a useful part in alleviating the considerable public discontent with the EU's current institutional design. But institutional reforms must be *preceded* by a strategy which tackles the lack of a European demos directly. Communitarianism claims to offer such a strategy.

6.4 Communitarianism

6.4.1 Possible Approaches

Communitarianism addresses directly the most significant factors responsible for low levels of felt legitimacy in the EU, namely the lack of a European identity. It does so by employing a sociological analytical perspective according to which *communal ideologies* can be employed to stimulate a *sense of political community*, which measures the community's cohesiveness as a group.¹⁰⁴

As discussed in chapter two, communal ideologies can assume a number of guises. The discussion identified four theoretical approaches to the issue which were termed

¹⁰³ Sverker Gustavsson: "Preserve or Abolish the Democratic Deficit?", in: Eivind Smith (ed.): National Parliaments as Cornerstones of European Integration, (London: Kluwen Law International, 1996), p.109

¹⁰⁴ Chapter 2, p.75

primordialist, modernist, ethno-symbolist and *post-modernist*.¹⁰⁵ The first three draw on the communal ideology of nationalism, which is rejected by the fourth approach. These four theoretical paradigms represent different views on the dynamics of collective identities, in particular whether a communitarian strategy can successfully remedy the legitimacy deficit by creating a European identity. The following sections assess whether any of these four theoretical perspectives meet the two criteria for solving the legitimacy deficit. To fulfil the pertinence criterion, they must demonstrate whether and how communal ideologies can be employed to enhance the EU's legitimacy by creating a new European identity. To meet the feasibility criterion, communitarian strategies must find the endorsement of Europe's political élites.

6.4.2 Primordialism

Primordialism represents a view of communal ideologies which is based on the equation of *demos* with *ethnos*. This amounts to an "objective" manifestation of nationhood whose members share a common ethnic history, culture and language.¹⁰⁶ This version of nationalism has been termed objective because it is linked to the notion that national identities are to be treated as ethnically primordial and organic rather than imagined.¹⁰⁷

A primordialist interpretation of nations and national identity has two important (and fatal) implications for communitarian strategies to solve the legitimacy deficit of the EU. First, a European national identity would struggle to establish itself vis à vis the historically entrenched, organic and "natural" nationalisms of its member states.¹⁰⁸ Because of their "authenticity", these enduring myths about national ethnic origins continue to provide powerful communal ideologies which buttress the legitimacy of Europe's nation states. Against the persistence of a multitude of national *ethnies*, a European *demos* will be unlikely to emerge.

¹⁰⁵ Chapter 2, pp.76ff

¹⁰⁶ Joseph Weiler, Ulrich Haltern and Franz Mayer: "European Democracy and its Critique", West European Politics, vol.18, no.3, 1995, p.10

¹⁰⁷ For instance: van den Berghe, op. cit., Geertz, op. cit.

¹⁰⁸ Obradovic, op. cit., pp.213ff

Second, being the organic product of a common ethnic history, culture and language, national identities cannot be created from scratch. Some scholars, who have been given the label “Euro-nationalists”, maintain that a uniquely European ethnos, rooted in the distant past, does exist.¹⁰⁹ However, many sceptics of the Euronationalist literature believe that the imprecise demarcation of Europe as a cultural and geographical unit makes the notion of objective nationhood fraught with difficulty.¹¹⁰ The idea of a unified European identity lacks its pre-modern authentic myth which could provide it with pre-political social unity, emotional substance and historical depth.¹¹¹ In Easton’s terminology, the problem with the idea of an “objective” thick identity is that Europe’s *political community* is not underpinned by a homogenous and powerful *social community*.¹¹²

From a primordialist perspective, therefore, the communitarian strategy for solving the legitimacy deficit fails because a European ethnos cannot be created from scratch. However, the primordialist paradigm is itself contested, and its analysis is open to criticism on a number of points. Some member states, such as Belgium or Spain, arguably do not exhibit the primordialist characteristics of being based on a common ethnic history, culture and language. In many other European countries national identities have lost some of their organic coherence as a consequence of increasing ethnic diversity and a revival of older, regional loyalties.¹¹³ Moreover, the congruence of political and social community emphasised by primordialism may also be normatively undesirable. A communal ideology which is based on homogenising Europe’s diverse societies and cultures would be unable to command a great degree of felt legitimacy from European publics. Any departure from the multinational and multilingual nature of the EU may well be considered illegitimate right across member states.¹¹⁴

¹⁰⁹ For a survey of Euro-nationalist literature, see: A. Bance: “The Idea of Europe: From Erasmus to ERASMUS”, *Journal of European Studies*, vol.22, no.1, 1992, pp.8-9

¹¹⁰ Obradovic, *op. cit.*, p.214f

¹¹¹ *Ibid.*, p.214f, also: Anthony Smith, (92), *op. cit.*, p.62

¹¹² Easton (65), *op. cit.*, p.184f

¹¹³ William Wallace: “Rescue or Retreat? The Nation State in Western Europe, 1945-93”, *Political Science*, vol.42, Special Issue, 1994, p.75

¹¹⁴ Karlheinz Reif: “Cultural Convergence and Cultural Diversity as Factors in European Identity”, in: Soledad Garcia: *European Identity and the Search for Legitimacy*, (London: Pinter Publishers, 1993), p.151

Traditional “objective” nationalism may have a proven historic track record as a very effective psychological tool for forging a strong sense of *political* (and *social*) *community*. But it has also been responsible for the suppression of minority cultures *within* national territories and for many of the violent European conflicts *across* national territories which the process of European integration was designed to overcome. Besides, such nationalist ideologies tend to define themselves negatively against “the others”, thus opening the EU to charges of creating a “fortress Europe” mentality of cultural exclusiveness.¹¹⁵ Even if the imposition of a homogenising European *ethnos* were possible, it would still fail both pertinence and feasibility criterion: it would neither find the support of Europe’s political élites, nor be considered legitimate by the wider publics.

6.4.3 Modernism

The modernist perspective on nationalism does not equate *demos* with *ethnos*. Instead, peoplehood manifests itself in a “subjective” way.¹¹⁶ Nations are “imagined political communities” because they are deliberate constructs of political élites.¹¹⁷ National identity expresses itself in terms of public loyalty to, and cohesive support for, the national political community. By implication, the communitarian strategy of identity-building at the European level has the potential to succeed because collective identities are susceptible to dynamic transformation.

Deutsch et al suggest a number of conditions under which supranational integration, defined as the attainment of a sense of community, can develop towards a full political merger (“amalgamated international community”).¹¹⁸ These include the fostering of unbroken social communication both across territories and across social strata (inter- and intra-group transactions) and the emergence of values, institutions and habits of action which mark the new community off from major neighbours.¹¹⁹ Through a process of social learning, which involves increasing communicative bonds

¹¹⁵ Anthony Smith (92), *op. cit.*, p.76

¹¹⁶ Weiler et al (95), *op. cit.*, p.10

¹¹⁷ Anderson, *op. cit.*, p.6

¹¹⁸ Deutsch et al, *op. cit.*, pp.5-36

¹¹⁹ *Ibid.*, pp.46-58

and the generation of common memories and symbols, individuals can learn to become a people.¹²⁰

Some scholars have drawn on Deutsch's study of the analogies between European integration and the historic nation-building process in the United States and Canada.¹²¹ Howe suggests that European leaders should follow in the footsteps of North American nation-builders who, in the absence of a common historic ethnos, based their communal ideology on the forward-looking idea of a common destiny. Over time, the myth of a common destiny could be complemented with an emerging history of positive joint European experiences.¹²² A closer inspection of the historical parallels reveals their limits, however.

Both the US and Canada are largely based on immigrant societies who developed a *plural* rather than an *ethnic* concept of the nation.¹²³ Nevertheless, the historic dominance of white Puritan Anglo-Saxon culture and language has provided a strong ethnic base, a public culture, an education system and a foundation myth for the welding together of successive waves of immigration. Successful nation-building has depended on a certain degree of initial historical and cultural affinity among a dominant core of the population. Where this affinity was weakly developed, or even contested by competing core *ethnie*, plural national identities have failed to become deeply entrenched, as the example of Canada illustrates.¹²⁴ The Canadian federation represented more a *marriage de convenance* for Francophone settlers who disliked English-speaking rule, but urged loyalty to the British crown after the French revolution in 1789. In other words, Canada always remained "the home not of one nation but of a nation-and-a-half."¹²⁵

But even the United States initially failed to generate a sense of nationhood stable enough to withstand serious regional conflicts in economic interests. When these were exacerbated by the emotional issue of slavery, "there developed something which

¹²⁰ Deutsch (66), p.174

¹²¹ Deutsch et al, *op. cit.*, p.46-58

¹²² Paul Howe: "A Community of Europeans: The Requisite Underpinnings", *Journal of Common Market Studies*, vol.33, no.1, 1995, p.32f

¹²³ Anthony D. Smith: *Nations and Nationalism in a Global Era*, (Cambridge: Polity Press, 1995), p.107ff

¹²⁴ *Ibid.*, p.107ff

could seriously be called southern national consciousness.”¹²⁶ As the Southern States seceded, precipitating a very costly and destructive civil war, efforts were made to remodel public education with the aim of inculcating “national loyalty” specifically to the South rather than to the US as a whole.¹²⁷

In short, the process of nation-building in the US has occurred under conditions rather dissimilar to the situation of the EU today. Plural nationalism was established on the basis of an immigrant society whose initial collective identity was underpinned by a large fragment of a core *ethnie*. The growing ties of communication and community, which arose as the populations of the colonies were increasingly linked by newsprint and commerce, *preceded* any widespread unification of political institutions.¹²⁸ Once common interests and communal self-awareness had emerged, political conflict with Britain offered the external threat *against* which the American nation state could be formed.¹²⁹

The EU is not composed of immigrant societies, recent immigration inflows notwithstanding. It does not have a core *ethnie* which could provide the parameters for a common public culture, heritage and educational framework. To the contrary, the EU is integrating sovereign states with distinct, entrenched national identities.¹³⁰ As a result, institutional integration has preceded the emergence of a European demos. Modernist attempts to “invent” a European nation are further complicated by the fact that the evolution of an American nation has been slow and sometimes precariously close to failure. Even Switzerland, a successful example of a plural, multi-lingual nation which is not based on immigrant societies, arose from one initially dominant, pre-modern (Alemmanic) *ethnos*.¹³¹ As with the USA, its modern plural identity emerged from a long and sometimes fragile integration process, including a short civil war in 1847, which in retrospect played a major part in eventual formation of a sufficiently cohesive Swiss nation.

¹²⁵ Hugh Seton-Watson: *Nations and States*, (London: Methuen, 1977), p.230

¹²⁶ *Ibid.*, p.214

¹²⁷ *Ibid.*, p.214

¹²⁸ Anderson, *op. cit.*, p.64ff

¹²⁹ Richard Merritt: “Nation-Building in America - The Colonial Years”, in: Karl Deutsch and William Foltz (eds.): *Nation-Building*, (New York: Atherton, 1966), pp.70ff

¹³⁰ Roger Eatwell: “Europe of the ‘Nation States’? Concepts and Theories”, in: Roger Eatwell (ed.): *European Political Cultures - Conflict or Convergence?*, (London: Routledge, 1997 b), p.249

¹³¹ Anthony Smith (95), *op. cit.*, pp.48-50

To conclude, a comparison with historic nation-building processes in North America and Switzerland casts doubt on the viability of a modernist strategy for solving the legitimacy deficit. Nation-building occurred incrementally over generations around a core cultural *ethnie*, it *preceded* the state-building process and was catalysed by violent internal conflict and a “unifying” external enemy. These factors are either absent in Europe, or undesirable as a means of modern nation-building. Even if effective substitutes for them could be found for the EU, the most important lesson to be drawn from these historic cases is that the process of “inventing” successful and durable collective identities is likely to follow less linear dynamics and requires a much longer time frame than most modernists assume.¹³²

6.4.4 Post-Modernism

The practical difficulties associated with a modernist strategy of “inventing” a European nation state play into the hands of scholars who could be loosely grouped under the label post-modernism. Rather than copying historic attempts at nation building to create a European nationalism intended to “trump” the nationalism of its member states, they seek to create a “thin” European identity which is compatible with existing national identities.¹³³ On this view, European democracy does not *require* a nationally organised, strongly resonating demos. All that is needed is a *sense of political community* strong enough to generate the degree of mutual trust and political identification necessary for democratic majority decisions to be universally accepted.

