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The Concept of Legitimacy in the Political Theory of the European Union

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Introduction

Scholarly debate on the legitimacy of the European Union (EU) has two notable features. First, it is often conducted in terms borrowed from systems theory, particularly its adoption of the language of "input" and "output" legitimacy (e.g. Scharpf 1999; Lord and Magnette 2004) and, more recently, "throughput" legitimacy (Schmidt 2013). Secondly, it continues to use the normative diagnosis that is (in)famously known as the "democratic deficit". In a first part, this paper provides an exposition of these important features in EU legitimation discourses, in order to prepare the ground for a critique of the conceptual flaws that underlie them. In the second part, we revisit Michael Oakeshott's Hobbesian distinction between the "constitutional shape" of a government and the desirability of its activities or the "character of its engagement".

The paper argues that both the systems theoretic approach to the legitimacy of the EU and the democratic deficit diagnosis run on a conceptual error (Oakeshott 1975a). Juxtaposing the questions "how ought the EU be constituted to be considered legitimate?" and "what should the EU be engaged to do?" reveals input legitimacy and throughput legitimacy as pleonasms and output-legitimacy usually a fateful oxymoron. Exposition of this inadequacy of systems theory to conceptualize legitimacy in the EU helps, in turn, to expose the inadequacy of the democratic deficit-thesis. It suggests that to attempt to close the alleged democratic deficit often in fact address another, distinct problem (i.e. the character of the EU's engagement, *not* the question of its legitimacy). Finally, the paper argues that proposals to close the democratic deficit, geared towards legitimacy understood in terms we endorse as valid, are apt not to close but merely displace the locus of the alleged deficit.

1.1. The Democratic Deficit Diagnosis

The literature on the legitimacy of the European Union and the literature on the democratic deficit in the European Union are intertwined. In fact, legitimacy and democratic legitimacy are often taken in the literature to be coextensive - perhaps unsurprising considering the centrality that democratic procedures have in justifications of political power in contemporary political theory and contemporary politics. It is nevertheless important to keep the notions analytically separate. While democratic credentials have become paramount in accounts of political legitimacy, this development is historically bounded and contingent. Further, though accounts of political legitimacy emphasizing democracy are generally dominant, the function of democratic procedures to legitimacy remains importantly variant. Most centrally, some theorists of political legitimacy defend democracy because (and, by implication, insofar as) democratic procedures best pursue some higher goal - most commonly justice (Estlund 2009, Van Parijs 2011).

European Union politics is usually diagnosed with a democratic deficit to the extent that it does not have certain supposedly key characteristics that an ideal democracy is argued to require. The further the EU scores from an analyst's preferred ideal, the larger the putative deficit is argued to be. Of course, not all EU scholars agree there is a democratic deficit at all. For instance, Majone argues that the application of democratic standards to EU governance is a category error. For him, the EU is a 'regulatory state' (1994), which ought to pursue pareto-efficient policies. That is to say, the success (and thereby legitimacy) of EU policy is its *lack* of politicization – EU policies should make everyone better off, not prefer one party or the other, as majoritarian institutions tend to do (1998). Moravcsik comes to a similar rejection of the democratic deficit diagnosis through the opposite path; he argues that in fact EU policies measure up to legitimacy standards quite as well as policies enacted in actually existing national democratic fora (2002). Nevertheless, the dominant position is that the EU does suffer from some kind of democratic deficit. The particular features of an ideal democracy desired by those holding this view vary between theorists and so also the particularities of the deficit. The literature is further divided into those pessimistic about their diagnosis - thinking that it is unlikely the EU will ever meet the criteria of democratic legitimacy they defend - and those offering institutional prescriptions that may enable the EU to better meet their preferred standard. Three important categories of concern are 1) the lack of a democratic culture; 2) the lack of sufficient democratic control and; 3) the lack of sufficient citizen participation¹.

Those who worry that the EU is not sufficiently homogeneous culturally usually start from the observation that successful democratic communities usually share certain characteristics such as a common language, culture, history or identity otherwise-defined. One version of this argument sees shared identity as a defence against the tyranny of the majority (e.g. Scharpf 1999 - see below). More commonly,

¹ We are indebted for several bibliographic references in this section to the helpful review article by Jensen (2009)

it is argued that such features are not constitutive of a democratic polity strictly speaking, but rather prerequisites for one. The worry then becomes that the EU is not composed of citizens who share enough to be viable as a democratic system. Some argue that this lack in fact constitutes a limit for European (democratic) politics, arguing that proposals to address this are either undesirable (Schmitter 2000) or unlikely to succeed (Zielonka 2004). For those theorists not pessimistic about addressing this putative (democratic) deficit, proposals are either geared to developing a 'European demos' with a 'European identity' (e.g. Cederman 2001, Decker 2002) or to overcoming this lack while recognizing the multiple 'demoi' that a European polity (or 'demoi-cracy') would include (Cheneval and Schimmelfennig 2013, Kalypso 2013).

Theorists emphasizing the lack of democratic control the citizens of the European Union are able to exercise on its politics typically highlight certain institutional features that such control would require and that are missing from EU politics. For instance, Mény (2003) argues that instead of focussing on the constitutional aspects of EU governance, for instance by merely increasing the competencies of the European Parliament, democratic reform should include more direct democratic procedures in order to engage the public more directly and increase their influence on EU politics. Another frequent proposal to this end is the direct election of the EU Commission president. Such a procedure would supposedly give the Commission president a mandate to govern, and, by holding the President directly accountable, would enable EU citizens to express (dis)satisfaction with Commission activities in line with the Schupeterian ideal of a competitive democracy. A step in this direction was controversially taken by European parliamentary groups when they unilaterally put forward *spitzenkandidaten*, agreeing to mutually support the candidate of the largest, and therefore 'winning' parliamentary group in EP elections by rejecting other candidates proposed by the European Council. This successful coup led to the installation of Juncker as Commission President to the ire of British Prime Minister Cameron.

