Thin Institutional Arrangement of Overlapping Adjudicating Regimes

Everita Silina
The New School and Syracuse University

Thin Institutional Arrangement of Overlapping Adjudicating Regimes

Everita Silina
Graduate Program in International Affairs
The New School

and

Department of Political Science
Maxwell School of Citizenship and Public Affairs
Syracuse University
esilina@maxwell.syr.edu
www.GPIA.info

ABSTRACT

The main arguments underwriting the legitimacy of the European Union rely on a utilitarian calculus that emphasizes scientific neutrality and prioritizes elite rule. Advocates of a deliberative communicative model of democracy turn to a common European identity and appeal to greater EU-wide interests to resolve the unwelcome consequences of utilitarianism. My paper highlights some of the theoretical inconsistencies and practical risks of the dominant utilitarian view of legitimacy and the more recent alternatives. Taking seriously the problems of governance under conditions of complexity and functional differentiation characterizing modern society, the paper suggests an alternative model of EU legitimacy that is consistent with principles of democracy and diversity.

Thin Institutional Arrangement of Overlapping Adjudicating Regimes

Everita Silina

Plato argued in <u>The Republic</u> that a State arises out of human needs, which he maintained was the only source of a State (or *polis*) that we can imagine. Since no person is self-sufficient, everyone must find a way to establish cooperative arrangements if individual needs are to be satisfied. This body of inhabitants so joined by exchange, according to Plato, is in fact the state, although later theorists (Nozick, for example, 1974) would regard these conditions as a precursor to the State. Then, almost paradoxically, Plato proceeds to reveal the complete form of the State. The story he tells is a familiar one. The diversity of needs and wants requires different kinds of citizens as suppliers – a husbandman to provide food, a builder to construct dwelling, weavers and shoemakers to make garments. But a more complex state soon replaces this simple notion of the State. The explanation (and seeds of a later problem that Plato addresses) is that people's wants exceed their necessities "and they give themselves up to the unlimited accumulation of wealth." (1963: 66)[1] The more complex (and larger) state requires a hierarchy of various classes of citizens: laborers to carry out heavy jobs that demand no skill, artists and poets to entertain the citizens, soldiers to defend its expanding borders, and most importantly the guardians who are "wise and efficient" and who have "a special care of the State." Plato addresses the question of justice in ordering the goods and

---

[1] Plato, (1963). *The Republic*. Translated by Jowett, B. New York: Random House.

classes found in the more complex state as a direct consequence of his developmental theory of the state (1963: 121).

The development of the European Union has followed Plato's narrative in surprisingly close and puzzling ways. The EU was founded on economic cooperation, which was essentially Plato's first cut into a theory of state. Six European states came together in 1957 to form the European Coal and Steel Community in order to promote economic survival and provide benefits for each. Over time the European project in cooperation expanded into more issue areas and gained more members. In parallel with Plato's theory of state development the project evolved into a much more complex enterprise. The task of running the Union required the presence of elites who were "naturally" gifted or experts in various policy areas. These technocratic elites became the guardians of the European project, looking out for the interests of the people and protecting the interests of the European Community/Union. Plato's Guardian ruling class would not have been uncomfortable in the resulting arrangements.

In 1989 Francis Fukuyama proclaimed that we have reached the end of history and that ideological battles exemplified by the Cold War had finally come to an end. The Western liberal model of democracy, along with free market capitalism, he argued, had won the battle of ideas and was now truly global in its appeal. "The universalization of Western liberal democracy as the final form of human government" was for Fukuyama a logical end point of a long evolutionary process.[2]

Fukuyama might have been correct about the end of history and triumph of liberal democracy, but it is a sad end and a hollow victory. The liberal democratic model that is being embraced by more and more states hides within it the end of democratic

---

[2] Fukuyama, Francis. (1989). "The End of History," *The National Interest* (Summer).

governance. The appearance of democratic practices remains tied to states, while major decisions affecting people's lives increasingly take place at transnational centers of power and through international networks of experts far beyond the reach of domestic democratic practices. In a globalized world, governance has become too complex and to diffuse to be subjected to a meaningful control by people under the liberal democratic model locked within national boundaries. Rapid advances in technology and increased integration and overlap between locations, entities, and spheres intensify our sensitivity to decisions taken anywhere in the world and decrease the time available for response. Growth in scientific knowledge decreases our certainty, our ability to predict, plan and control our environment (Zolo, 1992).[3] The increased functional differentiation of various spheres further compounds the problem of effective governance as the political sphere becomes increasingly more de-coupled from its regulative functions. Additionally, as an immediate effect, the proliferation of transnational organizations and regimes breaks the usual channels of accountability and transparency. It has become simply impossible to trace the source of many policy changes, much less hold elite decision-makers accountable for their choices. In face of this growing complexity of the world order, some have gone so far as to assert that the very notion of representative democracy (and many of the family concepts that accompany it) no longer accurately describes political reality in democratic states, and that it does not adequately distinguish democratic regimes from the non-democratic ones (Zolo, 1992).

       In parallel to Plato's description of state development, the increased complexity of the system, especially the ongoing specialization and differentiation of various tasks

---

[3] Zolo, Danilo. (1992). *Democracy and Complexity: A Realist Approach*. Translated by David McKie. University Park, PA: The Pennsylvania State University Press.

(systems) along functional lines, leads to centralization of power in the hands of authoritarian networks of decision-makers. Political elites (often acting in concert within new system of transnational organizations) and international expert networks have become decidedly more isolated from external controls and more authoritarian. The dominance of the utilitarian ethic among these world elites, its emphasis on scientific neutrality, and elite rule all prejudice decision-makers against imagining other forms of governance. The notion of democracy that we have known for the past 200 or so years, cannot withstand this onslaught from the creeping authoritarianism of technocratic oligarchies.