One of the leading representatives of this view, Joseph Weiler, proposes an intellectual “reformation of European constitutionalism” away from the old conceptions conflating citizenship and nationality, even if understood in organic-cultural rather than ethnic terms. His alternative is based on what he terms a “concentric circles approach” allowing the harmonious co-existence of multiple *demos* with which the citizens of the Euro-polity can identify. Weiler wants to replace

¹³² Eatwell (97b), *op. cit.*, p.249

¹³³ See for instance: Beetham and Lord, *op. cit.*, pp.43ff

the “real or imaginary trans-European cultural affinities or shared histories”¹³⁴ with an understanding about common social rights and duties and the values of a rational, intellectual culture beyond national differences.

Crucially, he does not aim to replace member state nationalism with a European one.

This view

*“invites individuals to see themselves as belonging simultaneously to two demoi, based, critically, on different subjective factors of identification. I may be a German national, or French or Italian in the in-reaching strong sense of organic-cultural identification and sense of belongingness with all the attendant emotional charge which may (at least to many) seem necessary and positive. I am simultaneously a European citizen in terms of my European transnational affinities to shared values which transcend the organic-national diversity and which are the subject not of emotional identification but of reflective, deliberative rational choice. So much so, that in the range of areas of public life, I am willing to accept the legitimacy and authority of decisions adopted by my fellow European citizens in the realisation that in these areas I have given preference to choices made by my out-reaching demos rather than by my in-reaching demos.”*¹³⁵

Habermas goes even further than Weiler because he wants to replace the old ethnicity-based concept of nationhood entirely, both at the national and the supranational level. As societies in the member states become increasingly multicultural, collective identities and communal solidarity can no longer be justified in terms of exclusivist ethno-cultural nationalism.¹³⁶ The socially-constructed fusion between national and republican citizenship, in other words between *ethnos* and *demos*, must be disentangled because “citizenship was never conceptually tied to national identity.”¹³⁷

¹³⁴ Weiler (97a), *op. cit.*, p.119

¹³⁵ *Ibid.*, p.119f

¹³⁶ Jürgen Habermas: “The European Nation State - Its Achievements and its Limits”, *Ratio Juris*, vol.9, no.2, 1996, pp.289ff

¹³⁷ Habermas (92), *op. cit.*, p.4

Habermas's *republican citizenship* for the EU completely breaks with the notion of belonging to a "pre-political community integrated on the basis of descent, a shared tradition and a common language."¹³⁸ Freed from nationalist connotations, a republican citizenship should foster identity through citizens actively exercising their civil rights. A new *constitutional patriotism* must grow out of the different national interpretations of the same shared universalist constitutional principles, such a popular sovereignty and human rights. People may come to identify with the EU because it provides an infrastructure for collective *will formation* by which all their other overlapping attachments (local, gender, occupational and so on) can be managed and prevented from coming into excessive conflict with each other.¹³⁹

The idea of defining a community in terms of the rights, duties and practices of citizenship has been revived in the recent debate about the perceived need for a substantive European *citizenship* which, it is argued, can contribute to legitimise the EU in the eyes of its citizens.¹⁴⁰ Most communitarians conceive such a European citizenship as being based on a "thin" conception of identity which can co-exist with national identities because it is open to reflexive adaptation and based on abstract standards of interaction rather than value-laden socio-ethnic identities.¹⁴¹

Two problems remain with almost all versions of *communal ideologies* based on the notion of thin identity. First, the content of thin identities is too vague and abstract in order to be able to inspire European citizens to shift their loyalties towards the EU's political community. They do not address the problem of ranking different levels of communities, thus leaving the "thin" European identity in danger of being overridden by existing "thick" national ones. Second, the normative content of thin identities neglects country-specific variations in what constitutes legitimate values for a communal ideology.

¹³⁸ *Ibid.*, p.3

¹³⁹ Habermas (96), *op. cit.*, p.289

¹⁴⁰ For an overview see: Garcia, *op. cit.*, pp.1-29

The Ranking of Loyalties

Both Weiler and Habermas argue against a mere *replacement* of member state nationalism with a future European nationalism. Yet their conception of the harmonious co-existence of the different levels of identity is perhaps too idealistic. Weiler's theory underestimates the problem that political decisions by the EU may on occasions adversely affect some national polities, but not others.¹⁴² As a result, citizens will feel conflicting demands made on their loyalty towards each of their multiple *demos*.

Even after reflective rational deliberation these will sometimes be hard to reconcile. Despite the substantially different nature of identification each circle evokes, many Europe-wide political issues and conflicts will require the competing demands of one circle to be weighed against another. The more European integration proceeds - and communitarianism is premised on a normative choice in favour of "ever closer Union" - the greater the need for a powerful sense of political community will become.¹⁴³ For the EU to acquire powers of direct taxation or a military capability of its own would require the creation of a strong European *demos* which commands the *primary* political loyalty of Europeans.¹⁴⁴

As argued in chapter three and four, the conditions for creating a European *demos* are more favourable in Germany than in Britain because Germany's national identity is far more compatible with an additional, supranational layer of identity. But the last chapter revealed that around half the German population still has an *exclusively* national identity, and even among those who feel both German and European only a negligible minority identify *primarily* with the EU.¹⁴⁵ Weiler concedes that the nation will still command greater attachment in any normative conflict between the two, but he does not develop this important argument.¹⁴⁶ Similarly, Habermas assumes that in the future rational attachment to constitutional values will prevail over allegiance to a political community based on a common social and cultural tradition, even in times of

¹⁴¹ Beetham and Lord, *op. cit.*, pp.43-47

¹⁴² Scharpf (96a), *op. cit.*, p.26f

¹⁴³ Helen Wallace (93), *op. cit.*, p.100f

¹⁴⁴ Beetham and Lord, *op. cit.*, p.38, 78f

¹⁴⁵ See: Chapter 5, pp.232ff

crises. Such optimism seems misplaced. It remains questionable whether a European thin identity can ever achieve the degree of emotive loyalty which is indispensable for any political community, even the EU.¹⁴⁷ Such loyalty need not be the kind of uncritical, xenophobic and nationalistic attachment that Weiler and Habermas rightly denounce. But their common emphasis on shared political values empties the content of a “we-feeling” to leave nothing more than the mere procedures and outputs of the European political system itself.¹⁴⁸

Even if a thin identity were able to generate a widely resonating European identity, it would require a big shift of consciousness among the European publics which has not yet occurred. The emergence of a thin identity in the EU is premised on societal change which will need to be fostered over decades rather than years. Until then, judgement as to its feasibility must remain to some degree speculative. Considered from this perspective, Habermas’s argument appears almost circular: his constitutional patriotism requires a European constitution, which requires a demos to act as a popular sovereign, which his patriotism is designed to foster in the first place.

Political Values Are Country-Specific

A general commitment to shared political values such as democracy and human rights may well disguise substantial differences and disagreement about how these values should be applied to the political system of the EU.¹⁴⁹ This leads back to the central argument that the legitimacy of the EU depends on the country-specific perspective of each member state.

For instance, the strong judicial protection of human rights may help to legitimise the EU from Germany’s national context which is shaped by a depoliticised, legalistic political culture and a constitutional tradition of a powerful supreme court. From a British perspective, where courts are constitutionally subordinate to Parliament and the question of human rights is considered a political rather than a judicial issue, a rights-based European citizenship may well be considered undemocratic, and thus

¹⁴⁶ Weiler (97a), *op. cit.*, p.119

¹⁴⁷ Anthony Smith (92), *op. cit.*, p.75

¹⁴⁸ Beetham and Lord, *op. cit.*, p.43f

have a negative effect on the EU's legitimacy.¹⁵⁰ Even from a purely German perspective, the legitimising effect of protecting human rights at EU level remains doubtful, since they are already effectively guarded by the Basic Law, the FCC and even the European Court of Human Rights. Indeed, Weiler agrees that the contribution of human rights to a sense of shared identity has "reached the point of diminishing returns."¹⁵¹

Habermas stresses the universality of human rights that form the core of his republican citizenship, but he leaves their scope undefined. At least in terms of *economic* human rights, different national traditions prevail, such as *Rheinish* or *Anglo-American* capitalism. This will make the selection of a substantive list of common rights very contentious, and thus divisive rather than unifying. Once again, what is considered legitimate may differ considerable according to the national perspective of each member state. For instance, scepticism about economic rights is more widespread in Britain than in Germany.¹⁵² Neither Weiler nor Habermas discuss the implementation of their abstract ideals of concentric circles or European constitutional patriotism. Yet many of the above-mentioned deficiencies in their approaches arise exactly when one attempts to derive guides for political action from them.

Similar objections can be raised against the arguments in favour of a substantive European *citizenship*. Not only does the actual meaning of "citizenship" very often remain nebulous and ill-defined.¹⁵³ Even when the effort is made to spell out its meaning more clearly, citizenship seems to amount to no more than a conflation of the notion of political identity with a framework for civil, political and economic rights.¹⁵⁴ Such arguments rest on a merely asserted causal link between so-called

¹⁴⁹ Scharpf (94), *op. cit.*, p.168

¹⁵⁰ Witness the largely negative British reaction to recent proposals by Germany's Foreign Minister Joschka Fischer to adopt a European Charter of Basic Rights: "Business Leaders Fear Threat Posed by Charter", *Financial Times*, 29/3/2000, p.2

¹⁵¹ Joseph Weiler: "To be a European Citizen - Eros and Civilisation", *Journal of European Public Policy*, vol.4, no.4, 1997, p.501

¹⁵² "Necessary? The EU and Human Rights", *The Economist*, vol.354, no.8156, 5/2/2000, p.42

¹⁵³ Jennifer M. Welsh: "A Peoples' Europe? European Citizenship and European Identity", *Politics*, vol.13, no.2, 1993, pp.25-31

¹⁵⁴ Antje Wiener: "Constitution-Making and Citizenship Practice - Bridging the Democracy Gap in the EU?", *Journal of Common Market Studies*, vol.35, no.4, 1997, pp.601-03

citizenship rights and public emotional identification with the EU.¹⁵⁵ But this causality remains questionable for some of the reasons outlined in the previous paragraph.

Weiler has recently acknowledged that to confine citizenship to the “European” values of human rights and democracy is too narrow a view (“Saatchi&Saatchi European citizenship”¹⁵⁶), since the EU member states, as signatories to the ECHR, already share these values.¹⁵⁷ He also concedes that these values can differ significantly at a more substantive level, quoting the ECJ’s telling refusal to rule on the Irish *Grogan v SPUC* abortion case as an important example.¹⁵⁸

Yet a revised version of his multiple demois argument still cannot escape some of the earlier objections. Weiler claims that European and national citizenship must be seen as totally interdependent. Europe should never seek to acquire an organic national-cultural demos, but “we are willing to submit aspects of our social ordering to a polity composed of “others” precisely because we are convinced that in some material sense they share our basic values.”¹⁵⁹ Weiler thus links two poles of Europe’s cultural heritage: the valuable, but potentially destructive power of nationalism is tamed by a humanist, rational and enlightened supranational civilisation. As before, the challenge lies in making the two complementary rather than competing with each other, which in turn begs the question how the a European demos can be substantiated. Weiler offers some concrete policy proposals, but they are premised upon, rather than creating, a significant degree of European communal cohesion (European legislative ballot, European income tax).¹⁶⁰

To summarise, post-modernists reject the communal ideology of nationalism in favour of thin identities which they believe a communitarian strategy for solving the legitimacy deficit can successfully create. However, a thin European identity would not meet the pertinence requirement of significantly enhancing diffuse support for the EU’s political community. Although it espouses communal values and rights which

¹⁵⁵ “Belongingness was created step-by-step and area-by-area.” *Ibid.*, p.606 (my italics)

¹⁵⁶ Weiler (97b), *op. cit.*, p.502

¹⁵⁷ *Ibid.*, p.510

¹⁵⁸ See: *Case C-159/90 SPUC v Grogan* (1991) ECR I-4685

¹⁵⁹ Weiler (97b) *op. cit.*, p.511

are long established within most EU member states, this seeming advantage is also its problem. Concepts of thin identity do not offer anything over and above the values represented by enlightened national identities and a belief in internationalism. That makes thin identities unlikely to evoke strong affective loyalties, especially when competing with well-entrenched national identities. Yet as soon as conceptions of thin identity become more specific and value-laden, they conflict with different national legitimising traditions.