A third important strand in the literature on the democratic deficit of the European Union concerns citizen participation in EU politics. The most evident and mediatized lack of democratic participation in the Union consists in low and generally dropping participation in European Parliament elections. As a result of the highly publicized coup of the election of Commission President by Parliamentary groups, and the economic difficulties the Union has faced over the past few years, Euro-parliamentarians had expected turnout for EP elections to stabilize after years of decline. After running on the slogan "this time it's different", EP spokesperson Jaume Duch Guillot even claimed on election night that the 2014 election were, "a historical moment because for the first time since 1979, the long term trend of declining turnout has been reversed"². This proved inaccurate, with 42.54% turnout at final count continuing the trend of decline.

² Reference from:

<http://www.euractiv.com/sections/eu-elections-2014/its-official-last-eu-election-had-lowest-ever-turnout-307773> accessed 21/05/15

Concerns over citizen participation are not however focussed exclusively on citizens showing up at polling stations on voting day. Several theorists of European Union legitimacy look to deliberative politics to find a metric of legitimacy analysis, inspired no doubt by concurrent trends in democratic theory (see centrally the edited volume on the issue, and especially chapters one and six, by Eriksen and Fossum 2002). Some conversely see deliberative politics as a source of legitimacy. Joerges and Neyer for instance propose a notion they also call 'deliberative supranationalism', to justify the Commission 'comitology' system of EU legislation. Long criticized for its lack of transparency and the absence of Euro parliamentarians in the process, Joerges and Neyer legitimate such fora as unique sites of a discursive politics of persuasion, despite limited membership.

The centrality of the democratic deficit debate, both in academic discussion of the European Union and, increasingly, in popular and political discourse, has had material effects in EU constitutional innovation. Particularly the continuing project of expanding the competencies and importance of the European Parliament vis-a-vis the other European institutions is often justified and - at least in part - caused by the attention this debate has received (see e.g. Costa and Magnette 2003). The third section of this paper will be geared to geared to scrutinizing these proposals in the pursuit of EU democratic legitimacy.

1.II. Systems Theory Legitimacy Analysis

Fritz Scharpf's contribution to academic debates on the legitimacy of the European Union should be seen largely as an attempt to respond to the literature on the democratic deficit and its influence is difficult to underestimate. His 1999 work *Governing in Europe: Effective and Democratic?* was the first to introduce the distinction between 'input' and 'output' legitimacy to the discussion, a distinction much discussed in theory and much applied in analyses of Union political institutions and policies³. Focussing on output legitimacy has encouraged scholars of EU legitimacy to move beyond the perceived defects in the EU's identity-based, procedural or participative credentials to look at the actual domain of EU governance - how well the EU is able to do the things it sets out to do.

Scharpf develops the input/output distinction by first identifying what he takes to be two different strands of democratic theory in the history of normative political theorizing - one focussed on "governing by the people" and the other "governing for the people" (p. 6, his emphases) - and associated these with different legitimation mechanisms. 'Input' theories of democratic legitimacy he takes to be part of governing by the people and thus closely associates with majoritarian rule. The core question for such theories is how to overcome "the danger that self-interested, or hostile, majorities could destroy the minority" (p. 7) - the usual strategy being to focus on overlapping cultural, historical, linguistic and ethnic identity. The intuition here is that individuals sharing a 'thick' identity will be able to trust the majority not to

³ See Borrás et al. 2007, Risse and Klein 2007, and Lingren and Persson 2010 on institutions, and Skogstad 2003 and Borrás 2006 in policies.

violate their rights, even when they are outvoted. It is clear that if this were the end of the story, as some theorists of the democratic deficit supposed, the EU would not measure up very well to the standard of democratic legitimacy.

As opposed to 'input' democratic legitimacy, 'output' democratic legitimacy is supposed to correspond to the second tradition of democratic thought (a categorization we reject below), that focussed on governing 'for' the people. While broader and more flexible, Scharpf does note that it also "tends to be more contingent and more limited" (p. 11). Substantively, he describes output legitimacy as deriving its force "from its capacity to solve problems requiring collective solutions" that ordinary individual and civil actions cannot solve. Output-oriented legitimacy is the metric used to assess the success at which political actions are able to solve problems efficiently⁴. To this end, Scharpf identifies independent expertise, corporatist agreement, intergovernmental agreement, and pluralist policy networks as mechanisms of output legitimacy in the European Union, as well as describing electoral accountability as a sort of 'hybrid' mechanism whereby the shadow of an input (elections), "reinforces the normative orientation of office holders toward the public interest" (p. 14). Not surprisingly, the EU is more equipped to score-high on these 'output-oriented' legitimation measures.