I want to argue that elevation of democratic practices and principles to the EU or global level will not address the imbalance between technocratic governance and popular sovereignty. Democracy must be strengthened at the level where it has any chance of being meaningful and effective. Solutions offered by advocates of deliberative-communicative (Habermas, 1996; Eriksen and Fossum, 2004; Schmidt 2004)[4] and cosmopolitan models of democracy (Held, 1987)[5] do not address real maldistributions of global power. They incorrectly diagnose the extent of pluralism and particularity that exist in the modern societies. Their prescription for consensus seeking forms of public control misses the very point of complexity, the absence of any common point of reference from which such a consensus can emerge. Agreement on some unifying universal principles, if it exists at all, is too thin a layer to sustain the heterogeneity of

[4] Habermas, Jurgen. (1996). *Between Facts and Norms: Contributions to a Discourse Theory*. Cambridge: Polity. Eriksen, E.O. and Fossum, J.E. (2004). "Europe in Search of Legitimacy: Strategies of Legitimation Assessed," *International Political Science Review* 25(4): 435-459. Schmidt, Vivien A. (2004). "The European Union: Democratic Legitimacy in a Regional State?" *Journal of Common Market Studies* 42(5):975-997.
[5] Held, David. (1987). *Models of Democracy*. Stanford, CA: Stanford University Press.

human experiences and world views. In the context of the European Union, deliberative-communicative and communitarian theorists have already abandoned the critical stance altogether. The legitimacy of the union, they argued, depends on proper recognition by the publics of the EU that they have a shared destiny in an integrated European polity. This recognition should lead to the development of an added layer of common identity, as EU citizens, that will provide the necessary step toward public communicative action that can lend much needed legitimacy to the integration process (Schmidt, 2004).[6] It is a politically motivated stance. The EU is seen by many liberal theorists as an effective tool in confronting a globalized world order dominated by the United States. The problem for these theorists, therefore, is not so much the actual form and structure of governance in today's EU but the perceived absence of democratic legitimacy by the public. This legitimacy crisis can be bridged by binding people to the existing model of governance via public communicative action. Or, put in other words, they would transform a skeptical public into supporters of the EU institutions by involving them in democratic deliberative processes. The aim of the communicative deliberative approach, and to lesser extent of the communitarian approach, is to view democratic deliberation as a process through which the minds of citizens are changed toward a 'correct' understanding of the EU.

I argue that the utilitarian notion of legitimacy has justified and propagated a model of 'elite rule' that undermines the principles of democracy and erodes diversity in the economic, political and social spheres of the EU. Further, I show that the main alternative solution offered by deliberative communicative theory leaves much to be desired. It fails to acknowledge the great plurality of value systems in today's societies.

---

[6] Schmidt, Vivien A. (2004).

As a consequence, it offers a model of governance that depends on a consensus on the very values and issues that are divisive. Under this model, the problems of democracy and diversity are dealt with by asserting a shared identity at the EU level rather than critically examining the institutional arrangements of the EU.

Taking the two principles of democracy and diversity as my cornerstones, I propose a model of EU legitimacy that does not aim to alter individual preferences in order to suit the existing EU set-up. I suggest that democratic practices should be strengthened at the level where they can provide participants with the necessary resources and actions for the preservation of popular sovereignty. I draw on Zolo's notion of complexity to advance a theory of EU legitimacy that a) focuses on protecting principles of democracy and b) attempts to shield and enhance the diversity of indigenous customs and ways of life. I propose a model of EU legitimacy that requires this functional devolution, producing a system of *thin institutional arrangement of overlapping adjudicating regimes.*

<p align="center">*</p>

Utilitarianism

Utilitarianism has at its core a very simple and appealing premise. Among possible collective actions we ought to select those that most contribute to the greatest overall happiness. Further, with little adjustment, the same moral principle can be applied to individual action choices. In either case, the justification for selection of an action resides exclusively in the consequences of that action. In its early versions, the main consequence that interested utilitarian thinkers was happiness. But the meaning of consequentialism has since expanded to include any number of desirable outcomes and to

accommodate various moral principles. As Bernard Williams observes, "Very roughly speaking, consequentialism is the doctrine that the moral value of any action always lies in its consequences, and that it is by reference to their consequences that actions, and indeed such things as institutions, laws and practices, are to be justified if they can be justified at all." (1973: 79)[7]

Utilitarian logic rests on two main characteristics, both present in the process of European integration - consequentialism and maximization of the Good (aggregation). Either independently or acting together, these two aspects of the utilitarian model produce a particular type of governance and decision-making that we see in the EU today. Specifically, the utilitarian logic, much like the process Plato described in his theory of state development, produces governance by experts (or guardians) in two ways. First, the focus on consequences means that there is less emphasis on the means by which desired ends are achieved. In modern Europe committed to the rule of law, all that is required is that the process of integration is backed by legal measures, the treaties. The introduction of few democratic elements, such as popular elections of the EU Parliament, should not be mistaken for the willingness on the part of the EU elites to submit the process of EU integration to public control (in fact its scorn for public decisions that go against EU wishes is well known).

Second, the emphasis of aggregate indicators as guiding points for integration means that the opinions and interests of technocrats that interpret and define aggregate measures become more important than democratic accountability and public participation. Aggregation requires development of formulas. These complex calculations

---

[7] Williams, Bernard and Smart, J.J. (1973). *Utilitarianism: For and Against*. Cambridge: Cambridge University Press.

in turn require the presence of experts who can interpret the success of the existing

models of economic development as well as produce new measures and formulas. Policy

selection and decision-making in general become matters of scientific process to be

administered by trained experts. The public simply is not an appropriate source of input

into decisions regarding the maximization of the Good. It might, as the Irish prime

minister asserted in the aftermath of Irish 'no' vote in the referendum on the Nice treaty,

vote incorrectly. Under this arrangement not only the policy goals but the very definition

of the Good to be maximized is left to experts, not to the public. This practice produces,

in the end, quite contrary to Mill's original intention, a very paternalistic form of

governance.