It may be objected that these criticisms are based on an understanding of collective identities that is unduly confrontational and one-dimensional, whereas in fact people always have multiple identities and are simultaneously members of many social and political communities.¹⁶¹ While this is undoubtedly true, these identities have a different degrees of political relevance. Smith agrees that

“theoretically, then, it would be perfectly possible for the peoples of Europe to feel that they had more than one collective cultural identity: to feel themselves Sicilian, Italian and European, or Flemish, Belgian and European (as well as being female, middle class, Muslim or whatever). At the same time, it should also be asked: what is the relative strength of these “concentric circles of allegiance”? Which of these circles is politically decisive, which has most effect on people’s day-to-day lives? And which of these cultural identities and loyalties is likely to be more durable and pervasive?”¹⁶²

Easton similarly acknowledges the existence of multiple levels of political community. Yet he also agrees that “the nation may be held out as the ideological symbol in terms of which the members of a system interpret their common political bonds as against the particularistic identification with tribe, village, region or class.”¹⁶³ In short, the communal ideology of nationalism tends to enjoy the legitimacy to arbitrate between the multiple individual identities that are contained within the broad collective identity of the nation. As Howe has put it, “while it is easy to imagine someone being intensely French and secondarily European, it is difficult to

¹⁶⁰ *Ibid.*, p.513ff

¹⁶¹ Beetham and Lord, *op. cit.*, p.44f

¹⁶² Anthony D. Smith: *Nations and Nationalism in a Global Era*, (Cambridge: Polity Press, 1995), p.124

conceive of someone being at once intensely French and intensely European.”¹⁶⁴ As was argued above, even in countries like Germany, where national identities can accommodate the emergence of supranational loyalties, citizens continue to identify primarily, if not exclusively, with their nation rather than with Europe.

The recent regionalisation in some European countries, far from disproving this analysis, only serves to confirm it. In most countries, there has merely been a desire for devolved political decision-making which does not call the national political community into question. Bavarians may be fiercely proud of their regional identity, and they may seek to expand their political authority within Germany, but in an ultimate political conflict their collective loyalties lie with the Federal Republic as a whole. On the other hand, separatist movements such as in Scotland, Belgium or Spain do not aim for regionalisation. Instead, they reflect the re-emergence of even older national identities which in the past had been supplanted by the collective identities of the multi-national states into which they have been absorbed. For committed Scottish nationalists, their Scottish identity is politically decisive and trumps over their remaining British sense of political community.¹⁶⁵

6.4.5 Ethno-Symbolism

As discussed in chapter two, ethno-symbolists represent a intermediary position between primordialists and modernists. While they do not equate *demos* with *ethnos*, they stress the historic legacy of ancestral ethnic myths which underpin many modern national identities. Successful communal ideologies are based on a *shared memory* just as much as a *common destiny* and their historic myths and symbols can be reinterpreted to generate national identities.¹⁶⁶

Which values could form the content of such a European peoplehood? As regards the *shared memories* of a European *demos*, the lack of clear ethnic or geographic boundaries leaves a common European heritage “the object of lofty reflections rather

¹⁶⁴ Easton (65), *op. cit.*, p.181, 334

¹⁶⁵ Paul Howe, *op. cit.*, p.33

¹⁶⁶ Eurobarometer: British Public Opinion, *op. cit.*, p.38

¹⁶⁶ Anthony Smith (95), *op. cit.*, p.133

than the source of spontaneous emotions.”¹⁶⁷ The founding fathers of the European movement, for instance, sought to evoke the pan-European Carolingian and Ottonian Holy Roman Empire as an example of shared historical experience. Others reach back to the legacy of classical antiquity which underlies most of today’s European languages and cultures. But such shared memories are historically remote and based on high culture which hampers their usefulness in providing a vivid and powerful sense of political community in the modern EU.¹⁶⁸

It seems more promising to connect the legacy of classical culture with the common European experience of the Renaissance, the enlightenment, industrialisation and modernity which has culminated in a pan-European commitment to liberal democracy, pluralistic, open societies and respect for the rule of law.¹⁶⁹

*“These patterns of European culture [...] have created a common European cultural heritage and formed a unique culture straddling national boundaries and interrelating their different national cultures through common motifs and traditions. [...] It is here, rather than the mythology of medieval Christendom [...] or a Rhine-based Holy Roman Empire [...] that we must look for the basis of a cultural Pan-European nationalism that may paradoxically take us beyond the nation.”*¹⁷⁰

It is true that the shared memories lying behind these historic symbols are also memories of divisions between European countries and the suppression of minorities. Maybe European history is simply a history of its peoples, written in terms of state conflict and war.¹⁷¹ However, a long history of internal conflict has not prevented German and British nation-building, and the pan-European values outlined below have emerged *in response to* past violent disputes and divisions in Europe. Although common historic experiences have highlighted Europe’s divisions, they have at the same time given rise to a shared history of tolerance and rationality whose values can

¹⁶⁷ Obradovic, *op. cit.*, p.215

¹⁶⁸ Anthony Smith (95), *op. cit.*, p.133f

¹⁶⁹ Norman Davies: *A History of Europe*, (Oxford: Oxford University Press, 1996), p.1278

¹⁷⁰ Anthony Smith (91), *op. cit.*, p.174f

¹⁷¹ Anthony Smith, (95), *op. cit.*, pp.134-37

be projected forward in shaping a common destiny.¹⁷² If seen from that perspective, there is no need for Europe to break with its (only partially haunted) past.¹⁷³

These shared memories must be connected with the *common destiny* evoked by the founders of the European Community.

*“For many the prime motivation for European unification was, from the first, political, even military: the rejection of war as an instrument of state policy and a reading of recent European history as a futile carnage of civil wars unleashed by the blind forces of unbridled nationalism, culminating in the holocaust of Nazism.”*¹⁷⁴

The telos of “ever closer Union” reflects this desire to build the EU on the unifying and enlightened values that arose from a common history marked by strife and divisions. Appeals to a shared destiny have been at the heart of the communal ideologies of many multi-ethnic states.¹⁷⁵ Just as most Americans today prefer to interpret the Civil War as an important stage in American moral development, so Europe’s history must be treated as a shared lesson in the savagery and futility of war.¹⁷⁶

Some have argued that today the values of peace and internationalism can no longer mobilise the publics in the member states to integrate ever further, especially as the memory of the two world wars becomes less vivid.¹⁷⁷ But appeals to a common destiny can be supplemented by more contemporary interpretations of a European telos. Beetham and Lord refer to the image of a “community of fate” in the face of globalisation, which has sometimes been evoked in the context of EMU.¹⁷⁸ The common mastery of threats to the peace and stability of the entire continent, be they of an economic nature or in the shape of military conflicts in the Balkans, also

¹⁷² Laffan, *op. cit.*, p.99

¹⁷³ Anthony Smith (95), *op. cit.*, pp.130-33

¹⁷⁴ Anthony Smith (91), *op. cit.*, p.151

¹⁷⁵ Laffan, *op. cit.*, p.99

¹⁷⁶ Paul Howe, *op. cit.*, p.32

¹⁷⁷ Garton-Ash argues that European integration, rather than being a sign that Europeans have “learnt from history”, has been a product of the Cold War with the Soviet Union as negative external integrator and the US as a positive one. This historically favourable constellation has disappeared. See: Garton-Ash, *op. cit.*, p.54ff

¹⁷⁸ Beetham and Lord, *op. cit.*, p.36

contributes to a sense of common destiny. Future experiences of joint political and military action to avert external threats to peace and security in Europe will help to build mutual trust. They will also provide shared historical myths and symbols for future generations. After all, political systems always operate within boundaries, and boundaries mark off those within them as distinct and belonging together.¹⁷⁹

Would the propagation of such a “thick” identity transform the telos of European integration from ever closer union among the peoples of Europe into the creation of one European people?¹⁸⁰ It would, but not as an organic, “objective” ethnic manifestation of nationhood which merely transposes the potential excesses of nationalism to the European level.¹⁸¹ Instead, it would create a multi-national state identity for Europe. It would be based on a communal ideology consisting of a (sometimes conflictual) shared history from which it derives a common telos of peaceful co-operation within an integrated political system. Its myths, symbols and values will have to be fashioned such that a European collective identity overarches, but does not abolish individual nations.¹⁸²

Thick, subjective communitarianism could thus meet the pertinence criterion for solving the legitimacy deficit. Howe believes

*“there is reason to think that the people of the EU can become intensely European yet remain secondarily French or Spanish or German; in other words, that the European loyalty will gain the upper hand without any significant erosion of the ethnic traits and distinct cultures that today sustain more intense local allegiances.”*¹⁸³

However, the contingency of EU legitimacy on the national perspective of each member state means that the promotion of a European demos would be received very differently in Britain and Germany.¹⁸⁴ As discussed in chapters three and four, post-war Germany turned its back on strongly ethnicity-based, nationalistic communal ideologies (the legal notion of *ius sanguinis* notwithstanding) and embraced

¹⁷⁹ William Wallace (90), *op. cit.*, p.105

¹⁸⁰ Weiler (97b), *op. cit.*, p.498

¹⁸¹ *Ibid.*, p.506f

¹⁸² Anthony Smith (91), *op. cit.*, p.175

¹⁸³ Paul Howe, *op. cit.*, p.33

supranational integration. In the FRG, low levels of national pride are therefore positively related to popular identification with Europe.¹⁸⁵ Military defeat, including the destruction of the country's infrastructure, made the Federal Republic particularly receptive to the triple telos of peace, prosperity and European reconciliation espoused by the EC's founding fathers. This provided positive moral content for a nascent, if weak, European identity in Germany which complemented rather than challenged the country's post-war national identity.

By contrast, Britain's national identity was strengthened rather than weakened by the experience of the two world wars. Historically defined against external enemies, British national identity has been based on the perceived dissimilarity to other nations which was reinforced by historical experiences which varied from those of continental Europe. Belated membership of the EC, far from offering a welcome substitute for a discredited national communal ideology as in Germany, only served to accentuate the inevitable end of Britain's imperial tradition and was also perceived as a threat to national identity. As a consequence, levels of national pride, which are higher than the European average, are negatively related to Europeanness.¹⁸⁶ This makes Britain's traditional national identity to some extent incompatible with the creation of an overarching European demos.

Both elements of a thick European identity, a shared memory and a common destiny, will therefore have less resonance in Britain than in Germany whose history is closely interwoven with that of its European neighbours. Such country-specific differences may hamper the EU-wide creation of vivid and clearly defined European identity which could sustain a sense of peoplehood, but they do not constitute an insurmountable obstacle. Smith concedes that "perhaps in time, over several generations" European rites and ceremonies will emerge to create a vivid and powerful sense of political community centred around the EU's symbols and emblems, its institutions in Brussels and an emotive myth about its founding

¹⁸⁵ Laffan, *op. cit.*, p.86f

¹⁸⁶ Chapter 5, p.234f

¹⁸¹ Chapter 5, p.234f

fathers.¹⁸⁷ The speed at which such a largely “invented” traditions can mature and find a deeper response in subsequent following generations depends largely on the way a communal ideology is being communicated by political élites. This raises questions about the feasibility of communitarianism.

6.4.6 Is Communitarianism Politically Feasible?

To summarise, the above discussion has assessed four different theoretical interpretations of the degree to which the dynamics of collective identities can be influenced. Can a European demos be “created” and thus the legitimacy deficit be solved? Only a primordialist interpretation of nationalism considers the creation or modification of collective identities impossible. However, a primordialist interpretation of nationalism fails the pertinence criterion because Europeans increasingly reject its emphasis on ethnicity as divisive and outdated. The post-modernist concept of thin identity similarly fails the pertinence criterion because it is incapable of creating a widely resonating and powerful European identity which could significantly bolster the EU’s felt legitimacy. Modernists believe that a European nation can be “invented”, but a comparison with nation-building processes in countries such as the US or Switzerland highlights the pitfalls of such an approach. Ethno-symbolists offer a more realistic assessment which considers the creation of a European demos possible, but acknowledge the differences between the EU and other “invented nations”. Ethno-symbolism stresses the need to ground a future European demos in shared collective memories as well as a common destiny and points to the length of the transformation process. Ethno-symbolism can therefore pass the pertinence criterion, but is it politically feasible?