The interplay of input and output legitimacy produces a four-by-four table of legitimacy judgements, and there is evidence to suggest that Scharpf considers output-oriented legitimation salient in the case of the European Union. Seeing that 'input' and 'output' legitimacy are independent from each other for the most part, it is not difficult to imagine a political institution that is well able to solve collective action problems but has no direct democratic mandate, little by way of democratic accountability, and no immediate democratic control. Such an institution would presumably score highly on 'output' democratic legitimacy, but low on 'input' democratic legitimacy. Similarly, a policy that enjoys close congruence with the 'will of the people' expressed through democratic procedures - such as for instance a measure adopted through a referendum - may fail spectacularly to solve the problem that the measure was intended to address, or may prove overly inefficient. The remaining options would be a wholly illegitimate or fully legitimate policy on these metrics. Looking more closely at Scharpf's proposals however demonstrates that input and output legitimacy as he conceives them are not independent variables. We have already noted that electoral accountability seems to address both input and output legitimacy, one telling quote seems to go further: considering the potential of European politics to avoid divisive decisions as a strategy for increasing output legitimacy Scharpf writes: "if European policy networks should be able to assure win-win solutions that satisfy all interests affected, output-oriented legitimacy would be assured, and the democratic deficit would cease to matter" (1999 p. 25). It is important to note at this point that in our view Scharpf's and other analyses of systems theory and the deficit diagnosis are confused as to whether output in fact addresses a problem of democratic legitimacy. When output is presented as engaging

⁴ As such, Scharpf's input/output distinction seems to mirror Dahl's earlier concerns over citizen participation versus systems effectiveness (1994).

another tradition of 'democratic' thought and as a variable of democracy, the assumption is that better output for the people strengthens 'democratic' legitimacy and reduces a democratic deficit. When it is presented as independent from, say, participatory democratic input, the assumption is that better output for the people simply makes democratic legitimacy less important rather than reinforce it. In the latter case, better output does not solve but helps to avoid the problem of a democratic deficit. It is in this sense, for instance, that Vivien Schmidt at times speaks about output or the challenge "to get the economics right" as distinct from Europe's 'other [democratic] deficit' or the need "to get the politics right" (2012, p. 7) and at others takes output as internal to a specifically democratic conception of legitimacy (2013).

Recently, scholars have proposed to add a third metric to Scharpf's toolbox, also borrowed from systems analysis - throughput legitimacy. This term received some attention in the years following Scharpf's book (e.g. Risse and Klein 2006, Wolf 2006, Bekkers 2007), but veritably exploded in importance in EU studies literature following Vivien Schmidt's 2013 Political Studies article on the subject. Throughput legitimacy focuses in her words on "what goes on inside the 'black box' of EU governance" (p. 5), as such, it concerns the processes of EU politics, rather than the electoral procedures of 'input' or the effectiveness of 'output'. Schmidt takes throughput legitimacy centrally to involve the "efficacy of... EU governance processes and the adequacy of the rules they follow" (p. 6). Further, this metric is also supposed to measure "the accountability and transparency of the governance processes", "the quality and quantity of EU governance processes' inclusiveness" and, "the openness of the EU's various bodies to 'civil society'" (*ibid*).

Schmidt's article also draws attention to the difference between the public perception of legitimacy and the normative question of whether an institution has a right to rule. This distinction - between moral and sociological legitimacy - has long been recognized as a central conceptual distinction with regard to the concept of legitimacy in political theory. The question of a political agent's moral legitimacy asks whether the agent has a moral right to coerce/rule and, usually, whether its subjects are a moral obligation ordinarily to obey⁵. If a political agent does have such a right, then the rule/coercive act is morally justified. In contrast, sociological legitimacy holds that an actor is considered to have the right to rule, supposedly leading its subjects to generally believe that they are under an obligation to obey. Whether or not the population is correct in their assessment of the moral legitimacy of the political agent in coercing/generating rules is a separate (and often untreated) question. Sociological and normative legitimacy need not be considered wholly independent, and may interact in interesting ways (Beetham 1991). We will return to this distinction, but for the time being it suffices to note that the distinction cuts across the input/output/throughput distinction; for instance, without proper democratic elections (input) both the normative and the perceived democratic legitimacy of a parliament will presumably suffer.

⁵ This interrelationship between legitimate authority / the right to rule and an obligation to obey has been a standard assumption of most normative political theory literature on political obligation but has recently been challenged, for instance by Applebaum (2010).

II.1. Oakeshott's Distinction Between Legitimacy and Desirability

Here we propose to develop a critique of both the systems theoretic approach to the EU's legitimacy and the democratic deficit-thesis with reference to the political theory of Michael Oakeshott. It has been noted that systems theory regards legitimacy as an "interactive construction" (Schmidt, 2013, p. 11) that encapsulates variables of both input, throughput and output. For Oakeshott, by contrast, these are not variables of one interactive construction but indicate questions and concepts that are "independent of one another" (1993, p. 9). Although his work predates the systems-theoretic approach and is far removed from its terminology, it may retrospectively be read as a premonition against the view of legitimacy as an interplay between, on one hand, participatory input and procedural throughput and, on the other hand, performance output. Oakeshott puts forth the stark suggestion that an "interactive alliance" between the former two and the latter "has the support neither of logic nor of evidence" (2004, p. 269). Oakeshott presents an alternative approach to legitimacy which, when brought to bear upon the case of the EU, fundamentally challenges the systems theoretic analysis popular in EU studies literature. Oakeshott's point of departure is that modern political thought has been preoccupied with two major but analytically distinct questions. The first of these questions is "How should a governing body be constituted, composed and authorized in order to be considered legitimate?" The second problem to be addressed is "What should a legitimate governing body be engaged to do and to achieve?" Thus the first question refers to the legitimacy of a governing body, whereas the second refers to the desirability of its activities or "the character of its engagements" (Oakeshott, 1975a, p. 330).

Reflections on the legitimacy or authority of a governing body are not peculiarly modern; they are conducted in the idiom inherited from pre-modern political theory, such as Aristotle's threefold classification of constitutional shapes and their perversions, and express certain beliefs and opinions about the normative sources of the right to rule. In modern European history, "the grace of God" and "the people" were foremost among these beliefs and, needless to say, not considered as mutually exclusive: *vox populi vox dei est* (Oakeshott, 1975a, p. 329). Nevertheless, in current legitimation discourses "democracy" stands topmost among these considerations and has been translated more or less (in)adequately into democratic procedures by which the right to rule may be legitimately exercised. "Universal suffrage", for instance, has overtaken "hereditary succession" as a central source of political legitimacy. Procedures, as Oakeshott stresses, are internal to the concept of legitimacy and explain why the statement "that "law regulates its own creation" is not a paradox but a truism" (1999, p. 151). That is to say that legitimacy requires procedures to be followed. This is by no means exclusive to democratic legitimacy; when identifying who is to rule as legitimate monarch after the death of a reigning monarch, a hereditary claim is only considered valid when the hereditary principle of succession is an already established procedure⁶.