Throughout the history of European integration economic efficiency has been one

of the main goods to be maximized by this co-operative arrangement. In particular the

focus has been on the common (now single) market as a most efficient organization of

the European economic area. Some have even maintained that the "common market" is

the common good of the integration process.[8] Focus on single- market indicators

certainly presents the technocratic elites of the EU with easily quantifiable measure of

success. 'Output' legitimacy, typically construed as higher economic growth, system

efficiency and effectiveness, is pitched to the public as the main pillar of EU legitimacy.[9]

The most worrisome aspect of the utilitarian approach is, however, the rule of

expert elites it tends to produce. Utilitarian theory and principles are open to various

interpretations of course, and its simple message of arithmetic morality might even find

---

[8] Lindahl, Hans. (1998.) "The Purposiveness of Law: Two Concepts of Representation in the European Union," *Law and Philosophy* 17: 481-507.
[9] I argue elsewhere that these aggregate measures are themselves inadequate to establish 'output' legitimacy of the EU.

appeal among many who are frustrated by the modern complexities of highly heterogeneous societies. However, as Michael Walzer[10] observed the classical notion of utilitarianism "seems to require a coordinated program, a central plan of a highly specific sort, for the distribution of social goods." (1983: xv) This ensures that the power of the planners would dominate. In Walzer's view "If we are to respect social meanings, distributions cannot be coordinated, either with reference to the general happiness or with reference to anything else. Domination is ruled out only if social goods are distributed for distinct and 'internal' reasons." (1983: xv) Utilitarianism, Walzer holds, is an integrated science that cannot satisfy this requirement.

Over-reliance on group/committee rule exemplifies this form of decision-making in the EU. Groups are formed prior to the drafting of the legislation to deliberate various aspects of the proposed policy. The process is seen, by its advocates, as more participatory and democratic, allowing relevant interests input alongside experts and political elites. However, participation in the groups is limited. Membership is based on identification of interests that would be affected by the implementation of the policy under consideration. Elites identify the participants of this deliberative process. This approach ignores the fact that any policy has implications beyond its initial targets. Hence, the identification of interests must pose some difficulty. It is however consistent with the view promulgated by political elites and many academics that present the EU's (and indeed other transnational organizations') influence as fragmented, limited, and specific to set spheres.[11] Perhaps it was possible to ignore the policy 'spill-over' when policy decisions and influences were confined, more or less, to the nation-state.

---

[10] Walzer, Michael. (1983). *Spheres of Justice*. New York: Basic Books.
[11] This is a line of reasoning endorsed by many advocates, including Andrew Moravcsik, of intergovernmental approach.

Globalization, however has destroyed that perception, exposing the overlaps and co-influences among various spheres. In sum, consequentialism and focus on aggregate indicators combine to produce an elite or expert-led decision-making model and tilt the tradeoff between economic efficiency (and other indicators) and democracy strongly in favour of the former.

Here is the other important consequence of the utilitarian organization of European integration - it diminishes the economic, political, and social diversity of the constituent parts of the union (variously defined depending on which aspect of human diversity we focus on). Liberals in academia and political elites have for a while now considered diversity an important value. In principle, the European Union is committed to promoting and sustaining the diversity of various peoples living on the European continent. In practice, that policy has been pursued mostly in cultural sphere with requirements for language use in the EU institutions, emphasis on native language channels for linguistic groups and monetary support for cultural projects.

This however reflects a very minimal conception of diversity. At best, diversity is construed vaguely as a culture of the national units. At worst, it is seen as equivalent to linguistic diversity. Language is of course a very important aspect of group diversity as it is its outward and very public, expression. But language is only one of many different attributes that characterize a group of people. Further, by focusing on linguistic diversity the EU ignores diversity that does not conform to ethno-linguistic borders. I would argue that as far as economic policies of the EU are concerned, their impact is more acutely felt on diverse ways of life that are not demarcated by linguistic borders. For example, the Eastern European rural culture of small family farms is not the kind of diversity that

would be obvious by looking at linguistic differences. Yet EU policies - especially its drive for efficient agricultural practices – would considerably impact the way of life in the Eastern European country-side.

The diversity of the member- states of the EU presents a serious problem for the utilitarian justification of the EU. After all, it is a familiar problem for public choice theorist that it is impossible to aggregate across diverse systems. It would not be an exaggeration to say that the definition of the Good to be maximized by a cooperative arrangement like the EU varies from state to state, from nation to nation, from ethnic group to ethnic group, from socio-economic group to socio-economic group, etc. Problems associated with EU diversity have been exacerbated by the widening and the deepening of the union in the recent years. Eastern Europe is a very diverse area linked by a shared historic experience during the Soviet era. Eastern Europe is also a very different area from the Western Europe. The difference between the two Europes is greater than the differences among various states within Eastern Europe. Malcolm Bradbury has Denis Diderot imagine in his cross-continental journey to Catherine the Great's court in St. Petersburg upon reaching the frontiers of Eastern Europe "Then somewhere, quite unnoticed, they cross a highly mysterious border. Europe becomes not Europe. The world subtly changes. The post-horses grow more scrawny. Now even time is different; somewhere or other eleven human days have disappeared from the western calendar and spiralled away into the strange wastes of the cosmos."[12] Tony Judt has explored the historic, cultural and social paths of the two Europes and has concluded that despite some convergence there is little reason to expect that the two areas can

---

[12] Bradbury, Malcolm, (2000). *To The Hermitage*. London: Picador.

successfully be merged into one.[13] Even if Judt's view is too pessimistic (or realistic) and given that it is too early to judge the success of the latest round of enlargement with accuracy, the EU of 25 members is vastly more diverse along many more dimensions, than the union of the original 6 members or even the EU of 15 members.

The widening of the union has been accompanied by a consistent deepening of the EU powers, broadening of the scope of its institutional reach. Changes since the Maastricht Treaty have been particularly significant. The introduction of common currency (euro), the powers transferred under the Amsterdam Treaty and the Treaty of Nice all have contributed to drastic changes in the EU character. Some 40% of the UK's domestic legislation in 2004 originated in Brussels. In 2001, Joshke Fischer's call for a common EU constitution was received with more or less shared criticism and skepticism. Only three years later, an EU Constitutional Treaty is being put to referenda and national parliaments for approval. That is a significant change. From the perspective of diversity and utilitarian justification, this qualitative change in the nature of the union is as important as its increasing size and heterogeneity.