Political actors were ahead of the academic discourse in realising that identity and loyalty are indispensable ingredients for felt legitimacy. Stimulated by the Tindemans Report¹⁸⁸ and the Adonnino Report¹⁸⁹, the Commission in particular devised a whole

¹⁸⁷ Anthony Smith (95), *op. cit.*, p.139. For instance, 60% of Germans and 46% of Britons approve of the introduction of a “Europe day” celebrated as a “national” holiday across the EU. See: Europinion no.5, (Brussels: European Commission, 1995), p.14

¹⁸⁸ Report by Mr Leo Tindemans to the European Council - Bulletin of the European Communities, Supplement 1/1976

¹⁸⁹ Commission of the European Communities: A People’s Europe, Bulletin of the European Communities, Supplement 7/1985

range of policies aimed at making the peoples of Europe identify more closely with the EU.¹⁹⁰ One of the first policies was to make the EU more recognisable by fitting it with the symbolic trappings of a state. A European flag was devised, and the wide use of its logo in the member states was actively encouraged. Beethoven's "Ode to Joy" became the designated European anthem, and the Commission launched a whole range of educational and exchange programmes (*Erasmus*, *Socrates*, etc.) dedicated to foster cross-border understanding and trust among the populations of the member states.¹⁹¹ The use of EURO banknotes and coins may also help to reinforce a sense of community, at least among those countries joining EMU. Yet EMU may equally cause feelings of identity and common purpose between the "ins" and the "outs" to weaken, which will become particularly salient in the course of Eastern enlargement of the Union.¹⁹²

A second set of policies was designed to give legal substance to the gradual emergence of emotive communal feelings amongst "European citizens". Art.8 of the Maastricht Treaty established a European citizenship. Its most noticeable consequences were the introduction of common passports and separate customs controls at national borders. It also guarantees freedom of movement and residence within the EU as well as active and passive voting rights for local and European elections. The Schengen Agreement, fully integrated into the EU by the Amsterdam Treaty, complements these steps by abolishing border controls between most member states. The envisaged adoption of a European Charter of Fundamental Rights would lend further substance to the concept of EU citizenship.

The usefulness of these political efforts at identity-building has often been viewed sceptically.¹⁹³ Even if effective, such measures will only contribute incrementally towards the creation of a European political community with a strong sense of its own identity.¹⁹⁴ Nevertheless, the last chapter contains evidence of some, albeit uneven, improvement. The modest impact of communitarian policies can partly be blamed on a lack of political will to implement them with sufficient vigour. National élites in the

¹⁹⁰ Wallace and Smith, *op. cit.*, p.148

¹⁹¹ Wallace and Smith, *op. cit.*, p.148

¹⁹² Helen Wallace (97), *op. cit.*, p.231f

¹⁹³ For instance: Welsh, *op. cit.*, p.25ff

¹⁹⁴ Wallace and Smith, *op. cit.*, p.148ff

member states can either facilitate or obstruct the emergence of a sense of political community in Europe, and their role in the mobilisation of public support for the EU is pivotal.¹⁹⁵

One of the most important factors determining the success in creating a stable and meaningful European identity is the way member states employ their monopoly over education policy and cultural politics.¹⁹⁶ This is far from saying that national loyalties are to be fully transferred to the EU in a “feat of cultural and social psychological engineering.”¹⁹⁷ However, by means of control over the national education system, the media, and the general political and cultural discourse the social and political élites of each member states have the power either to suppress or to foster a European communal ideology *alongside* their respective national communal ideologies.

Unless children at school are being taught how their own national identity is embedded in a wider, European one, they will never acquire a sense of *shared memories* and *common destiny* so vital for the legitimation of the EU. And unless young people acquire the linguistic competence to communicate fluently with at least some of their European neighbours, the transmission structures which are essential to a cross-European political dialogue will never emerge. Efforts to enhance linguistic competence may also increase the levels of mutual trust and understanding amongst the peoples of Europe, especially in the UK where only a small section of the public can converse in other European languages. European exchange programmes lose their effectiveness if large parts of a member states population are unable to participate in them.

Any substantial improvement in this area will require a concerted effort from the Commission, national governments and the political élites of the member states. They must interpret and codify Europe’s shared history and its current collective experiences into a communal ideology that makes a European identity readily visible,

¹⁹⁵ Philip Everts and Richard Sinnott: “European Publics and the Legitimacy of Internationalised Governance”, in: Oskar Niedermayer and Richard Sinnott (eds.): Public Opinion and Internationalised Governance, (Oxford: Oxford University Press, 1995), p.453ff

¹⁹⁶ Obradovic, op. cit., p.214

¹⁹⁷ Anthony Smith (95), op. cit., p.143

accessible and transmissible over generations.¹⁹⁸ In short, political leaders must engage in active identity-building. Once a European identity is created, social and political élites in the member states, by exercising their ability for opinion leadership through the media and political parties, must communicate the notion of a European demos to their citizens in order to win felt legitimacy for it.¹⁹⁹ Those to whom the necessary prospect of a vigorous promotion of a European communal ideology does not appeal, are left with the alternative of departing from the underlying normative commitment to closer European integration. For this section has shown the concept of thin identity to be incapable of generating a loyalty-inspiring European demos.

The potential for an active legitimization of a European identity through political leadership depends on the degree of élite consensus on this issue, which varies among member states. As argued in chapter three, the merits of a communitarian strategy and its underlying commitment to ever closer Union are highly contested among Britain's political élite.²⁰⁰ A significant part of the British media and at least one of the two major political parties tend to reject the creation of a European demos on normative grounds, arguing in favour of a containment strategy instead. Such a lack of an élite consensus on the issue renders the political legitimization of a European demos less feasible in the UK.

But even political decision-makers in Germany have so far preferred to pursue an incrementalist strategy because they remain disinclined towards a vigorous promotion of a European identity.²⁰¹ The creation of a new, supranational demos would entail a relative demotion of national identities which still provide valuable legitimacy to the political system in the member states. However, there is far less political reluctance in Germany towards the creation of a *secondary* European identity, possibly based on the concept of thin identity.²⁰² Although such a thin identity will not be able to command the primary loyalties of European citizens, the broad pro-integration consensus of Germany's political élites, and their greater willingness to consider communitarian legitimising strategies at all, means that in Germany the creation of a

¹⁹⁸ Easton (65), *op. cit.*, p.333

¹⁹⁹ Chapter 2, pp.82ff

²⁰⁰ Chapter 3, p.108

²⁰¹ Lepsius, *op. cit.*, p.35ff

²⁰² See for instance Foreign Minister Fischer's 1999 speech to the EP: Fischer, *op. cit.*

European demos is a more *feasible* strategy for solving the legitimacy deficit than in the UK.

6.4.7 Summary

Political leadership could create a European demos in the long-run, and thus resolve the legitimacy deficit, if a “thick” ethno-symbolist interpretation of peoplehood were chosen. Communitarianism passes the pertinence criterion, but it does not offer any short-term prospect for solving the legitimacy deficit. It also requires a shift of consciousness from the peoples of Europe (in particular Britons). However, a subjective, tolerant and multi-ethnic communal ideology should be capable of enjoying high felt legitimacy because it is based on a shared historical past. Politically, this shift of consciousness will require long-term and determined support from Europe’s social and political élites which at the moment remains uncertain. Communitarianism is more likely to pass the feasibility criterion in Germany than in Britain where parts of the political élite would prefer to tackle the lack of a European identity by pursuing a containment strategy.

6.5 New Governance

6.5.1 The Approach

The inadequacy of incrementalist solutions to the legitimacy deficit and the amount of time and resources required for a combination of constitutionalism and communitarianism both play into the hands of the *new governance* school of thought. It argues that these “old-style” remedies are structurally incompatible with the reality of the supranational European political regime. To summarise from chapter one, new governance has identified three distinctive characteristics of the EU, namely the close relationship between public and private actors, its multi-level nature and the predominance of regulation.

These characteristics render conventional solutions to the legitimacy deficit (like constitutionalism) obsolete because they are premised on the structural conditions for traditional statehood which no longer exist (no demos, transformed nature of

governance). Instead, new forms of legitimacy have to be conceived which are congruent with the realities of post-modern statehood, such as non-majoritarian forms of democracy. If policy-making in the EU is mostly regulative in nature, then the existing multi-level system is far more *Pareto-efficient* than a “traditional” parliamentary regime because regulatory politics is conceptually more amenable to non-majoritarian bodies.

As indicated in the diagram at the outset of this chapter, new governance is therefore concerned both with the political authorities and the political regime component of legitimacy. Its arguments for non-majoritarian institutional reform and its rejection of both constitutionalist and containment visions of Europe are based on a functionalist analytical perspective according to which European integration was primarily designed to regain the political steering capacity lost by nations in the wake of globalisation. A reversal of integration or an empowerment of the EP would be counter-productive, since structurally unsuited.²⁰³ It would merely endanger the newly-strengthened capacity to govern effectively at the European level, thus increasing rather than diminishing the legitimacy deficit.

Does the new governance strategy for reform amount to a effective solution to the legitimacy deficit of the EU? To pass the pertinence criterion, new governance strategy must demonstrate why it does not tackle the low sense of community directly, or why it does not need to do so under conditions of post-modern statehood. It must explain how its strategy of increasing output support will create a spill-over into diffuse community support, when this has failed to materialise for neo-functionalism. New governance also must devise institutional reforms which meet public demands for greater democracy in Europe. Finally, their reform strategy must appeal to Europe’s political élites in order to pass the feasibility criterion.

6.5.2 Can New Governance Enhance Regime or Community Support?

Rather than attempting to democratise particular European institutions, proponents of new governance have turned their attention to the possibilities of democratising the

²⁰³ Zürn, *op. cit.*, p.44

multi-level system as a whole. For instance, Dehousse advocates the delegation of some of the Commission's powers to independent agencies which would avoid turning the EU into a structurally unsuitable majoritarian parliamentary democracy.²⁰⁴ Vibert develops this idea further and calls for an comprehensive "un-bundling" of the Commission by transferring its regulatory functions to independent agencies, such as a European Trade Commission, a European Environmental Agency and a European Cartel Office.²⁰⁵

These arguments turn partly on a functionalist view of legitimacy, since they are concerned with maximising specific output support as a means to create public loyalty to the political system. According to new governance theory, the EU enjoys a high degree of specific support because its regulatory style of policy-making has a particularly high capacity for problem-solving. Regulation by specialised independent agencies is legitimised through their Pareto-optimal outcomes, because regulatory policies, unlike redistributive policies, can be conceived of as positive sum games which enhance aggregate welfare.²⁰⁶ However, Pareto-optimal outcomes require a non-majoritarian institutional design which ensures that regulatory agencies cannot be captured by powerful and self-interested political groups bargaining in parliamentary coalitions.²⁰⁷

This does not mean regulation should proceed in an institutional vacuum. New governance theory also offers an institutional design for its regulatory polity, whose legitimising principles reflect values such as accountability and technocracy. *Expertocracy* is a rather fitting, if somewhat clumsy, terminology which has been given to this almost corporatist type of political system. The complex and highly technical nature of European policy-making requires that "expertise plays a central role in the discourse, negotiation, and decision-making".²⁰⁸ Although different from a parliamentary understanding of representation, expertocracy can still be representative in character.

²⁰⁴ Dehousse, *op. cit.*, pp.128-33

²⁰⁵ Frank Vibert: "The Case for "Unbundling" the Commission", in: *What Future for the European Commission?*, (Brussels: Philip Morris Institute for Public Policy Research, 1995), pp.16-20

²⁰⁶ Majone (96), *op. cit.*, p.294

²⁰⁷ *Ibid.*, p.286

²⁰⁸ *Ibid.*, p.286

*"This is because the specialised forms [of policy networks] bring together and organise agents with a particular interest in the policy area or issue...[...]...These forms also realise, in a certain sense, general cultural notions of democracy, namely the right to form groups or organisations in order to advance or protect interest and the right to voice an opinion and to influence policies or laws that affect one's interests or values...which parliamentary representatives, "generalists", cannot represent."*²⁰⁹

As long as transparent decision-making is ensured through media, parliamentary and judicial scrutiny of the regulator, "no one controls an agency...[but] the agency is under control."²¹⁰ The new role for parliamentary bodies such as the European Parliament would then be to "hold participants in organic governance accountable".²¹¹ As far as policy networks in general are concerned, it has been proposed to achieve legitimisation of European policy networks by means of a broad participatory base. Participation in those networks would be accorded through statistical representation or by means of interest representation rather than through elections. "Pluralism - understood in a comprehensive way as a mode of governance and participation - is a distinctive feature of the network model."²¹²

The subsequent paragraphs argue that, despite some innovative ideas on how the EU's formal legitimacy can be adapted to the realities of multi-level governance, the remedies proposed by new governance scholars fail to address the European legitimacy deficit effectively. Often preoccupied with regulation and public policy-making, new governance tends to neglect the problem of legitimising the EU *law-making* process which gains increasing salience as the expansion of EU competencies continues apace. But even within the regulatory domain their ideas remain problematic. New governance also fails the feasibility criterion because its policies remain often unspecific and do not enjoy the support of Europe's political élites.