⁶ This point pertains also to the impossibility of a legitimacy condition being met for the constitution of a new polity. The famous problem of the constitution of a democratic polity not being legitimate on the

Reflections on the activities by which a governing body should rule have become increasingly important in and characteristic of modern political thought. The reason for this focus is fairly straightforward. Whereas the scope of engagements of a governing body in pre-modern times were restricted - mainly to dispensing justice and organizing defense - modern European history has witnessed an unceasing growth in the scope of governing activities. This development is best explained by the increased availability of resources and the concurrently increased power with which a governing body can pursue new activities, stemming to a large extent from the growth of science and technology. Increasing focus on the activities of government is characteristic of modern political thought since hitherto no governing body could imagine unfolding, much less actually engaging in, the scope of activities undertaken in modern times (Oakeshott, 1993, pp. 9 – 10). They have power to do and to achieve things never done before, which invites reflection on the desirability of these activities.

Although Oakeshott thinks that in modern political thought a comparative shift of attention from the legitimacy to the desirability of governing activities is undeniable, for three reasons he is not surprised that this shift has not become more explicit. First, the shift of attention does not mean that the question of legitimacy has become obsolete. On the contrary, Oakeshott believes it remains crucial as the absence of firm beliefs on which its acknowledgment rests invariably indicate the disintegration of a political association and the faltering of its governing body. But he does think that modern reflection on legitimacy has been sparked by the changing pursuits of government rather than *vice versa*: "authorization mattered more because power and activity had increased". Thus the modern case for democratic legitimacy was built in response to growing activity: "where it was not argued that a democratic constitution would increase the power of government, it was argued that it is intolerable that governments disposing of such immense power should not be democratically constituted". Second, the shift has remained underappreciated because reflection on the pursuits of a governing body has not produced a distinctive idiom of its own but has confusingly used and transfigured the political vocabulary designed to address the problem of legitimacy. Notably, the adjective "democratic", which properly belongs to the idiom of legitimacy, is often invoked as a "confidence-trick" to recommend specific activities (for instance, the government provision of pensions). And thirdly, reflection on legitimacy has retained a "fictitious pre-eminence" because of the misguided conviction that the activities of a governing body are a necessary function of its constitutional shape. Accordingly, it was wrongly expected that "to have settled" the question of the legitimacy of the government "is to have decided the other", separate question on the desirability of its activities (Oakeshott, 1993, pp. 10 – 11). Oakeshott thus argues that the activities of a governing body cannot be seen as a necessary function of the authorization and constitutional shape which give it legitimacy, and that the distinction between these two concerns must be sharply observed in political theory. In terms of logic, his contention is that a particular belief

standards of democratic legitimacy thus proves generalizable - a new monarchic dynasty cannot be legitimized on the procedural standards of the preceding dynasty, etc.

about legitimation (for instance, that it should be "democratic") "neither favors nor obstructs (much less compels or excludes)" a specific belief about what a governing body should be engaged to do and to achieve. In the historical context of Europe, his contention is that the *administrative histories* of governing bodies in modern Europe do not follow, nor even run parallel to, their *constitutional histories* (Oakeshott, 1993, p. 9 and 1975b, p. 189, p. 193).

While the distinction Oakeshott develops has become more important with the widening activities of government, its analytic foundation has earlier roots. For instance, in the *Leviathan* Hobbes distinguishes, on one hand, the authorization and constitutional shape (Ch. XVII and XIX) and, on the other hand, the office or specification of tasks (Ch. XVIII and XXX) of a governing body (1651). It also finds support in Locke's claim in the *Second Treatise* that a commonwealth is not reducible to democracy or any particular constitutional shape that bestows legitimacy, but that it signifies a certain kind of association, namely one that is independent (1689, Ch. X). Relatedly, in *The Social Contract* (1762), Rousseau is keen to distinguish beliefs about the desirable activities of a governing body, inferred from "the limits of the sovereign power" and specified in "the signs of a good government" (Ch. IV Book II; Ch. IX Book III), from beliefs regarding the best constitutional shape of a governing body (Ch. II – VIII Book III). From Oakeshott's perspective, this means that our answer to an even more basic question, "What is the character of this political association?" informs our beliefs about the desirable activities of its governing body and a commensurate apparatus of power at its disposal to adequately undertake these activities. But this answer does not dictate any particular belief about which constitutional shape renders the governing body legitimate nor the other way round (cf. Oakeshott 1975b). Among those who have treated concerns about the legitimacy and the desirability of governing activities in terms of an "interactive alliance" (as we claim the systems theoretic analysis of EU legitimacy does), Oakeshott points to Kant for arguing incorrectly that a republican constitutional shape necessarily imposes the pursuit of peace among the activities of government and to Paine for wrongly asserting that a governing body with democratic legitimacy "would confine its activities within limits he approved and would be inexpensive" (Oakeshott, 1993, p. 10). But Hume (1777) and most offshoots of utilitarianism stand out, of course, for their insistence on the inseparability between these concerns, as the recognition of legitimacy rests on the desirability of a governing body's activities (for which the evaluative measure is "utility") rather than on its democratic and procedural qualities.