For, as the contours of the EU become better defined, it becomes increasingly more difficult to project different conceptions of the good (to be maximized by cooperative arrangements of the EU institutional framework) onto the common fabric of the union. Under a more ambiguous, fluid EU, it was easier to maintain any particular "dream of Europe". In fact, different and contradictory notions of Europe could be held equally well by different member-states or groups of people without creating a conflict with actual EU operations. There was value to vagueness. But, as an object coming into

---

[13] Judt, Tony, (1996). *A Grand Illusion? An Essay on Europe*. Annual New York Review of Books and Hill and Wang Lecture Series. Series, No. 3.

focus, as the EU becomes more defined, it becomes more difficult for these various conceptions of the union to sustain themselves. It becomes clear to some that the common EU they have been constructing embodies an idea of the good quite different from their own. Divers views cannot be accommodated under strict limits placed on the EU character. The imagined no longer fits the actual.

To buttress the point about the standing of the principle of diversity in the EU, we can examine EU entry requirements. Indeed, I would argue that it is not significant whether a common identity based on shared values exists in today's EU in any meaningful sense (as some are very concerned to establish). Joining the EU is after all conditioned on acceptance of a set of what are seen as common European values. The development path opened to applicant countries does not allow for different conceptions of modernity. It does not even allow for opting out of the euro. In its rigidity it resembles Rostow's old unilinear model of stages of economic development – narrow and constraining. No state that becomes a member of the EU can claim to retain great diversity in any meaningful sense. Only liberal, capitalist units can be members of the EU.

Finally, to demonstrate the standardizing effect of the efficiency-driven model on diversity, consider the Summer 2005 proposal of the committee in the British House of Lords on reform of the CAP. This was an attempt to bring the EU agriculture more in line with neo-liberal practices and thereby launch the U.K.'s EU presidency. In its report, the committee proposed several important changes to EU agriculture. Among them was an assessment of the agricultural system in the East European countries, which was found to be in a grave state. As one committee member observed in an interview on BBC Radio 4,

too many unproductive and inefficient farms dot the landscape of Eastern Europe. According to the report, the EU must rectify this situation. Like the CAP, Eastern European agriculture must conform to modern farming practices.

Here I find the minimal definition of diversity (the one mainly attached to linguistic difference) highly deficient. It does not safeguard diverse practices and ways of life. Preoccupied with easily quantifiable measures of efficient systems, the members of the Lords committee neither know nor understand the history of the countries they are so eager to transform into little copies of modern Western states. Nor have they bothered to visit the areas and discuss their plans with people who live and maintain the inefficient farms they are so eager to displace with large farm conglomerates. I can only speak with any certainty of one of the Eastern European countries. In Latvia, small family farms that consist of few acres of land and one or two livestock represent more than a means of earning a living. As so many country people find employment in city centers, these farms are often not the means for income at all. They are, however, an integral part of Latvians' self-understanding as a people. All Latvian traditions and festivals are tied to country living. During the largest festival of the year, the summer solstice, the cities empty as people head to the countryside to celebrate with their families and friends by eating home made Janis cheese and dark peasant bread and drinking home brewed beer. Oak-leaf garlands are strewn throughout the houses and around fence posts and large fires are lit in the courtyards. At some point in the evening groups of people go from house to house singing Latvian folk songs and typically feasting themselves on more homemade delicacies and beer. Small farms in the Latvian countryside might be inefficient, and perhaps it is more rational to require that everyone purchases their milk and eggs from

the local supermarket chain, but for most Latvians one long-lasting dream is to have a little house in the country one day where one can raise a couple of pigs and hens and delight in the produce from his own garden and continue the traditions that have been part of the land for centuries. None of this reasoning would find much appeal among the technocratic elites of the EU or members of national parliaments of the Western countries so eager to impose their own particular outlook on farming practices on to other lands.

Overall, expertocracy is becoming more and more difficult to accept in a complex, interdependent world in which no single conception of what is reasonable or rational dominates and in which individual groups strive to carve out a moral niche. Increased individualization reduces legitimacy claims by experts who advocate approaches to problem solution and policy decisions based on universal laws of science, logic, moral system and impartiality. Recent health problems associated with changes in people's diet, highly correlated with a move in the Western democracies to more processed and chemically enhanced produce, has brought the expertise of food processing industry under pressure. The return to more organic food cultivation and consumption signals a kind of retrieval of an important part of human existence from the scientific models of food production. The 'expertise' of food production specialists becomes suspect when they allow the efficiency of mechanized food processing to trump food taste and quality.[14] To what extent should the value of efficiency trump the values of food safety, food tastefulness, and food healthfulness?

---

[14] During her annual report to the Government, the food and health minister of Latvia, noted that as much as 30% of food produced and processed in Latvia had to be matched to the existing packaging technology. In a process the organic quality and taste of the food was altered. She predicted that the number would only increase given the type of food processing machinery that is available. The packaging machines are all standard Western equipment that does not allow for alterations for specific local differences or in order to preserve the organic quality of produce. In an impromptu on-line opinion exchange, many people wrote in to complain about declining quality of food in Latvia since the arrival of new food processing regime.

In sum, I have argued that the utilitarian model of legitimacy has reduced

diversity by imposing formulaic solutions. Further, I have argued that the utilitarian

model seeks to maximize system effectiveness and efficiency to the detriment of

democratic and other popular values.