²⁰⁸ Svein S. Andersen and Tom R. Burns: *The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance*, in: Svein S. Andersen and Kjell Eliassen (eds.): *The European Union: How Democratic Is It?*, (London: Sage, 1996), p.235

²⁰⁹ *Ibid.*, p.240

²¹⁰ Majone (96), *op. cit.*, p.300

²¹¹ Andersen and Burns, *op. cit.*, p.250

6.5.3 Problems with European Regulation

The first chapter argued that, despite some unique features, the EU did *not* constitute a discrete form of governance whose legitimising principles are structurally different and hence incomparable with those of states. While the EU is indeed characterised by a greater emphasis on regulatory policy, this fact does not preclude comparison of European and national regulatory legitimising principles. Quite to the contrary, a greater attention to the debates about the legitimacy of national regulation would reveal that scholars like Majone underestimate the difficulties associated with legitimising regulation.²¹³ For instance, “the proliferation of agencies in the US has been attacked on the grounds that agencies constitute a non-representative fourth branch of government, undermining the separation of powers, and placing government further beyond the reach of private citizens.”²¹⁴ Yet while regulatory agencies may, by their very nature, have to be independent from *governmental* influence, it does not follow that “no one controls an agency”.²¹⁵ Under the premise of rational choice theory, the industries to be regulated will be self-interested rather than seeking to maximise aggregate welfare. At the very least, *regulatory capture* by these industries always remains a distinct possibility, thus subverting the institutional design for Pareto-efficiency.²¹⁶

Current new governance thought has also neglected to take sufficient notice of difficulties in adapting American regulatory principles (on which most scholars model their arguments) to a very different European tradition of regulation. Even though Majone variously acknowledges these differences, he argues that considerable convergence has occurred between these two models of regulation.²¹⁷ He seems to forget, however, that current EU law makes the establishment of independent regulatory agencies as they exist in the United States almost impossible because the

²¹² Jachtenfuchs (98), *op. cit.*, p.56

²¹³ For a sceptical contribution on Britain, see: Rhodes, *op. cit.*, p.58, 197

²¹⁴ Caporaso, *op. cit.*, p.42

²¹⁵ Majone (96), *op. cit.*, p.300

²¹⁶ Caporaso, *op. cit.*, p.43

²¹⁷ For example: Giandomenico Majone (ed.): Deregulation or Re-regulation? Regulatory Reform in Europe and the United States, (London: Pinter, 1990)

Treaties permit no body other than the Council to exercise secondary rule-making competencies.²¹⁸

Other differences which set the EU apart from the American regulatory environment include the greater divergence of economic development and interests in Europe, the lack of legal and financial resources for regulatory agencies and the conflict between different national regulatory traditions.²¹⁹ The biggest problem with Majone's argument is that the democratic features which legitimise regulatory policy-making in the US, in other words Congress, are absent in the EU.²²⁰ Regulatory bodies require a wider democratic framework in which their broad objectives are set, but the EP is not yet able to provide that popular legitimation. In view of these factors, it seems necessary to devise a set of legitimising principles which adapt American theories to the particular conditions which obtain in the EU, but despite the relevance of this task to its agenda, new governance thought has not yet sufficiently matured in this area. Its remain generally vague about the design of actual political remedies and plays down the kind of legal and structural obstacles mentioned above.

6.5.4 The Neglect of Traditional Politics

The first chapter also argued that European politics is not exclusively concerned with regulatory policy and technical, and hence remote, public policy decisions. But even within their own area of focus new governance theory has not yet responded to the charge that regulation, and social regulation in particular, is never free of a normative political dimension. According to widely held public beliefs in Western Europe, political values are open to challenge and should be articulated in political debate.

Expertocracies or interest-oriented networks seem unable to accommodate such normative political discourse and will therefore struggle to generate sufficient felt legitimacy.²²¹ It remains doubtful whether the new governance vision of pluralist (or neo-corporatist) participation in European policy networks "is sufficient to assure the

²¹⁸ Christian Joerges: "Markt ohne Staat? - Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik", in: Rudolf Wildenmann (ed.): Staatswerdung Europas? Optionen für eine Europäische Union, (Baden-Baden: Nomos, 1991), p.257

²¹⁹ Ibid., p.252

²²⁰ Beetham and Lord, op. cit., p.21

legitimacy of a EU constructed as a network, or whether such an EU would in fact exclude large and distinguishable groups from the political process [...].”²²²

This criticism gains critical importance in light of the fact that, “given the centrality of popular sovereignty in Western political culture, there are serious problems of legitimising governance forms whose principles of representation, technical character and low accountability deviate substantially from the concept of popular sovereignty”.²²³ In the terminology of the dual concept of legitimacy, the new governance school underestimates the need for congruence between its model of formal legitimacy and the *political ideology* considered legitimate by European publics. The model of a representative democracy may be structurally unsuited to the current EU, but it is the form of political regime which enjoys most felt legitimacy among the peoples of Europe. New governance proposals for the political regime may be more suitable to the EU, but they do not enjoy widespread felt legitimacy, thus failing to address low public diffuse support for the current European political regime. That makes them unattractive to Europe’s political élites who have not warmed to new governance strategies because they also remain too abstract and unspecific about the institutional structure they propose.

6.5.5 Summary

Unlike any of the other academic theories new governance *does* draw attention to the important *institutional* features of the multi-level structure of the EU and the relative importance attached to regulation. It rightly stresses the *functionalist* motivations behind European integration, in particular the economic synergies created by the Single Market and the positive effect on political steering capacity derived from international co-operation (one might add the role of maintaining peace in Europe).

Although the new governance view about the inevitability as well as irreversibility of globalisation must be rejected, new governance correctly identifies the core problem of a trade-off (in certain areas, particularly regulatory issues) between efficiency

²²¹ Joerges (91), *op. cit.*, p.252

²²² Jachtenfuchs (98), *op. cit.*, p.56

²²³ Andersen and Burns, *op. cit.*, p.244f

(affecting output support) and democracy or accountability (affecting support for the political regime). This important analysis discredits both simplistic constitutionalist remedies of “simply more democracy” and the more extreme containment strategies for an abandonment of most of the EU’s functions or even its wholesale dissolution.

While new governance offers an interesting new analytical perspective of the legitimacy deficit, it fails to meet the pertinence and feasibility criterion for its successful remedy. Like incrementalism, the emphasis on specific output support is misplaced because it produces little spill-over to the other dimensions of the legitimacy deficit, notably the lacking sense of a European identity. Nor does new governance theory argue convincingly that the EU is structurally post-modern in its characteristics and therefore does not require a strong sense of European identity among its citizens. As regards the generation of diffuse regime support, new governance lacks a comprehensive institutional vision for legitimising the EU that extends beyond regulation to encompass other important areas, such as the allocation of legislative and judicial powers between EU institutions. The new governance strategy therefore fails the pertinence criterion because it does not result in a model of formal legitimacy capable of enjoying high levels of felt legitimacy amongst the peoples of Europe. These drawbacks also make it *politically* unattractive as a strategy for solving the legitimacy deficit of the EU, thus failing the feasibility criterion.

6.6 Containment

6.6.1 The Approach

All preceding strategies have been geared towards *improving* the legitimacy of the EU. Containment alone pursue a strategy of reducing the need for the EU to legitimise itself, which requires a willingness to abandon the normative commitment to the goal of ever closer integration. This entails particular assumptions about the political community component of the dual concept of legitimacy. In one version, intrinsic value is attached to the nation state as the most appropriate forum for political decision-making. The process of “ever closer Union” culminating in the emergence of

a European supranational democracy is therefore rejected in principle because it is regarded as a threat to the concept of the sovereign nation state.²²⁴

In the other version, opposition to further integration is not linked to a categorical defence of the nation state. Instead, it is based on the empirical observation that, for the time being, nationally organised political systems enjoy much stronger felt legitimacy than supranational ones. Scepticism about an ever closer Union is therefore merely contingent upon the current lack of a sufficiently strong European identity to legitimise the EU.²²⁵ If such a European identity were to emerge, opposition to further integration would disappear among this second group of people. If either of these two assumptions about the political community is accepted, then a partial reversal of some of the recent integrationist reforms can help relieving the EU of its “legitimacy overstretch” by reducing its need for legitimation.

The two-dimensional line of argument advanced by containment was described in the first chapter. On the one hand, its supporters are concerned about the decreasing compatibility of the EU’s formal legitimacy with that of its member states. On the other hand, they realise that the constitutionalist solution to this problem, namely the gradual creation of a European representative government, is unattainable because it presupposes the existence of a strong European identity which enjoys broad popular attachment.

Supporters of containment realise that this precondition is not fulfilled so far, and they share the pessimism about the possibility of its fulfilment even in the medium term. Instead, they aim to offer solutions to the legitimacy deficit which can be realised with immediate effect, while not falling foul of the constitutionalist fallacy. Essentially, this entails at least a partial reversal of European integration in order to recast the EU as a more traditional international organisation whose need for legitimacy would be significantly lessened.²²⁶ Unlike most other approaches, the containment strategy thus implicitly acknowledges the interdependence of the different components of the dual concept of legitimacy.

²²⁴ Helen Wallace (93), *op. cit.*, pp.101ff

²²⁵ For example: Anthony Smith (92), *op. cit.*, p.62

²²⁶ Beetham and Lord, *op. cit.*, p.68f

Which policies does the containment school propose to remedy the legitimacy deficit? Containment uniquely questions the *vertical* balance of power between the national and the European level, thus addressing the public fear about member states “dissolving” into an ever-expanding Union. The most radical suggestion (apart from leaving the EU altogether) is to strip the EU down to its Single Market core.²²⁷ A politically less controversial solution is to delete the aim of “ever closer Union” from the preamble of the Treaty of Rome and replace it with the vision of a “Europe of Nation States” which entails no presumption of an automatic expansion of the *acquis*.²²⁸

These changes could be complemented with a return to unanimous decision-making in the Council for all major pieces of legislation. It would ease the potential incompatibilities with regard to formal legitimacy, and it would make the lack of democracy within the EU’s political regime less relevant and objectionable. A significant restriction of QMV voting in the Council and a lighter policy output from Brussels would enhance the potential for democratic scrutiny of the EU by national parliaments. The biggest attraction of a vertical rebalance of power, however, is that it lessens the need for a strongly developed *sense of a political community* which the last chapter has identified as the most underdeveloped components of felt legitimacy in the EU.

Others, while generally pro-European, have considered EMU as either premature or “an unnecessary and divisive distraction” from the creation of a liberal European order valued by its civil society.²²⁹ Starting from fundamental doubts about the economic case for EMU, proponents of containment often argue that, even if generally successful, the economic benefits of the EURO will be unevenly split.²³⁰ Specific output support generated by EMU will differ across member states which means that the EURO has at least the potential to destabilise the fragile sense of

²²⁷ Lamont suggests Britain should negotiate an “outer-tier community membership” which only involves the trade legislation of the Treaty of Rome, but he acknowledges the strain the complexity of such a construct would put on the institutional framework. See: Lamont, *op. cit.*, p.108

²²⁸ Martin Howe: *Europe and the Constitution after Maastricht*, (Oxford: Nelson & Pollard, 1993), p.68

²²⁹ Dahrendorf (98b): *op. cit.*, pp.10-12, very similar: Garton-Ash, *op. cit.*, p.63

²³⁰ Martin Feldstein: “The Case Against EMU”, *The Economist*, vol.323, no.7763, 13/6/1992, pp.12-19

political community.²³¹ Much of the actual effect will depend on the degree to which political and economic conflicts can be absorbed by diplomatic means, not only between participants and outsiders, but also amongst the participating countries. Any serious disagreement over economic policy among core members of the EURO zone may damage mutual *trust* between these countries and weaken the sense of a common European identity.²³² Feldstein goes further than most when suggesting that EMU might even undermine the fundamental aim of the EU's founding fathers, namely to avoid the recurrence of an intra-European war.²³³

Most advocates of containment also seek “*horizontal*” institutional remedies aimed at bolstering national legitimising chains on the basis of the existent European framework. This applies first and foremost to the *modus* for decision-making. For if Weiler's *Anschluß* analogy is correct²³⁴, any kind of majority decision, whether in the EP or in the Council, will be illegitimate in the absence of a European demos. Hence the widespread hostility of containment supporters to the erosion of national vetoes in favour of QMV in the Council. Others have attacked the policy-initiating role of the supranational Commission which they want to confer on the intergovernmental European Council instead.²³⁵

Could a containment strategy really offer better chances of eliminating the legitimacy deficit than any of the other strategies discussed above? Regarding the pertinence criterion, three problems threaten to hamper the potential success of a containment strategy. First, containment endangers both the problem-solving capacity of the EU and the ability of EU institutions for efficient decision-making. Second, the strategy relies heavily on the activation of indirect legitimising chains through national parliaments, but structural factors pose severe constraints upon such legitimising potential of national assemblies.