II.II. Using Oakeshott's Distinction to Critique the Systems Theory Approach to EU Legitimacy and the "Democratic Deficit"

From the above exposition, it is clear that Oakeshott's approach challenges the systems theoretic approach to legitimacy on several fronts. Three points of critique, we think, stand out. First, if we adopt Oakeshott's perspective, it appears that the compound expressions "input legitimacy" and "throughput legitimacy" are pleonasms. "Input", as noted, is primarily concerned with "participatory quality", whereas "throughput" is "process-oriented" (Schmidt, 2013, pp. 4 – 5). The former

refers most explicitly to the democratic credentials of a governing body, whereas the latter specifies certain characteristics, such as "accountability" or "openness", to which government procedures must conform should its activities, like the laws it enacts or the policies it adopts, be acknowledged as legitimate. This recognition of procedural legitimacy, as we shall stress further, is distinct from beliefs about the substantive desirability of these activities. Procedures are concerned with "how" a governing body unfolds its activities but indifferent to "what" is done within the bounds of authorization. In other words, to the extent that legitimacy is believed to require a democratic anchorage and conformity to procedures, it is concerned with "input" and "throughput" inseparably and by definition. This of course does not imply that we endorse the specific considerations which systems theorists attach to democratic input and procedural throughput. Taking two conditions Schmidt discusses for instance, it is an open question if the democratic input of a governing body, be it the EU or any other, requires a "thick collective identity", and, contrary to her view, one of the marks of throughput is that certain procedures can be highly inefficacious but nonetheless considered indispensable for the legitimate exercise of rule.

In contrast to "input" and "throughput", "output" does not enter this conception of democratic legitimacy. From the alternative perspective explored here, the compound expression "output legitimacy" is an oxymoron since it denies the central condition of possibility for legitimacy, namely, that particular laws and policies of a governing body may be ascertained as legitimate (and as rightfully imposing obligations) even if their "problem-solving quality" (Schmidt, 2013, p. 4) is considered to be utterly deplorable. "Output" is not concerned with the legitimacy but the *desirability* of a governing body's activities or, in the language of systems analysis, the appreciation of its "performance". Indeed, debate on the desirability of certain activities *presupposes* the acknowledgment, be it rapturous or stingy, that a governing body legitimately undertakes them. If an action of government lies outside its authorized scope then that action is illegitimate *regardless of its character as desirable or undesirable*. Consequently, contestation over the "problem-solving quality" of laws and policies loses its weight in default of the recognition of their obligatory, because legitimate, character (Nardin, 1983, p. 265). It is only because we recognize the legitimacy of a governing body's activity that we have a stake in altering its character according to what we find desirable. And it is because we do not expect disagreement about performance to disappear that we find democratic procedures most suitable to ascertain the legitimacy of laws and policies which some applaud and others taunt. In other words, if the legitimacy of governing activities is made contingent upon their expediency, fairness or wisdom, the concept of legitimacy is bereft of its *differentia*.

This view of legitimacy does not assert, as Oakeshott mistakenly suggests, that the legitimacy of a governing body completely transcends its contingent performance: there is a critical point at which a negative evaluation of what it does and achieves dissolves legitimacy (which, of course, inaugurates revolution). Hobbes formulates this critical point at which the recognition of legitimacy and the assessment of the problem-solving quality of governing activities intersect, as follows: "The obligation

of subjects to the sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them." (1651, Ch. XXI).⁷ One way of reading this is to suppose that part of the normative definition of "sovereign" is "the protection of subjects" and that once a putative sovereign fails on this desirable activity one is no longer bound to it. A contemporary expression for this notion is Bernard Williams' "basic legitimacy demand" - perhaps more suited than Hobbes' formulation because of its sociologically reflexive character. So a governing body can lose its legitimacy by acting (or failing to act) in such a way as to fail at what is taken to be the most fundamental requirements of government (the specific criteria of which are historically contingent).

Nor do we suggest that important and ongoing discussion about the (lack of) legitimacy of the EU as a body politic cannot *also* take place alongside the exchange of views on its performance. Indeed, questions of legitimacy are often excited by concerns about the kind and scope of activities: because the EU's "power and activity" continues to increase, its "authorization" matters more. Yet changes in the procedures through which the EU's legitimacy is placed on a firmer democratic footing do not offer any guidance about the desirability of what it does. Stronger democratic procedures in the EU are indifferent to beliefs about the relative desirability of "stimulus" over "austerity" or of measures to promote "labor mobility" over those guarding against "social dumping". However, although debate on the lack of democracy in the EU may be sparked by changing activities, this leaves unaffected that the hallmark of legitimacy is precisely that above the critical point of disintegration it emancipates governments from momentary or incidental assessments of performance.⁸ For instance, the EU's conformity to international treaties signed by officials with a (democratic) mandate to do so and ratified by (democratic) parliaments, or its respect of the results of referenda may render its actions legitimate, but the positive or negative contribution of these actions to the EU's output makes it neither more nor less legitimate (though it may make it more or less just, utile, in accordance with God's will, etc.). While it is thus a question of legitimacy to ascertain whether the EU's bail-out programs of Greece stand the test of legitimacy, in light of their alleged violation of the Maastricht Treaty or the EU's pressure to call off a Greek referendum on the bailout in 2011, it is an altogether different concern to critique the poor "problem-solving quality" of these programs. Legitimacy requires that relevant procedures are observed (conformity to treaties, respect of referenda results, etc.), but has nothing to say on the substantive quality of the EU's performance.

These two points, that legitimacy is about "input" and "throughput" by definition but that "output" addresses the desirability rather than the legitimacy of governing activities, imply a third. This final point of critique is that the inclusion of "output" in

⁷ For criticism of Oakeshott's radical separation of legitimacy from the desirability of a governing body's activities, cf., e.g., Bikhu Parekh "Oakeshott's Theory of Civil Association" in *Ethics* (106) (1995), pp. 158 – 186.