The Main Alternative Approach

Perhaps the most notable among the recent approaches to issue of legitimacy in

the EU are a cluster of arguments that have developed out of Habermas' ideal speech

theory or what is what is more familiar to American scholars as a theory of deliberative

democracy. Various versions of this communicative discourse approach present a similar

scenario of constructing a kind of public space of deliberation for resolving the issue of

weak democratic legitimacy of the EU institutions. It is imagined that, by participating in

this deliberative democracy, the citizens of the EU will come to regard the union with

greater understanding and sympathy. Furthermore, it is argued, that the very process of

deliberation will have a transformative effect on the participants, effectively binding them

in a shared understanding of the union and their roles within it. Some go so far as to

suggest that it might even lead to a formation of a kind of 'imagined political community'

(Schmidt, 2004).

In practical terms, the communicative deliberative approach advocates more

effective communications by the political elites of the EU and the member-states about

the positive features of the EU. In Vivien Schmidt's (2004) recent account, EU

legitimacy depends on internal acceptance and external recognition (2004: 980). On her

evaluation of the EU, internal acceptance is lacking, in large part, because national

political elites have not "sold" the EU to their constituents. This allows skeptics on both

ends of the political spectrum to monopolize the public deliberative sphere with exaggerated claims about the EU and its supposed threats to national sovereignty (2004: 990). Schmidt's solution to the problem is to "demand a much stronger national communicative discourse to legitimize EU-related changes to national publics" (2004: 992). She argues that national politicians should abandon their cautious attitude and should instead engage "the public in deliberations on the changes in the traditional workings of their national democracies in the light of Europeanization" (2004: 994). Schmidt believes it is time that people of Europe were told that their cherished notions of sovereignty and democracy cannot be sustained in the existing international arrangement.

Schmidt is a rare exception among theorists of communicative deliberation in that she acknowledges that the absence of a common European public sphere poses real practical problems for her approach (on her account there is no common EU media, language, and public opinion). She suggests instead that the communicative discourse take place at the national level. However, like most theorists of communicative discourse, she offers no realistic proposal for rescuing deliberative space from the control of global media empires driven by strong profit considerations and overt political preferences. The existence of domestic media, as Rupert Murdoch's power in the UK media market exemplifies, is no guarantee that such communicative deliberation is possible. But, as this is a practical matter, it is less worrisome then the normative underpinnings of the communicative discourse approach and its implications for the principles of democracy and diversity.

Even this quick overview of the communicative discourse approach exposes a curious absence. There is almost a complete lack of critical perspective regarding the

institutions and practices of the EU and implications it has on the principles of democracy. Instead, every attempt is made to shield the EU structure from scrutiny and to shift the burden of proof onto those who seek a more principled democratic EU. Schmidt's opening reference to the Constitutional Convention of the European Union is a telling example of this lack of critical perspective. In it, Schmidt, referencing Magnette (2003), praises the convention for making the first important step "in addressing the so-called 'democratic deficit' of the EU not only institutionally, with proposals for structural reform, but also procedurally, through intense deliberation and wide consultation" (2004: 976). And again, later in her study, she argues, "the Constitutional Convention did represent the first truly European communicative discourse about questions of 'polity' in a fully European public space" (2004: 992). After Schmidt's earlier assessment that European public space could not exist under current circumstances, it is odd to find here a reference to a self-selected group of Europe's political elite as constituting a 'fully European public space.'

British MP Gisela Stuart has written and spoken extensively of her experience as a representative of the British Parliament at the Constitutional Convention. Her account leaves little doubt that the proceedings at the Convention were far from 'intensely deliberative and widely consultative'.[15] As Stuart recalls in a pamphlet published by the Fabian society, "Not once in the 16 months I spent on the convention did representatives question whether deeper integration is what the people of Europe want, whether it serves their best interests or whether it provides the best basis for a sustainable structure for an expanding union. The debates focused solely on where we could do more at the European

---

[15] You can access some of her writing on the topic on her web-page. Available. [Online] http://www.giselastuartmp.co.uk/

Union level. None of the existing policies were questioned."[16] She also reminds us that the Convention was not originally charged with writing a Constitution, but with drafting proposals to address some of the more immediate problems facing the EU (like the alienation between EU institutions and majority of member-state publics).

Communicative discourse theorists, it appears, are primarily interested in transforming the internal landscape of human attitudes and beliefs rather than challenging the structure of European or global institutions of governance (Habermas, 1996; Schmidt, 2004; Steffek, 2003)[17]. In accord with this reasoning, they see the problem of EU legitimacy to be one of presentation, or packaging, rather than design. Legitimacy of the European project, as Schmidt argues in her study, can be enhanced by better public relations campaigns on the part of already-converted elites. Hence, she admonishes leaders of member-states for failing to "sell" the EU project to their people. It is curious that she uses the term communicative (deliberative) side-by-side with such phrases as 'the EU has to be "sold" to the public' and that 'political leaders have not explained things to people'. Neither of these references to elite communications seems to fit the meaning of deliberative democracy – the relatively equal exchange of ideas by all the parties to the debate in some approximation of a neutral environment. Indeed, nothing in her study indicates that such a deep deliberative approach is desirable. Rather the opposite appears to be the case. The tell tale signs are that what is really required to enhance legitimacy of the EU is one-way communication (or propaganda) by the political elites. After all, a deep, deliberative approach might produce conclusions that are skeptical or even hostile to the current EU arrangement.

---

[16] The quote is from "The Making of Europe's Constitution," The Fabian Society. 8 December , 2003.
[17] Steffek, Jens. (2003). "The Legitimation of International Governance: A Discourse Approach," *European Journal of International Relations* 9(2): 249-275.

The communicative model proposed by Schmidt (2004) and others is problematic for the principle of democracy, but it is potentially even more devastating for the notion of diversity. Schmidt asserts at the outset that her model of EU legitimacy grounded in communicative discourse and her conception of the EU as a 'regional state' would ensure that integration at the EU-level is balanced by "ever-continuing national differentiation" (Schmidt, pg. 976). This 'unity in diversity' approach has become popular among many EU scholars, most notably adherents of the intergovernmental approach who wish to deny that EU policies have any homogenizing affect on national political, social and cultural landscapes.[18] Yet not a single sentence in her study demonstrates that this is the case in the current EU arrangement. Neither does she show how it would result from her proposed approach of communicative discourse. Lacking any supportive evidence, the assertion appears much an article of wishful thinking or simply a comfortable belief.