Third, the normative acceptability of a containment strategy varies considerably with country-specific perspectives on the EU. The political élites in Germany and most

²³¹ Ralf Dahrendorf: “Disunited by a Common Currency”, *New Statesman*, 20/2/1998, pp.32-33

²³² Peel, *op. cit.*, p.26

²³³ Martin Feldstein: “EMU and International Conflict”, *Foreign Affairs*, vol.76, no.6, 1997, p.61

²³⁴ See *Chapter 1*, p.36

other member states remain committed to solving the legitimacy deficit by means of improving legitimacy rather than reducing the need for it. Although containment enjoys the support of a significant section of Britain's divided political élite, it seems to fail the feasibility criterion which requires that solutions to the legitimacy deficit must be acceptable to political decision-makers across Europe. The half-hearted character of most existing containment policies can at least partly be explained in terms of little political will in the EU to adopt a containment strategy.

6.6.2 Does Containment Damage Output Support?

Chapter one argued that containment reduces the problem-solving capacity of the EU, thus potentially endangering the level of specific output support it can generate. Containment also threatens to rigidify the institutional structure of the EU. Involving even the current fifteen national parliaments closer in the supranational law-making process will slow down European policy-making and make the entire process more cumbersome (see below). The argument against majority voting in the Council is that it considerably weakens the impact of national parliamentary scrutiny over each government's voting behaviour in the Council. But a return to the era of national vetoes poses grave dangers of political stalemate because it reduces the propensity to seek compromise. It is doubtful whether even the Single Market could have been created in the absence of at least some degree of majority voting.

A similarly uncomfortable dilemma for a containment strategy arises in the guise of Eastern enlargement of the EU. Its proponents generally support enlargement, often for the instrumental reason that it would decelerate the process of deepening integration. Yet enlargement presents containment with an unpleasant choice between accepting widespread majority voting in an enlarged Union with weaker collective identity or risking political stalemate as the likelihood of national vetoes increases with the number of member states. Dilemmas like these are likely to arise in other areas as well, since they are symptomatic of an increasing diversity of interests among the members of an enlarged Union.

²⁵ Sked, *op. cit.*, p.23, also: The "No Turning Back" Group of Conservative MPs: A Conservative Europe 1994 and Beyond, (London: The European Foundation, 1994), p.26f

One possible solution may be the introduction of flexibility clauses into the Treaties. Two forms of flexibility are already practised under the current arrangements. So-called “opt-outs” entitle some member states to abstain from specific commonly agreed policies. Examples for this are the British and Danish opt-out from EMU or the British and Irish opt-out from the *Schengen acquis*. Another kind of flexibility has been introduced with the Treaty of Amsterdam, enabling individual member states to use the existing institutional framework to integrate more closely in specific areas without involving all other member states. For instance, this allows some member states to co-operate more closely in Police and Judicial matters (Art.40, Title VI, TA). Similar provisions have been introduced into the CFSP pillar where individual members can abstain from joint actions under CFSP which can then normally be implemented with qualified majority.²³⁶

Britain’s decision at the time of the Amsterdam Treaty to terminate its opt-out from the “Social Chapter” exemplifies how flexibility can help the EU to continue to devise and adopt new policies even in the temporary absence of agreement about their desirability. But such arrangements also risk undermining the cohesion of the *acquis* and diminishing common policies, thus violating the EU’s political culture.²³⁷ Flexibility clauses might also undermine *trust* between the peoples of Europe if some countries were perceived to employ them to gain a relative competitive advantage by not implementing certain joint policies.²³⁸ Critical mutters about “un-communitaire” conduct could already be heard on the Continent subsequent to Britain’s departure from the ERM in 1992.

Britain’s opt-out from monetary union is bound to provoke similar sentiments *if* Britain were seen to derive relative economic benefits from this decision at some point in the future. However, given the difficulties of Central European applicant countries with implementing the full *acquis communautaire* prior to accession, an increasing use of flexibility clauses may be the only means available to contain diverging interests and policy approaches within the enlarged EU.²³⁹ It would also

²³⁶ Article 23, Title V, Treaty of Amsterdam

²³⁷ See: Chapter 5, p.235

²³⁸ Grabbe and Hughes, *op. cit.*, p.47f

²³⁹ *Ibid.*, p.48

allow some member states to adopt a slower pace of integration which is more commensurate with their lagging development of felt legitimacy for the EU.²⁴⁰

Another problem is that flexibility clauses are mostly applied to *additional* policies, and hence of little value in legitimising the *existing* degree of integration. Recognising that the biggest challenge to the constitutional orders of the member states will be legal in nature, Redwood effectively calls for an end to the *Simmenthal* doctrine of the ECJ.²⁴¹ But he evades the problem of how a uniform application of EC law is to be ensured unless it is superior to all forms of national law.

Howe's proposes more practicable, if no less controversial, reforms to preserve the *compatibility* of European integration with national constitutions, thus addressing explicitly the challenge to Britain's formal legitimacy. He suggests an amendment of the 1972 European Communities Act which enshrines the ultimate supremacy of Parliament over all EC law, but also introduces rules to ensure the precedence of EC law over unintentionally conflicting Acts of Parliament. Courts could for instance refer incompatible UK law to the Privy Council which could seek an amending Order in Council to bring the act in line with EC law.²⁴² While this solution is less obviously in conflict with the *Simmenthal* doctrine, Howe's other idea of a reserve list excluding the core of the British constitution from the jurisdiction of the ECJ seems too confrontational to stand a realistic chance of ever being acceptable to other member states, let alone the ECJ itself.

The Centre for Economic Policy Research has proposed a less radical attempt to address concerns about the existing degree of integration. It proposes to distinguish a *common base* of responsibilities shared by all member states from *open partnerships* that allow countries to opt into integration in other policy areas such as EMU or CFSP. Whereas decisions for the *common base* (comprising the Single Market and its flanking policies) would proceed by majority to preserve effective governance, member states would have a veto over their participation in *open partnerships*.²⁴³ In

²⁴⁰ Redwood, *op. cit.*, p.193

²⁴¹ *Ibid.*, p.202

²⁴² Martin Howe, *op. cit.*, p.62

²⁴³ Giovazzi, Francesco, et al: *Flexible Integration: Towards a More Effective and Democratic Europe*, (London: Centre for Economic Policy Research, 1995)

other words, flexibility rules would even apply to a sizeable part of the current (non-flexible) *acquis communautaire*.

The German elder statesman Count Lambsdorff has proposed another interesting strategy to remedy the legitimacy deficit.²⁴⁴ He argues that the EU's relentless drive towards greater harmonisation and centralisation increasingly narrows the scope for policy competition between member states, thus stifling political innovation in the EU. Unlike most proponents of containment, Lambsdorff believes a clear-cut division of competencies and effective barriers against centralisation can only be achieved with a European constitution narrowly restricting the competencies of Brussels institutions. He considers external trade policy, cross-border environmental issues, Single Market policies, human rights protection and CSFP best dealt with at the European level. Other policy areas, such as agriculture, social and employment policy, education, taxation, should either remain at, or be repatriated to the national level. In addition, Lambsdorff demands the right for member states to nullify or opt-out of European legislation in all those policy areas not constitutionally reserved for the Union. By narrowly enshrining the allocation of competencies, a constitution can help to stem the centralising tendency inherent in most federal states, such as Germany. It would also protect the democratic will and identity of the member states.

However, multi-level systems like the EU might not be easily amenable to a clear vertical separation of competencies.²⁴⁵ More importantly, the legitimising effect of containment strategies like those of Lambsdorff, Howe or the Centre for Economic Policy Research varies with the country-specific perspectives on the legitimacy deficit of the EU. A slowdown of the integration process coupled with a renewed emphasis on indirect forms of democratic legitimacy would help to improve the compatibility of the EU with Britain's formal legitimacy. It would equally increase felt legitimacy because Britons tend to oppose a constitutionalisation of the EU that would strengthen the EP at the expense of the Council and national parliaments. Making the EU less supranational would also reduce the need for a European demos whose creation may have conflicted with, and been perceived as a threat to, Britain's national identity.

²⁴⁴ Otto Graf Lambsdorff: "Die Europäische Union braucht eine Verfassung", *Handelsblatt*, 31/7/1998, p.6

²⁴⁵ Wessels and Rometsch, *op. cit.*, p.364

Finally, a containment strategy takes account of Britain's élite cleavage on the European question because it reduces the need for active legitimization of the EU.

Almost the opposite is true for Germany, where a containment strategy would conflict with a more idealistic commitment to European integration and a preference for the EP as the central democratic institution of the EU. Attempts to reduce the *common base* of the *acquis communautaire* would also be opposed by the broad élite consensus in favour of ever closer Union which makes containment politically unfeasible in Germany.²⁴⁶

6.6.3 Is Containment Politically Feasible?

A general lack of political enthusiasm across Europe is the biggest obstacle to a success of the containment strategy. The great majority of Europe's political élite rejects the normative lack of commitment to the ideal of ever closer Union, thus preventing the negotiation of a "watered-down" EU. In fact, advocacy of a "minimalist" Europe is confined to the fringes of the public debate in Germany, although it enjoys considerable mass and élite support in Britain. Containment, therefore, seems to suffer from an inconsistent triad where only any two out of three propositions are compatible with each other: widespread political support for extending the *acquis communautaire*, the demands of democracy and the absence of legitimacy outside established political identities.²⁴⁷

Although political actors have tended to be wary of its agenda, they have adopted two containment policies in the Maastricht Treaty. First, the TEU introduced the principle of subsidiarity in order to allay fears about an overcentralised Union undermining the remaining core of national statehood.²⁴⁸ It is intended to preserve the compatibility of the European with the national constitutional orders by delineating the respective spheres of competencies between the two vertical levels. The principle of subsidiarity evaluates whether the EU possesses legal competence for a particular legislative

²⁴⁶ Weale (98), *op. cit.*, p.60f

²⁴⁷ Weale (98), *op. cit.*, p.61

²⁴⁸ Art.3b, TEU

measure, whether there is need for legislation and whether the legislation is proportionate to the need for it.²⁴⁹

The legal definition of subsidiarity has unfortunately been phrased in very vague terms, even after its supposed clarification in the Amsterdam Treaty.²⁵⁰ EU legislation must prove why its objectives “cannot sufficiently be achieved by Member States’ action” and “can therefore be better achieved by the Community”.²⁵¹ Although this justification needs to be substantiated by qualitative or quantitative indicators, it will prove very difficult for the ECJ to establish the relative effectiveness of national versus EU action. Some commentators, such as the German FCC judge Grimm, even doubted whether the subsidiarity principle in its pre-Amsterdam form was properly justiciable at all.²⁵²

Moreover, the odds in any future conflict are already stacked in favour of the European level. By insisting that subsidiarity must not undermine the existing *acquis*, the principle cannot be used to call into question any of the established EU powers.²⁵³ The subsidiarity principle also is not applicable to the vast areas where the EU has exclusive responsibility.²⁵⁴ Even where it does apply, the objectives to be achieved by a particular EC action are themselves defined by the Commission. The application of the principle of subsidiarity is explicitly subject to the constraint of Art.6.4 TEU which states that “the Union shall provide itself with the means necessary to attain its objectives and carry through its policies.”²⁵⁵

To justify individual cases of subsidiarity against such a loosely defined catch-all caveat amounts to a “hopeless undertaking.”²⁵⁶ Consequently, the subsidiarity principle does little to contribute to the legitimation of the EU, and its potential as a

²⁴⁹ Art.3b, TEU

²⁵⁰ “Protocol on the Application of the Principles of Subsidiarity and Proportionality as Annexed to the Treaty Establishing the European Community”, Treaty of Amsterdam

²⁵¹ Ibid., Clause 4

²⁵² Dieter Grimm: “Subsidiarität ist nur ein Wort”, Frankfurter Allgemeine Zeitung, 17/9/1992, p.38

²⁵³ Martin Howe, op. cit., p.45

²⁵⁴ “Protocol on the Application of the Principles of Subsidiarity and Proportionality as Annexed to the Treaty Establishing the European Community”, Treaty of Amsterdam, Clause 3

²⁵⁵ Ibid., Clause 2

²⁵⁶ Helmut Lecheler: Das Subsidiaritätsprinzip - Strukturprinzip einer europäischen Ordnung, (Berlin: Duncker&Humblot, 1993), p.15

motor for decentralisation has not been realised.²⁵⁷ This is regrettable, since the idea of subsidiarity enjoys strong *felt legitimacy* in both Britain and Germany and could ease the compatibility of both countries' *formal legitimacy* with that of the EU.