⁸ To avoid their momentary or incidental character, legitimacy requires that these assessments are themselves regulated in democratic procedures: a "*quinquennat*", say, may replace a "*septennat*".

the trinity of variables makes it difficult to see if systems analysis offers a specifically *democratic* conception of legitimacy. Imagine governing body A scoring 6/10 on "input" (for instance, open and competitive elections, low levels of abstention) and "throughput" (for instance, parliamentary procedure followed in legislation, freedom of deliberation, publicity) but only 3/10 on "output" (for instance, the quality of public goods like infrastructure, healthcare and public schools). Governing body B scores only 4/10 on "input" and "throughput" but 8/10 on "output".⁹ If we follow systems analysis, according to which "input" and "output" somewhat confusingly involve "complementarities and trade-offs" (Schmidt, 2013, p. 3 ff.), we are forced to the absurd conclusion that governing body A should be believed, not merely to be less legitimate, but less *democratically* legitimate than governing body B. This conceptual amalgamation of legitimacy with expectations about what a governing body should do and achieve is also found, for instance, in the work of Richard Bellamy and Dario Castiglione. Offering alternative models of democracy to scrutinize the EU's legitimacy, support for extensive public goods provision is taken to be a necessary function of "thick" beliefs about democracy (2013, p. 211). But the alleged link is questionable. A governing body can excel in such output as high-quality public goods provision for the people without being democratic and, conversely, a "thick" democracy with strong claims to legitimacy can underperform in terms of output.¹⁰ If output evaluation is postulated as internal to legitimacy, we are not only left wondering if we are presented with a specifically democratic conception but, more broadly, whether it has not in fact become indistinguishable from other sociologically measurable concepts like "credibility", "public opinion", "popularity", etc. To be sure, just as Madison claims in *Federalist* No. 47 and 49 that "all government rests on opinion", so does the normative claim to legitimacy ultimately rest on sociological belief. Yet the acknowledgment of this normative claim does not equal, much less necessitate, approval of or favorable attitudes towards what is substantively done within legitimate, authorized bounds. Systems theory is unable to account for this distinguishing mark of the concept of legitimacy and hence cannot provide a satisfactory analysis of the EU's legitimacy.

The (in)famous democratic deficit-thesis to scrutinize the EU's legitimacy turns out to run on the same conceptual conflation as the systems-theoretic analysis. In a very similar vein, the deficit-thesis muddles democratic and procedural legitimacy with expectations about the EU's performance, that is, the substantive desirability of its activities. This holds true not merely for scholarly debate on the deficit diagnosis, but also its invocation in popular and political discourse. Take, for instance, the *Staat van de Europese Unie 2013* ("State of the European Union 2013") which former Foreign

⁹ For instance, in the US majority decision-making is well-entrenched and there are various (even if imperfect) ways to hold governing agencies accountable, but its performance in public goods provision is relatively weak. Alternatively, the constitution of Singapore's government, say, relies on electoral procedures but these do not have strong democratic credentials and are not particularly transparent. However, its performance on the provision of certain public goods is of a comparatively higher quality than that of the US.

¹⁰ Of course, some justifications of democracy run on it being a necessary procedure to *define* the political "good", but even here the lack of adequate resources to realise the desirable good can result in a low "output" evaluation.

Minister and current Vice-President of the European Commission Frans Timmermans presented to the Dutch Parliament.¹¹ In his discourse, Timmermans claimed that:

"The Achilles heel of the EU is its democratic deficit. This deficit can only be tackled if, on one side, the EU performs better and, on the other, if democratic control within the EU is enlarged. What the EU and its Member States do they must do better, more transparent, more efficient *and* more democratic. In that way not only will the outcome of the process convince with better performance, but the process itself also becomes more easy to follow and much better to influence by Europeans." (p. 5, our translation, original italics)

Here we have a clear example of how in a single sentence the banner "democratic deficit", which properly belongs to the idiom of legitimacy, at once lumps "output" performance, democratic "input" and procedural "throughput" together and separates these considerations ("on one side", "on the other"). And it is revealing in this regard that the adjective "democratic" is *not* reserved for considerations of performance. If the deficit-thesis is to offer a clear and meaningful contribution to the concept of legitimacy in the political theory of the EU, it must confine itself to beliefs and expectations about "how" the EU should be constituted, composed and authorized in order to unfold activities that may be ascertained as legitimate but not with "what" we expect these activities to do and to achieve. In the final section, then, we propose to scrutinize those proposals introduced in the first section to close the deficit to test the extent to which the conceptual confusion we have exposed marks the proscriptive contributions of EU theorists.

III. Critique Proposals to address the 'Legitimacy Deficit' of the EU

This section returns to some of the proposals discussed in section one that attempt to address the putative legitimacy/democratic deficit of the European Union. This article takes no final view on the desirability of EU policies generally, nor does it deny the possibilities of an EU democratic deficit and the concurrent charge of a measure of EU democratic illegitimacy (indeed, our view is that all really existing governing bodies will unavoidably be sensitive to this charge to some degree). Marking the distinction between the constitution of a body politic and the character of its engagements, tracking to the normative standards of legitimacy and desirability, we suggest that many of the proposals are analytically confused, or displace the locus of democratic legitimacy instead of changing the democratic character of the EU.