Schmidt's view of diversity is conceptually faulty and based on erroneous empirical observations. The model of communicative discourse, with its strong insistence on persuasive communications by leading political elites, is likely to be detrimental to diversity (certainly the diversity of opinion) within the EU. Further, as Olson has observed in his survey of the literature on European unity and diversity, "veteran EU-scholars hold different opinions about how national identities and loyalties have been affected" by the Europeanization process so far[19]. Schmidt takes the highly optimistic view that the current institutional arrangement of the EU is balanced, requiring no adjustment between the supranational tendencies of the EU and the differences across

---

[18] See discussion and critique of the intergovernmental approach in Olsen, Johan P. (2004). "Survey Article: Unity, Diversity and Democratic Institutions: Lesson from the European Union" *The Journal of Political Philosophy* 12(4): 461-495.
[19] Ibid.

nation-states. She ignores the protracted debate about real-life interactions and distributions of power and influences across levels of governance. Communicative deliberative approaches place a high premium on the transformative qualities of deliberation. Schmidt hopes this might even produce an 'imagined political community. But this implies that existing diversity (however it is conceptualized) is a hindrance to rather than an asset for EU's legitimacy.

Finally, the communicative discourse model, with its emphasis on transforming people's attitudes and beliefs toward a more positive and accepting conception of the EU, fails to engage diversity whatever. The notion that there is a 'right' conception of the EU is contradicts any meaningful notion of diversity, however thinly defined.

<div align="center">*</div>

A model of EU legitimacy as a system of *thin institutional arrangement of overlapping adjudicating regimes*

I suggest a model of EU legitimacy that, I believe, recognizes the threat posed to principles of democracy and diversity by the utilitarian approach to European integration. My model, unlike many others, acknowledges the modern environment of increasing functional differentiation and individualization. I have argued that prevailing utilitarian reasoning, with its emphasis on aggregate indicators of the good and with its tendency toward expert elite decision-making, is highly unsuitable for promoting democracy and diversity in the union. Likewise, the main alternatives offered for settling the EU legitimacy crisis leaves much to be desired. Specifically, deliberative communicative approach fails to acknowledge the great plurality of value systems operating today. As a consequence, they offer models of governance that depend on deep consensus on the very values and issues that are divisive. Despite claims to the contrary, it is unity and

overarching consensus on liberal values that characterizes their solution to the problem of EU legitimacy, not diversity and the plurality of values.

My model of EU legitimacy avoids recourse to a single value system or restricted definition of the good. By a way of introduction let me observe that at the core of my model stands a very different conception of a union. Communitarian and deliberative communicative theories have a romantic view of the integration process. They see the EU as a kind of marriage contract built on the right motivations, shared understanding and commitment to the common good by participants in the project. A good European citizen is one who shares a positive orientation toward the EU, the single market, the euro, liberal Western values and accepts that his/her personal preferences might be overlooked in order to realize the greater good of the common EU. Contrary to this romantic view, my conception of the EU is more akin to a business contract. This notion of union does not inquire into the reasons behind actions. Neither does it demand social transformation on part of the skeptics. The only relevant fact is that the parties to the contract have decided to enter into a mutually binding agreement. That this may be done for purely self-interested and maybe even immoral reasons is immaterial. Under my model, the EU does not insist that the citizens of member-states develop a shared identity through their commitment to the EU institutions as a way to theorize away contentious issues.

This view of the EU as a business contract forms the *first* theoretical pillar to my model of EU legitimacy. The *second* pillar is based on the recognition that the dualities we work with should be abandoned for a more inclusive view of reality and relations between spheres of human interaction. As Clair Cutler advocates, in order to make private authority (for example, the authority of law merchants) visible in a global

capitalist structure, we should to reconsider the dualisms and distinctions we are used to living with. Among the main dualities are the familiar distinctions of public/private; political/economic; local/global; etc.[20] But the distinctions that compartmentalize human experience do not stop here. The increased complexity and functional differentiation of the current world order have been accepted by many scholars as defining features of the new era. For example, Zolo sees the global system as socially complex and consisting of functionally autonomous sub-systems located on the same level. None assumes a central position or dominance over the other subsystems. The political system, in his view, is just one among several subsystems – economic, cultural, social, religious, etc. - that are functionally differentiated from each other. Not only is the political subsystem unable to exert control over other subsystems but Zolo recommends that it should be confined to its own sphere of functional competence, as its interference in other subsystems can produce great dysfunctions (1992: 69-70)[21].

I propose that any serious response to the issue of European legitimacy, and more broadly, to global governance in the post-national era, should start with a more nuanced (or may I dare to say, honest) understanding of the interactions and interdependencies of functionally differentiated spheres. First, it does not suffice to describe the current global order as complex and functionally differentiated without acknowledging that deep interactions occur not only within different systems but also across system boundaries. In fact, despite increased differentiation, the boundaries among systems remain as porous as ever. Recent trends toward deregulation have not eliminated the spill-over effects from

---

[20] Cutler, Claire A. (1999). "Locating 'Authority' in the Global Political Economy," *International Studies Quarterly* 43: 59-81.
[21] Zolo does not seem to be worried that similar dysfunctional consequences might follow from centralization of power in other sub-systems. Given the power of global market actors/networks his exclusive prejudice against political system is perhaps hasty.

one sphere into another. A cursory examination of interactions between the economic and political, or the economic and cultural spheres, will reveal that removal of direct interventionist policies do not create a wall between these systems. Indirect effects remain and are strengthened by the 'negative' integration of global markets. The absence of political interventions in the economic system is not equivalent to the creation of some idealized neutral environment or, as some argue, the *natural* operation of world markets. Neo-liberal policies work in favour of some sectors and against the interests and free operation of others. A string of recent studies has revealed the extent of market influences on patterns of food consumption and indigenous ways of life. These direct and indirect effects of market systems on cultural systems often carry significant negative consequences. As I noted earlier, they are frequently responsible for the decreased diversity of practices, values and cultures.