Potentially equally promising from the containment perspective is a second innovation of the Maastricht Treaty, the Committee of the Regions.²⁵⁸ It is designed to tap the sometimes powerful popular loyalties towards subnational regions in Europe. However, it has been equipped with consultative powers only, and its lack of a prominent role in EU politics has left the Committee's legitimising potential largely unexploited. Since the chance was missed to raise its institutional profile through the Amsterdam Treaty, the Committee's appeal will continue to be largely confined to regional policy makers.

If the Committee's institutional status were upgraded, its members would need to have equal standing and be equally representative of their regions. With a mix of federal, devolved and unitary member states that requirement will be hard to meet. Representatives of sometimes artificially created sub-national units will do little to boost the EU's felt legitimacy, thus making the Committee of the Regions "another case of symbolic politics."²⁵⁹ The Committee only adds another body to the already over-complicated institutional structure, further increasing the existing pathologies of EU decision-making.

6.6.4 Can Containment Enhance Regime Support?

Containment seeks to increase support for the political regime of the EU by exploiting the legitimising potential of national parliaments. But there is some academic disagreement over the extent to which national parliaments can really call their national government to account over its actions in the Council. Theoretically, any action by a government in the Council could be made subject to prior parliamentary approval which would effectively extend the national veto over EU legislation to

²⁵⁷ Similarly: Armstrong and Bulmer (98), *op. cit.*, pp.292-96

²⁵⁸ Art.198 a-c, TEU

the domestic legislature. Judge argues that parliamentary scrutiny procedures have greatly improved in most member states over the past decade.²⁶⁰ As chapters three and four have shown, an increasingly well established “parliamentary reserve” has helped to ensure national scrutiny of EU legislation prior to its being voted upon in the Council.²⁶¹ However, there remain three general problems with a meaningful participation of national parliaments in EU policy-making.

First, the scrutiny of EU legislation by national parliaments has been frequently frustrated by the slow flow of information from EU institutions and a sometimes negligent compliance with the consultation procedure by national governments. Despite visible improvements, the British and German parliaments continue to play a rather marginal role in the EU policy process.²⁶² Only the Danish political system has ever come close a significant influence over a national government’s day-to-day EU policy.²⁶³ Even if these problems could be overcome, both Germany’s and Britain’s national parliament can only pass non-binding resolutions on such legislation which does not amount to the binding parliamentary approval legitimising national legislation.²⁶⁴ Under such circumstances, national parliaments can at best fulfil a informative function conducive to a national political debate about European legislation.²⁶⁵ In short, the *formal* powers of most national parliaments in the scrutiny of EU legislation, and the obstacles to their exercise in *practice*, compare poorly with respective national legislating procedures.²⁶⁶

Second, there are also structural problems with the idea of fifteen national parliaments exercising binding scrutiny powers over European legislation.²⁶⁷ These range from the sheer geographical distance to the decision-making centre to the potential time constraints and lack of expertise of national parliaments. Attempts to overcome these

²⁵⁹ Heidrun Abromeit: “How to Democratise a Multi-level, Multi-dimensional Polity”, in: Albert Weale and Michael Nentwich (eds.): Political Theory and the European Union - Legitimacy, Constitutional Choice and Citizenship, (London: Routledge, 1998), p.114

²⁶⁰ Judge (95), op. cit., p.80

²⁶¹ Ibid., p.80

²⁶² See: Chapter 3, p.104f, Chapter 4, p.156f

²⁶³ John Pinder: “The EC, the Rule of Law and Representative Government: The Significance of the Intergovernmental Conference”, Government and Opposition, vol.26, no.2, 1991, p.207

²⁶⁴ Weber-Panariello, op. cit., p. 106, 306

²⁶⁵ Ibid., p.309

²⁶⁶ Weber-Panariello, op. cit., p.106, 306

²⁶⁷ Beetham and Lord, op. cit., pp.71-75

constraints by improving the inter-institutional flow of information and co-operation across member states resulted in the ill-fated joint conference of national parliaments and the EP (“Assizes”) in 1990 which has remained a singular event. More successful have been the now well-established COSAC meetings launched also in 1990. They bring together members of national parliamentary EU committees to discuss both procedural and policy-issues of common interest and to devise improvements to national scrutiny procedures.²⁶⁸ However, the greatest structural obstacle to an effective parliamentary scrutiny of EU law would be the ensuing institutional pathologies if European policy-making became hostage to the approval of fifteen additional institutions.²⁶⁹ Further deepening (EMU) and widening (Eastern enlargement) of the EU will only exacerbate these problems.

Third, the introduction of majority voting in the Council has made the link to national parliaments even more tenuous than it previously was in Britain and Germany (or any other member states).²⁷⁰ The Council of Ministers, like the European Council, is not legally answerable to any other body and most of its meetings still take place behind closed doors.²⁷¹ But there is also the Commission to consider which currently enjoys too much political independence to be plausibly legitimised through the connection of the Council to domestic electorates.²⁷² Enlargement will make the use of QMV in the Council even more ubiquitous, thus reducing the scope for national parliaments to hold the Council to account for its decisions. In short, these three obstacles demonstrate that their influence of national parliaments on EU policy-making is *necessarily* restricted, given the supranational character of the EU.²⁷³

The same problems affect many of the other containment proposals which have focused on representative institutions. Sked rather boldly suggests to abandon direct elections to the EP and to “reaffirm the wisdom of the founders of the Community” by returning to a system whereby the EP is composed of representatives from national

²⁶⁸ Weber-Panariello, *op. cit.*, p.312

²⁶⁹ Scharpf (94), *op. cit.*, p.170f

²⁷⁰ Grainne de Burca: “The Quest for Legitimacy in the European Union”, *Modern Law Review*, vol.59, no.3, 1996, p.353

²⁷¹ Classen, *op. cit.*, p.253

²⁷² Beetham and Lord, *op. cit.*, pp.64-67

²⁷³ Weber-Panariello, *op. cit.*, p.309

parliaments.²⁷⁴ The lines of legitimacy would then remain firmly rooted in highly legitimate national assemblies, and the constitutional compatibility between the two layers of governance would be enhanced. However, the very long and indirect chain of legitimacy compared to a directly elected European chamber would be a significant drawback of this idea. Given historic experience, it remains doubtful whether such an essentially appointed parliament could command more felt legitimacy than the current arrangements, even in the UK. While Heseltine's idea of a Senate of national parliamentarians as a second chamber to the EP would avoid these disadvantages, it would make the EU institutionally even more cumbersome and hamper efficient law-making.²⁷⁵

6.6.5 Summary

A containment strategy can indeed reduce the need for legitimising the EU, thus alleviating the "legitimacy overstretch" on the political community and the political regime of the EU. However, containment strategies often have the negative side-effect of reducing the EU's potential to generate economic benefits from supranational co-operation. The challenge is to devise containment policies which minimise the negative side-effect on specific output support and do not produce institutional stalemate.

For instance, Lambsdorff's vision of "competitive federalism" coupled with the provision of flexibility clauses could actually enhance output support compared to the more rigid, homogenised federalism generally favoured by constitutionalists. Such a solution would escape the new governance charge of endangering the capacity for effective governance. Only the more extreme, Euro-sceptic versions of containment have a self-defeating tendency to undermine the economic benefits of European integration. However, the impact of such reforms on felt legitimacy of the EU will be stronger in the UK whose citizens generally prefer to strengthen national channels of legitimation. There is little elite or mass support in Germany for containment's normative aim of reducing the need for legitimation in the EU, which limits its legitimising potential in the FRG and makes the political obstacles against its

²⁷⁴ Sked, *op. cit.*, p.21

²⁷⁵ Heseltine, *op. cit.*, p.25f

realisation difficult to surmount. As a result, country-specific differences in the nature of the legitimacy deficit mean that a containment strategy may pass the pertinence criterion in the UK, but not in the FRG and most other member states. This lack of EU-wide élite support for containment makes it unlikely to pass the feasibility criterion.

6.7 Conclusion

This chapter has assessed whether any of the five legitimisation strategies discussed will succeed in solving the legitimacy deficit of the EU. Their examination against a pertinence and a feasibility criterion has yielded the following conclusions.

First, only two strategy, communitarianism and containment, successfully address the lack of a European identity which lies at the core of the legitimacy deficit right across EU member states. The former strategy seeks to forge a European demos, the latter reduces the EU's need for legitimisation to alleviate its current "legitimacy overstretch". All other strategies fail the pertinence criterion because they cannot redress the EU's missing sense of community. New governance fails to identify the lack of a European demos as the weakest component of legitimacy. Incrementalism and constitutionalism *do* seek to create a European identity, but they misjudge the dynamics of identity-building. Their strategies seek to enhance output or regime support in the mistaken belief that this will spill over into a sense of community in the EU. Functionalist output satisfaction (incrementalism) or institutional engineering (constitutionalism) may be necessary, but not sufficient conditions for the creation of a European demos.

Second, the effectiveness of legitimisation strategies varies with the country-specific nature of the legitimacy deficit in Britain and Germany. Britain's formal and felt legitimacy remains to some extent incompatible with EU membership, and its national identity cannot easily accommodate the creation of a European demos. Together with the lack of public support for "ever closer Union" and a persistent élite cleavage which limits the scope for active legitimisation policies, these factors favour a remedial strategy which reduces the EU's need for legitimacy. This means containment will be a more effective strategy for resolving the legitimacy deficit than communitarianism.

By contrast, Germany's formal and felt legitimacy is more integration-geared and its national identity is compatible with an emerging European demos. A general mass and élite consensus in favour of European integration means that from a German perspective communitarianism is likely to be the more successful legitimization strategy.

Third, political élites across Europe remain reluctant to pursue either communitarianism or containment which makes these strategies unlikely to pass the feasibility criterion. Political decision-makers have in the past always pursued incrementalism, which offers little hope for a solution to the legitimacy deficit. The second research question of this thesis can therefore be answered thus: the legitimacy deficit of the EU is susceptible of resolution. The EU can be successfully legitimised either by creating a European demos or by containing the integration process and thereby reducing the need for a common identity. But there remains a serious question mark over the political will or ability of Europe's political élites to pursue either of these two successful legitimization strategies. This is not least because country-specific variations in the legitimacy deficit mean that the definition of what constitutes a successful strategy for its resolution differs from member state to member state.

Conclusion

The discussion of the two research questions that were raised in the introduction has yielded the following answers. The political system of the EU suffers from a legitimacy deficit relative to the well-legitimised national political systems in Britain and Germany. The severity and nature of this deficit depends on country-specific factors within these two member states. From both countries' perspective, the single most important cause for the legitimacy deficit is the absence of a European identity which could instil a *sense of political community*. This diagnosis implies that the legitimacy deficit can only be remedied either by creating a European identity or by reducing the need for its creation. The relative effectiveness of these two strategies varies with the country-specific nature of the legitimacy deficit.

The two research questions discussed in this thesis reflect an increasing interest among political scientists in the problem of legitimising the EU. The original contribution to this academic debate lies not so much in the research questions themselves, but rather in the way they have been answered. Starting from an analysis of the limitations of the existing research on the issue, the discussion of the two research questions has produced important insights, both for the theoretical analysis of legitimacy in the EU and for the political debate about possible strategies for resolving the legitimacy deficit.

At an *analytical* level, the thesis has supplied the academic debate with a theoretical framework, the dual concept of legitimacy, which enables an empirical, falsifiable and comparative analysis of the legitimacy of the EU. Although dualistic conceptions of legitimacy exist, their usefulness for applied research is limited because they do not clearly identify the various components of legitimacy or analyse in detail their dynamic interaction. The dual concept focuses on this multi-faceted nature of legitimacy. It distinguishes between formal and felt legitimacy, and also subdivides the latter into the components *regime*, *authorities* and *community*. The dual concept therefore enables a more nuanced analysis of legitimacy deficits because it disaggregates the legitimacy of a political system into support for its institutional framework, support for the outputs it produces and identification with the political

community it represents. It also investigates the dynamic aspects of legitimacy, in particular how legitimisation policies can raise support for a political system and under which conditions support from one component of legitimacy can “spill over” into (or be substituted with) support for another component.