The first category of proposals discussed in part one of this paper concern the putative lack of a shared and general democratic 'culture' in the EU. This concern has certain empirical features that are hard to deny. The European Union is of course a very diverse political community comprising of 28 different states, each with their own history and political culture. Bringing the distinction between the legitimacy of the EU and the desirability of its engagements to bear on this type of concern, we can see

¹¹ Available at http://www.europa-nu.nl/id/vj7hewyjmuux/staat_van_de_europese_unie_2013 21/05/15

that the site of supposed ‘democratic deficit’ is not that of legitimacy, but that of desirability. Note that the argument concerns not the procedural legitimacy of the EU as a democratic polity, nor its legitimate foundation. Rather, the idea is (usually) that the lack of a common democratic culture in the EU may result – through the lack of trust in or good faith between diverse EU citizens – in minorities being disadvantaged by the democratic process (Scharpf 1999, Cederman 2001, Decker 2002). Where these concerns in fact materialize, a claim that would require empirical assessment of EU policies and legislation, they may indeed constitute a grounds on which the activities of EU government may be criticized as undesirable (even unjust). Of course, demonstrating that the lack of a successful democratic culture, particularly when taken to mean the lack of a specific sociological feature of the EU electorate, for instance the lack of a shared language, is the cause of this putatively undesirable (though legitimate) outcome would be a tall order indeed. What is doubly unfounded regardless is to posit a ‘democratic deficit’ on the basis of the risk of such output. That not only constitutes the analytic confusion as to legitimacy versus desirability, but adds to that confusion by focussing on *potentially undesirable* outcomes.

The vein of democratic deficit literature that attempts to increase the level of democratic *control* by the electorate is arguably a more interesting case given our objections to the systems-theoretic evaluation of EU legitimacy. Theorists in this camp argue that the outcomes of EU political processes tend to poorly reflect the interests and preferences of EU citizens. Generally, the argument runs on a premise regarding the intransparency of European Union decision-making. Many suggest increasing politicization of EU politics, for instance through strengthening European Parliament competencies, though some suggest alternative avenues of constitutional reform – Mény for instance argues in favour of a more plebiscitary democracy instead of continuing the transfer of powers to the European Parliament (2003). Such proposals *are* geared to the processes of democracy, not its outcome, and therefore seem to be insulated from our critique. Arguably though, if (democratic) illegitimacy denotes the normative concern associated with failures to live up to existing procedural (democratic) standards, such arguments do not substantiate the charge of an existing illegitimacy of EU politics. We could take as a representative example to illustrate this point the election of the European Union president. Barosso, Juncker’s predecessor, was elected via the traditional bargaining processes between heads of state and government in the European Council. Juncker, in contrast, was the *spitzenkandidat* for the European People’s Party – the party that went on to win the largest number of seats in the European Parliamentary elections. Those that were responsible for the change in procedure could well have argued that the new procedure was more ‘direct’, even that it increased ‘democratic control’ and was thus more desirable. They would not however be able to find fault with the legitimacy of Barosso’s appointment – it was done in accordance with the existing rules of procedure. Barosso was a legitimate Commission President in this regard, and changing the process by which future Presidents were to be elected displaced the locus (or the character and standards) of democratic legitimacy, it did nothing to suggest a ‘democratic’ or ‘legitimacy deficit’.

Lastly, concern with citizen participation constituted the third strand of democratic deficit. The proposals generated addressing inadequate level of citizen participation can sometimes be assessed in similar ways to proposals addressing the lack of democratic control. Rather than changing the locus though, some such proposals change certain characteristics of democratic processes, for instance publicizing them (as EuroParlTV publicizes the debates of the EP) or increasing the scope for deliberation. As above, changing such features may be desirable, even on democratic grounds, but do not substantiate the charge of a democratic deficit existing prior to their change. More disturbing are proposals that seek to increase *any* participation whatsoever, or to include all parties ‘affected’ by a piece of legislation in its drafting. Where such aspects are already features of EU governance – described in the literature under the title ‘network’ governance – this on our analysis is potentially a source of democratic *illegitimacy*. Adding layers and actors to decision making beyond the existing formal (and formally regulated) democratic procedures may deny those *with* a democratic mandate (heads of state and government in the European Council, MEPs, etc.) some of their power. Scharpf even suggests that such ‘pluralist policy networks’, insofar as they may decrease the gap between EU legislative output and desirable output, constitute one aspect of EU democratic legitimacy (a strand of the ‘output-oriented’ democratic legitimacy he theorizes), a notion our argument of course rejects explicitly (1999). On the other hand, concern with dropping turnout in EU elections does stand up as serious concern for EU democratic politics.

Conclusion

The central argument of this paper has been to criticize existing scholarship on EU legitimacy and the democratic deficit for confusing desirability and legitimacy. Of course, one feature of legitimacy is that, *ceteris paribus*, legislation and policy is more desirable when it are legitimate than when it is not. Nevertheless, the concept of legitimacy has a distinct meaning that is properly kept separate from other metrics of desirability. Using the work of Oakshott, part two attempted to show how legitimacy is necessarily concerned with both ‘input’ and ‘throughput’. There is nothing *a priori* wrong about an analyst of EU legitimacy drawing out these distinctions. It is however a mistake to consider that the lack of legitimacy in ‘input’ can be *compensated* with more legitimate ‘throughput’. In this sense the distinction is usually a pleonasm. ‘Output’ however we consider alien to the notion of legitimacy that we develop. Measuring the desirability of the engagements of government is an important exercise - particularly given the long-term trend of governing bodies increasing the scope of their engagements. Nevertheless, confusing the evaluation of the desirability of the EU’s engagements with assessing the democratic legitimacy of its authorization is unhelpful. Finally, section three of the paper commented on how some important trends in the literature on the EU’s supposed democratic deficit were affected by our argument. It was shown that often such proposals are not grounded on a cogent critique of the democratic illegitimacy of EU governance. Further, they sometimes displace the locus of democratic legitimacy, rather than its character. Particularly ‘network governance’ proposals geared at increasing the deliberative roles of ‘affected interests’ in order to improve EU democratic legitimacy fare poorly.