In a global world in which authority is diffuse and difficult to locate or track to any single source, in which market operations have broken beyond the regulative borders of the states, and in which economic reasoning intrudes into every aspect of human existence, the notion of rigidly demarcated spheres, like separate public and private spheres, is unsustainable. This view shields powerful and dominant spheres from critical scrutiny and reduces accountable channels of governance to mere window dressing. Therefore, the *third* pillar of my model recognizes the mediating role played by the political sphere in complex heterogeneous societies. It reestablishes the political system as the only sphere that can bring some measure of impartiality to negotiate disputes and conflicts arising within or between other spheres of society.

Although I agree with Zolo's characterizations of global complexity and functional differentiation, I believe he misunderstands the role played by political sphere under circumstance of deep plurality. It is a misconception of the functions of the various spheres to arrange all of them on the same level. Zolo (1992) announces that in modern society the political system is no longer the central actor in strategies of social reproduction. "Rather it is a functional subsystem on the same level as others and carrying out functions which are differentiated from those of the other primary subsystems." (1992:69-70.) In his view the function of political subsystem is management or the reduction of fear that results from uncertainty. Politics becomes the new opiate of the masses.

It is difficult to see how the political system can achieve this task in an increasingly complex and interdependent world if it has no power to mitigate the effects of the very sub-systems that cause this uncertainty. If, as Zolo argues, it is just one among many sub-systems then it is unclear what function it performs at all. Indeed the very minimal conception of the political must allow its main function to be the final adjudicator of conflicts that result from the pursuit of different interests. As such, it must be placed above other spheres. Absence of an overarching moral code or religious doctrine, what else can ensure the cooperation of individuals and groups if not a relatively neutral political sphere? It is therefore important to distinguish between increased functional differentiation as such and the hierarchy of systems and subsystems that still exists. In fact, I argue that, under conditions of increased complexity, functional differentiation and interdependence, we need a political system that is itself more complex and more effective in its role as a mediator. It must be a reflexive system that

can recognize and adjudicate the inconsistencies that arise from contradictory principles and interactions of different subsystems. This function that cannot be assigned to a system that is equal in its standing with the very systems it is meant to oversee.

<div align="center">*</div>

Any conception of the European Union that takes seriously the account of the growing functional differentiation of modern society and the proliferation of private authority must consider carefully the role the political sphere plays in such a supranational context. The problem is confounded by the danger these global tendencies present to deeply held principles, such as democracy and diversity. Increased centralization of power in the institutions of the EU cannot be the answer. If experience with utilitarian thinking has shown anything it is that neither a single formulaic solution nor an appeal to a common value system will solve this problem. Instead the answer must lie in an arrangement that restores democratic decision-making to a level at which citizens can meaningfully participate. Likewise, this alternative vision of the EU project acknowledges that diversity cannot be maintained unless citizens can challenge standardizing practices imposed externally by economic integration or by the direct political interference of elites seeking to impose Western liberal values. As its main task, the union so constituted would offer the much-needed supranational level of political adjudication that can act as the final mediator over conflicting interests of various spheres within a given territory. What I propose as an answer to the legitimacy issue of the EU is a *thin institutional arrangement of overlapping adjudicating regimes*. Based on the three theoretical pillars outlined above this arrangement would strive to protect principles of

democracy and to shield and enhance the diversity of indigenous customs and ways of life across the EU.

It is an *overlapping* system because mechanisms already exist at various levels of governance and across different issue-areas for resolving conflicts ensuing from interactions across spheres. City governments, for example, are well experienced in negotiating the preservation of cultural heritage vs. efficient organization of the city's economy, ecological awareness vs. affordable housing projects, etc. Several European cities have established common or shared mechanisms for resolving pressing issues and for settling on better models of governance. They act in a kind of network of mutual support and advice. In this arrangement the EU would serve as the highest layer of conflict mediation within the EU territory.

The arrangement would be an *adjudicating* regime because its primary task would be diplomatic – to mediate the conflicts that arise from different internal logics and values of various sub-systems. It would approximate a neutral environment, including a set of rules and procedures that do not directly benefit any one of the subsystems of society. As a consequence, the EU would relinquish its over-emphasis on efficiency as a guiding principle. This, however, should not be mistaken as a campaign against profit generation by market-focused interests. It is not always the case that the preservation of a culture or way of life is economically unsound. The role of the EU under such a scenario would be to monitor the interaction between local traditions and market and to ensure that emphasis on profit do not produce such dislocations that only foreign tourists and a few wealthy connoisseurs can partake of local cultures. In its capacity as a diplomatic sphere, the EU should do as much as possible to enhance meaningful cultural development and

exchange. This effort should not be confined to exchange of souvenirs and preservation of linguistic diversity.

Finally it is a *thin institutional arrangement.* The current EU design has an intricate and confusing bureaucratic system. My thin model however features a slimmed-down version of EU institutions. Its primary function would be diplomatic services for conflict mediation among more local entities.

To establish a *thin institutional arrangement of overlapping adjudicating regimes* at the EU level would first and foremost require considerable functional devolution on the part of EU institutions. In order to safeguard democracy and diversity, the EU would also become a reflexive system that assesses its own impact on the two principles. With regard to the former it should recognize that regional and global integration of market functions strains the effective and meaningful operation of democracy. The EU should therefore strive to give all possible assistance to democracy-enhancing practices at national, regional, and local levels of governance. As a first step, the EU could endorse the use of national referenda for highly significant national issues, instead of maintaining its current, highly-condescending attitude toward any negative results. With respect to diversity, the EU should look beyond the simple linguistic conception of diversity and should embrace all aspects of human difference. It should stop its concern with trying to build an EU-wide identity, either for its own sake or as a method for consensus-building. The stability of Europe lies in its ability to embrace and foster cultural, ethno-linguistic difference and diverse traditions and ways of life. Their suppression could more likely result in renewed conflict