The dual concept also contains the important theoretical argument that the EU constitutes a full-blown political system which is most profitably studied from the analytical paradigm of comparative politics. Indeed, for the study of the EU’s legitimacy a comparative approach is even analytically necessary. Unlike normal states, the legitimacy of the EU cannot be studied in isolation. Its formal legitimacy is closely intertwined with that of its member states, and its felt legitimacy depends on the way the EU is perceived in each country. In other words, the legitimacy of the EU is contingent on the member state from whose perspective it is discussed. This contingency is best illustrated by comparing two well-legitimised member states whose different degree of compatibility with the EU has resulted in distinct perspectives on its legitimacy.

The dual concept has been specifically designed for comparative legitimacy research, which requires an empirical rather than a normative theory of legitimacy that seeks to measure how well legitimacy for the EU has been secured in its member states. As a second-order theory, the dual concept is free from any normative bias in favour of particular forms of legitimisation. The application of the dual concept is based on empirical, falsifiable data about the formal and felt legitimacy of the EU. Their validity can be tested both on empirical and methodological grounds (for example concerning the technical specifications of survey research).

At a *political* level, the thesis makes two contributions. First, it has provided a detailed diagnosis of the nature and extent of the legitimacy deficit and its differences among member states. This diagnosis can serve as a starting point from which to develop political strategies for remedying the deficit. Second, the thesis has offered two criteria against which the potential of legitimisation strategies for resolving the deficit can be evaluated. These criteria help to assess whether remedial strategies correctly identify and target the least legitimised component of the dual concept, whether they make correct assumptions about how the components of the dual

concept interact dynamically (for instance through *spill-overs*), whether remedial strategies can raise legitimacy across the different member states, and whether proposed reforms are likely to be supported and implemented by Europe's political élite. The discussion of these two criteria has clarified the political options for successful legitimization strategies, and it has drawn attention to some of the implications and side-effects of pursuing them.

These analytical and political insights have yielded the following detailed conclusions from the application of the dual concept of legitimacy to the EU. As regards formal legitimacy, Britain and Germany each operate with a distinct domestic constitutional framework. This causes different kinds and degrees of incompatibilities between the formal legitimacy of the EU on the one hand and the formal legitimacy of Britain and Germany on the other. Despite recent domestic reforms, Britain's formal legitimacy still has a low constitutional fit with the EU whose increasingly supranational formal legitimacy challenges the core doctrine of the British constitution, parliamentary sovereignty. Germany's formal legitimacy is geared towards European integration and exhibits a high constitutional fit with the EU, although there remains an unresolved judicial dispute about the competencies of the FCC and the "inviolable" core of the Basic Law.

There are similar variations in compatibility at the level of felt legitimacy which is high for both the British and the German political system. Britain's national identity has historically been shaped by a perceived dissimilarity from other (European) countries and a (con-)fusion of national with parliamentary sovereignty. Both factors complicate the emergence of a supranational identity at EU level. Despite a resurgence of older sub-national identities, levels of national attachment and pride remain high so that European integration is often perceived as a threat to British identity. By contrast, Germany's post-war national identity has rejected traditional conceptions of nationalism in favour of constitutional patriotism and a commitment to European integration. This has resulted in low levels of national pride and a national identity which can more easily co-exist with supranational loyalties and identification with the EU.

These variations have given rise to distinct national perspectives on the legitimacy of the EU which deviate from the European average in opposite directions. British support for EU membership is consistently around twenty per-cent below the level recorded in Germany. It rarely extends beyond fifty per-cent of the British population. Likewise, around two-thirds of Britons would not regret very much if the EU were dissolved, whereas the Germans who would regret a (hypothetical) dissolution of the EU nearly always outnumber those who would not. Different policy preferences and distinct economic cycles have been responsible for country-specific fluctuations in the perceived benefits of EU membership. Despite strong support for the Single Market, specific output support is generally lower in the UK than in the FRG, not least because a majority of Britons remain opposed to some of the other EU policies, such as CAP or EMU.

Both Britons and Germans consider the EU insufficiently democratic. But public attitudes towards institutional reform are shaped by different perspectives on the EU's constitutional philosophy, which reflect distinct national conceptions of sovereignty and democracy. From a British constitutional perspective, the EU is legitimised indirectly through the Westminster Parliament. German courts have argued that the EU rests on a dual legitimacy which is partly derived from the EP. Reflecting these differences, Germans prefer to strengthen the EP, if necessary at the expense of the Council, while Britons favour a strengthening of national parliaments and a retention of the national veto in the Council. A majority of Britons is also opposed to the formation of a European government responsible to the EP, whereas their German neighbours indicate cautious support for the idea.

As regards diffuse support for the political community, Britons feel considerably less attached to the EU and they are less likely to feel part of a common European culture than Germans. Around half of the German population identifies exclusively with their own nationality, and another third regard themselves primarily German and only secondarily European. The primacy of national identity is even more pronounced in the UK. Almost two-thirds of citizens exclusively identify themselves as Britons, and a majority in the UK fear that European integration threatens the survival of their national identity and culture. Two-thirds of Britons, but only a third of Germans, cannot speak another European language.

Beyond these substantial country-specific differences, the thesis has shown that the EU suffers from a legitimacy deficit relative to *both* the German and the British political system. In both countries this deficit manifests itself primarily in the absence of a European identity, which even in Germany is only weakly developed. There is little, and contradictory, empirical evidence of any rise in Europeanness over the last decade. Although older age groups are more likely to identify exclusively with their own country, demographic factors (or the length of a country's EU membership) play only a limited role in creating *positive* identification with Europe. Moreover, any effects of generational change may become diluted with the forthcoming Eastern enlargement of the EU which will increase the cultural diversity within the EU, thus complicating the creation of a European identity even more.

Germans and Britons strongly support a constitutional philosophy based on the principles of representative government, both for their own domestic political system and for the EU. Since the formal legitimacy of the EU deviates from this desired constitutional philosophy, diffuse support for the EU's political regime is low. Despite their inflated perceptions of the influence and powers of the EP, Britons and Germans consider the EU much less democratic than their national political systems and participation in EP elections has been in almost continuous decline in both countries.

Faced with low diffuse support for its political community and its political regime, the felt legitimacy of the EU remains over-dependent on specific support for the political authorities. This is problematic because during the 1990s public opinion on the benefits of EU membership has fluctuated by up to twenty-five percentage points in both countries. In a number of recent years a plurality of Britons and Germans considered membership unbeneficial, thus suspending any positive spill-over into diffuse support. Both countries have therefore witnessed a noticeable decline in support for EU membership during the 1990s.

To summarise, unlike national political systems whose legitimacy has rarely been a subject of attention in recent years, the EU is in an almost chronic state of forced

reflection upon its legitimacy.¹ In the absence of a sufficient degree of legitimacy the EU will have to rely on public acquiescence and inertia which provides no stable foundation for effective governance and the long-term stability of the EU. The current legitimacy deficit also endangers the future development of the EU, since its dependence on legitimacy increases in proportion to the degree of European integration. These findings raise the important question whether a resolution of the legitimacy deficit is possible.

The thesis has identified five potential legitimisation strategies which political élites can pursue in order to resolve the legitimacy deficit of the EU. The effectiveness and problem-solving capacity of legitimisation strategies can be measured with the help of a pertinence and a feasibility criterion. Successful solutions must contribute to the creation of a European identity, accommodate country-specific variations in the legitimacy deficit and be normatively acceptable to Europe's political élites. Analysis of the five legitimisation strategies has yielded the following result.

Strategies which seek to generate a European identity *indirectly* by means of boosting support for other components of legitimacy offer no viable remedy to the legitimacy deficit. In particular, institutional engineering or the functionalist creation of desirable policy outputs fail to generate sufficient spill-overs into diffuse support for the political community. Public satisfaction with political outputs and diffuse regime support are both necessary, but not sufficient conditions for a well legitimised political system. Neither the generation of economic benefits, nor a democratisation of EU institutions contribute effectively to the creation of a European identity.

That leaves the two strategies which tackle the lack of a European identity *directly*, communitarianism by seeking to generate a European demos and containment by reducing the need for one. But can the pursuit of active legitimisation policies by political élites actually create a European demos, and if so how? An answer to this question depends on the dynamics of collective identities. This thesis has argued that political leadership *can* influence the dynamics of collective identities, but this process is a slow one which has to be pursued over decades and does not always

¹ Beetham and Lord, *op. cit.*, p.123f

follow a linear development. In particular, recent proposals for a *thin* European identity are unlikely to generate a strong European demos which could command the primary loyalties of Europeans. Analogies to the traditional nation-building process of other multi-ethnic states such as the United States or Switzerland are also misleading. In these countries, nation-building did not occur against the background of entrenched national identities, it *preceded* the state-building process, was based on a core ethnies, and was accompanied by often violent internal or external conflict.

These conditions are either absent in Europe or normatively undesirable. Although self-identification against an internal or external “hostile other” has historically been a highly successful means of identity-building, it would not create the outward-looking, pluralist demos required to command popular loyalty across the existing and future member states. Chapter six suggested that it would be more promising and appropriate to forge a European identity around the *shared memories* of past conflicts from which a *common destiny* of peaceful co-operation can be projected.

The potential for a European demos that could command strong public attachment alongside the pre-existing national identities seems to be influenced by three factors in particular which can be distilled from the analysis of the preceding chapters. First, the degree of active political legitimation required for the creation of a European demos necessitates a strong, long-term élite consensus in its favour. Second, the nature of national identities in the member states must be compatible with the creation of a new, supranational level of identity. Third, the legitimation of a European demos can only succeed on the basis of sufficient mass support in favour of a supranational EU. If citizens in the member states are sceptical about European integration, they are unlikely to endorse an integrationist solution to the legitimacy deficit.

Considering these three factors in the context of Britain’s and Germany’s different perspective on the legitimacy of the EU suggests that a communitarian strategy has greater potential for resolving the legitimacy deficit from a German than from a British perspective. Germany’s élite consensus on the EU could facilitate the active legitimation of a communitarian strategy, the national identity of the Federal Republic can accommodate the emergence of a supranational European demos and there is sufficiently strong mass support in favour of ever closer Union. By contrast,

containment would be a more successful strategy to resolve the legitimacy deficit from a British perspective. It would take account of Britain's élite cleavage by reducing the need for an active legitimisation of the EU, it would lessen the challenge that EU membership represents to Britain's formal legitimacy and national identity, and it would accommodate generally weaker public support for European integration in the UK.

This is not to say that a containment strategy must be ruled out in Germany, nor that a communitarian strategy will never be able to resolve the legitimacy deficit from a British perspective. It would merely make a successful legitimisation of the EU more difficult. As suggested before, decisive political leadership might over time secure sufficient felt legitimacy for a continued Europeanisation of Britain's constitution, political culture and national identity. Making the British political system more compatible with EU membership may in turn eliminate many of the barriers towards higher levels of British mass and élite support for the EU, thus facilitating the creation of a European identity in the UK. While under these conditions a communitarian strategy could succeed in Britain, it would currently require a much greater amount of élite legitimisation and political leadership than a containment strategy.

These country-specific differences in the legitimisation potential of communitarianism and containment may complicate the search for a common strategy for the EU as a whole. However, political decision-makers in Europe have not attempted to pursue either communitarianism or containment, preferring instead incrementalism which offers little hope for a solution to the legitimacy deficit. This may be for a number of reasons. To some extent, the pursuit of incrementalism may be a reflection of the structurally-induced need for political compromise at the lowest common denominator, since the Treaties can only be amended with unanimous agreement.² Moreover, incrementalism may be the only feasible strategy in a fragmented political system where diverse political preferences reflect country-specific approaches to the legitimacy deficit. Yet another possible explanation would be that political decision-makers in Europe seem unwilling to invest the degree of élite leadership necessary for consolidating the EU's legitimacy. This could be either because they regard the

² Hix (99), *op. cit.*, p.26

legitimacy deficit as a problem of only secondary importance, or because national governments have been reluctant to legitimise the EU to an extent where it could rival, or even challenge, the legitimacy of the member states which they represent.³

However, explaining the preferences of the various political actors in the integration process, and determining the exact causes for the reluctance of national governments to pursue successful legitimisation strategies goes beyond the scope of this thesis.⁴ The feasibility criterion is primarily intended to indicate whether, rather than why, political élites in the member states are prepared to support a particular legitimisation strategy. On that basis, the conclusions of this thesis can be summed up as follows: the legitimacy deficit of the European Union is in principle susceptible of resolution, but the political prospects for one of the two potentially effective remedial strategies to be adopted and implemented are slim.

³ William Wallace: "Government without Statehood: The Unstable Equilibrium", in: Helen Wallace and William Wallace (eds.): Policy-Making in the European Union, (Oxford: Oxford University Press, 1996), pp.455ff

⁴ See: Chapter 6, p.242

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