Bibliography

- Abromeit, H. (2002) "Contours of a European Federation." *Regional & Federal Studies* 12(1), pp. 1-20.
- Applebaum, A. (2010), Legitimacy without the Duty to Obey. *Philosophy & Public Affairs*, 38: 215–239.
- Bekkers, V. (Ed.). (2007). *Governance and the Democratic Deficit: Assessing the Democratic Legitimacy of Governance Practices*. Ashgate
- Bellamy, R. and Castiglione, D. (2013). Three Models of Democracy, Political Community and Representation in the EU. *Journal of European Public Policy*, 20. pp. 206 – 223.
- Borrás, S., Koutalakis, C., & Wendler, F. (2007). European agencies and input legitimacy: EFSA, EMeA and EPO in the post-delegation phase. *European Integration*, 29(5), 583-600.
- Borrás, S. (2006). Legitimate governance of risk at the EU level? The case of genetically modified organisms. *Technological forecasting and social change*, 73(1), 61-75.
- Cheneval, Francis, and Frank Schimmelfennig. "The Case for Democracy in the European Union" *Journal of Common Market Studies* 51.2 (2013): 334-350.
- Costa, O., and Magnette, P. (2003). Idéologies et changement institutionnel dans l'Union européenne. Pourquoi les gouvernements ont-ils constamment renforcé le Parlement européen? *Politique européenne*, 9(1), 49-75.
- Dahl, R. A. (1994). A Democratic Dilemma: System Effectiveness versus Citizen Participation. *Political Science Quarterly*, 109(1), 23-34.
- Decker, Frank. "Governance beyond the nation-state. Reflections on the democratic deficit of the European Union." *Journal of European Public Policy* 9.2 (2002): 256-272.
- Eriksen, E. O., & Fossum, J. E. (Eds.). (2002). *Democracy in the European Union: integration through deliberation?* Routledge.
- Hamilton, A., Madison, J. and Jay, J. (1787 / 1788 [2008]) *The Federalist Papers*. Oxford
- Hobbes, T. (1651 [1946]) *Leviathan*. Basil Blackwell
- Hume, D. (1777 [1994]) *Political Essays*. Cambridge UP
- Jensen, T. (2009). The democratic deficit of the European Union. *Living Reviews in Democracy*, 1. pp. 1-8
- Kalypso, N. "European democracy and its crisis." *Journal of Common Market Studies* 51.2 (2013): 351-369.
- Keohane, R. O. (2006). The contingent legitimacy of multilateralism. *Multilateralism under challenge*, 56-77.
- Lindgren, K. O., & Persson, T. (2010). Input and output legitimacy: synergy or trade-off? Empirical evidence from an EU survey. *Journal of European Public Policy*, 17(4), 449-467.
- Locke, J. (1689 [2003]) *Two Treatises of Government and A Letter Concerning Toleration*. Yale UP

- Majone, G. (1994) 'The Rise of the Regulatory State in Europe'. *West European Politics*, Vol. 17, No. 3, pp. 78–102.
- Majone, G. (1998) 'Europe's "Democratic Deficit": The Question of Standards'. *European Law Journal*, Vol. 4, No. 1, pp. 5–28.
- Mény, Y. (2003). *De La Démocratie en Europe: Old Concepts and New Challenges*. *JCMS: Journal of Common Market Studies*, 41(1), 1-13.
- Moravcsik, A. (2002) 'In Defence of the "Democratic Deficit": Reassessing the Legitimacy of the European Union'. *Journal of Common Market Studies*, Vol. 40, No. 4, pp. 603–34.
- Nardin, T. (1983) *Law, Morality and the Relations of States*. Princeton UP
- Oakeshott, M. (1975a). *The Vocabulary of a Modern European State*. *Political Studies*, 23: 319 – 341; 409 – 414
- Oakeshott, M. (1975b) *On Human Conduct*. Oxford Clarendon Press
- Oakeshott, M. (1993) *Morality and Politics in Modern Europe*. *The Harvard Lectures*. Yale UP
- Oakeshott, M. (2004) *Conduct and Ideology in Politics*. *What is History and Other Essays*. Imprint Academic
- Oakeshott, M. (1999) *The Rule of Law*. *On History and Other Essays*. Liberty Fund
- Parekh, B. (1995). *Oakeshott's Theory of Civil Association*. *Ethics*, 106. pp. 158 – 186
- Risse, T. and Kleine, M. (2007), *Assessing the Legitimacy of the EU's Treaty Revision Methods*. *JCMS: Journal of Common Market Studies*, 45: 69–80
- Scharpf, F. (1999) *Governing in Europe, Effective and Democratic?* Oxford, Oxford University Press.
- Schmidt, V. (2012). *Dealing with Europe's Other Deficit*. *Public Policy Research*, 19. pp. 102 - 108
- Schmidt, V. (2013). *Democracy and legitimacy in the European Union revisited: Input, output and 'throughput'*. *Political Studies*, 61(1), 2-22.
- Skogstad, G. (2003). *Legitimacy and/or policy effectiveness?: network governance and GMO regulation in the European Union*. *Journal of European Public Policy*, 10(3), 321-338.
- Wolf, K. D. (2006). *Private actors and the legitimacy of governance beyond the state*. *Governance and Democracy: Comparing national, European and international experiences*,
- Zielonka, Jan. "Challenges of EU enlargement." *Journal of Democracy* 15.1 (2004): 22-35.
- Zürn, M. (2000). *Democratic Governance Beyond the Nation-State: The EU and Other International Institutions*, *European Journal of International Relations* 6(2), 183-221.