The EU Commission

By a way of offering more detail, let me quickly sketch the role played by the EU Commission under a *thin institutional arrangement of overlapping adjudicating regimes*. Obviously under my model of EU legitimacy, the Commission would face significant reductions in its power. It would effectively cease to operate as the engine of the integration process. Instead of generating policy propositions it would be limited to providing suggestions for policy changes or implementations on issues already under EU jurisdiction. It would become the main advisory body to the Council. For example, it could be asked by the Council to review the Common Agricultural and Common Fisheries policies. In order to avoid imposing a single interpretation of policy success or failure, the Commission would be charged with soliciting and researching local and regional effects of the policy and estimating the implications of possible changes in the policy for different sectors of society. Such reports are already performed for the CAP at some national levels. However, specific findings are kept for use at national parliaments without consideration at the level at which the policy originates. It is interesting that, contrary to general perception, the biggest UK beneficiaries of the CAP are the large farms and agricultural operations. Relatively little money flows to small farmers, as is often argued by many critics of the CAP.

Absent its role as the engine of EU integration, the Commission would become more a titular or symbolic head of the EU. It would become a representative authority on moral issues within the EU and in limited circumstances outside it. In other words, it could play the role typically served by the heads of state rather than the heads of government. It could replace the existing rotating presidency. The Commission could

concern itself with promoting co-operative arrangements in EU space research and in other collaborative scientific arrangements, like CERN, within which a great deal of European co-operation already takes place. Indeed, this does not departure much from some of the less concrete policy aspiration already expressed by the EU. Several intergovernmental conferences have noted the great need for the union to invest considerable resources in promoting the culture of science in the EU.

As part of its advisory as well as its moral standing, the Commission could act as the main research unit for the institutions of the EU. In this capacity it would be charged with exploring the data and implications of global trends in environment, economy, conflict and peace-keeping among many other issues. For example, it could act simultaneously to advise the Council on the patterns and practices of global currency speculations and assess the implications they have on the euro and remaining national currencies and areas of economy most affected by currency fluctuations. In this critical capacity, the Commission could go from contributing to the proliferation of authoritarian practices of governance, hidden under layers, emphasis on complexity, bureaucracy, and concealed forms of power, to becoming part of the network of organizations and individuals that work to expose the private authority operating throughout the global capitalist system. As these research, promotion, and information functions do not amount to executive powers the Commission could not become a locus of the centralization of political power.

Conclusion

In this paper I have adopted a critical stance toward the state of democracy and diversity in the EU and toward the main solutions offered for resolving the EU legitimacy

crisis. I have highlighted some of the theoretical inconsistencies and practical risks of the dominant utilitarian view of legitimacy and its more recent alternatives. I suggested a model for settling the issue of EU legitimacy that is consistent with principles of democracy and diversity. I recognized at the outset that this could be a tricky balancing act between normative commitments and realistic possibilities for reform in the EU. I am aware that the sketch I have given provides only a broad sketch of institutional arrangements that conform to my theoretical model.

My model of the EU legitimacy departs sharply from utilitarian reasoning. It does so because utilitarian reasoning threatens principles of democracy and diversity. I have not (as I do elsewhere) discussed problems of equality that arise from utilitarian pre-occupations with aggregate measures. This line of critique, I hope, is perhaps more familiar from John Rawls' detailed exploration of the problem in his *A Theory of Justice*. I hope I can be forgiven for not repeating it here. I would just like to note in passing that on most measures of inequality (Gini index, P10/P90 or P25/P75 percentile ratios) the gap between the richest and poorest segments of society has been growing in the EU as a whole as well as in almost all of its member-states. Labour markets (wage measures) in particular are becoming increasingly more inegalitarian across all geographic units.[22] Growing inequality is something any system built on predominantly instrumental justifications must worry about, as it opens the door for defections by those who do not believe that they can achieve a fair bargaining position within existing EU institutions.

---

[22] A thorough examination of the inequality measures and tendencies was presented by participants of the Conference on Democracy, Inequality and Representation: Europe in Comparative Perspective, Maxwell School, Syracuse University, May 6-7, 2005. Especially helpful was a detailed assessment of inequality trends and measurement issues presented by Andrea Brandolini and Timothy M. Smeeding, "Inequality Patterns in Western Democracies: Cross-Country Differences and Time Changes."

I have also tried to show that the main alternative approach to the EU legitimacy problem does not address the issue of deep pluralism that exists in the EU. I question its commitment to the principle of democracy. Deliberative communicative theorists assume that large consensus already exists or would be easy to forge among the citizens of the EU. Without any critical exploration of the issue and ignoring considerable evidence to the contrary, they assume that diversity does and can exist in the unified (even highly centralized) EU. An unstated background assumption is that those practices that are skeptical of or resistant to further integration can either be ignored or broken by references to a common European identity and appeals to greater EU-wide interests that should (morally) trump local preferences. It is clear that these propositions see Western-style liberalism (both political and economic) as a universal principle that should ground the core of the EU and be shared by all as a common point of identity.

In contrast, the model of the EU as the highest layer of diplomatic practice, the final referee of disputes that arise from competing and conflicting interests, does not, I argue, call for changes in people's attitudes or the transfer of loyalties from local levels to the EU level. The *thin institutional arrangement of overlapping adjudicating regimes* I have proposed recognizes that democratic practices are most effective at a lower level of governance rather than at the central EU level. At the same time it would protect indigenous practices and ways of life from the homogenizing effects of centrally directed economic and political policies that are either a product of utilitarian formulas or transformative effects of deliberative communicative action.

I have argued that the EU should cease to usurp domestic policies under its jurisdiction and undergo a serious functional reduction. Instead of aspiring for even

greater political centralization, it should seek to become a final mediator in a system of overlapping judicial (mediating) networks and allow greater flexibility for the national or regional governments to opt-out of various EU policies. I recognize the highly normative nature of my proposal. But even if little is changed in the current structure of the EU, any attempt to reflect seriously upon its own effects on democracy and diversity would be welcomed.