

The Reconstitution of European Public Spheres

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Abstract: *The strength of participation in its political processes has increasingly become the yardstick against which the legitimacy of the European Union is measured. Yet experiments in deliberative and participatory democracy suggest that their practice invariably falls short of their lofty ideals. A reason is their failure to consider the process of communication itself. As understanding of communication is constituted through a number of surrounding communicative contexts, communication, per se, can never be said to be good or bad. More important is a constitutional framework for communication which provides the contexts—performative, institutional and epistemic—that enable communication to contribute to particular, desirable ideals. This piece will argue that a deliberative approach to European governance involves a process of justification in which the three practical tasks of the European Union—polity-building, problem-solving and the negotiation of political community—are debated and resolved around the four values that have underpinned the development of politics as a productive process—those of transformation, validity, relationality and self-government. The organisational reform required for this involves a wide-ranging revisiting of the structures of the European polity.*

I Introduction

To those of us brought up in 1970s Britain, conversation and debate seemed so quintessentially and liberatingly ‘European’. There was the fashion, beauty and glamour of *La Dolce Vita*; the moody, intellectual chic of the Paris Left Bank, the sense-sating *Gemutlichkeit* of Viennese society, or the hedonism and opportunities of *la Movida* Madrid. In the new millennium, ‘European talk’ has become fashionable yet again. Beginning first in Ireland,¹ the fixation has spread, and is to be found not merely in Anglo-American literature, but also Scandinavian and German debate. This common concern derives not from any envy borne from a shared tradition of poor weather and even worse coffee. It is rather derived from talk being seen as being both good for and good at describing Europe. It has now very much entered official discourse. The EC Commission *White Paper on Governance* dedicated one of its four proposals to better

* London School of Economics and Political Science. I am indebted to Cristos Hadjiemannuil, Declan Roche, Martin Loughlin and Oliver Gerstenberg for comments on this piece. All failings are my own.

¹ The credit for first bringing deliberative approaches into European Union studies belongs to Deirdre Curtin, whose work on this was finally consolidated in D. Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (Kluwer Law International, 1997).

involvement of the 'people' in EU policy making.² The Secretariat of the *Future of Europe* has gone one step further. Participatory democracy is to be one of the yardsticks for evaluating the legitimacy of the Union, by its being encrypted into the draft Constitution as one of the organising principles of the Union.³

This is all very well, but United States experiments with deliberative government suggest that it can lead to extremely unpleasant politics. The policies developed are usually antagonistic and polarising and lead to further marginalisation of groups that are already disadvantaged or excluded.⁴ Recent evidence of direct democracy in the United Kingdom points the same way.⁵ Moreover, these doubts are creeping into the structures of the Union. Many nongovernmental organisations complained that the Convention establishing the Charter on Fundamental Rights was not a happy process, that it was unstructured and polarised, and that they were marginalised in the drafting and the decisions that mattered.⁶

This incongruence lies in a failure to separate the means and ideals of deliberation. Deliberation expresses four noble ideals that are particularly germane to modern decision-making. There is, first, transformation. Deliberation imposes a requirement to consider how existing things could be done better. Second, the requirement of validity demands that this be done in the light of what we know and value. Deliberative processes are, after all, processes of collective self-understanding. Third, the requirement of relationality, recognition of each individual's singularity and mutual dependence, is implicit in the intersubjective nature of deliberation. Finally, deliberation suggests processes of self-government.

Yet it is a feature of any communication that it is about something else. Communication can never therefore be said to be simply good or bad. To rely upon communication, *per se*, to attain these ideals is simply naïve. Three contexts, in particular, will inform any communication and give meaning to it. As a communication is always

² EC Commission, *European Governance: A White Paper*, COM (2001) 428, 11–18. The academic responses have largely focussed on this element. K. Armstrong, 'Civil Society and the White Paper—Bridging or Jumping the Gaps'; D. Curtin, 'The Commission as Sorcerer's Apprentice? Reflections on EU Public Administration and the Role of Information Technology in Holding Bureaucracy Accountable'; E. Eriksen, 'Governance or Democracy? The White Paper on European Governance'; P. Magnette, 'European Governance and Civic Participation: Can the European Union be politicised?'. These are all to be found on the EUI Robert Schuman site on Responses to the European Commission's White Paper on Governance at <http://www.iue.it/RSC/Governance/>. As part of the process the Commission has followed this up with a consultation document, EC Commission, *Towards a reinforced culture of consultation and dialogue—Proposal for general principles and minimum standards of consultation of interested parties by the Commission* COM (2002) 277 final.

³ The European Convention, *Preliminary Draft Constitutional Treaty*, CONV 369/02, 28 October 2002, Article 34.

⁴ For empirical work see S. Verba, K. Schlozman and H. Brady, *Voice and Equality: Civic Voluntarism in American Politics* (1995, Harvard University Press, Cambridge, MA). See also the survey in C. Sunstein, 'Deliberative Trouble? Why Groups Go to Extremes' (2000) 110 *Yale Law Journal* 71.

⁵ In 2000 and 2001 three Labour-controlled local authorities, Milton Keynes, Bristol and Croydon, organised one-off referenda establishing a direct correlation between levels of taxation and levels of health expenditure. Voters were told the extra services that would be brought by extra taxation. A series of meetings were held so that 'deliberation' could take place. In every instance, participation in the referendum was low and voters voted for the lowest rate of taxation, http://news.bbc.co.uk/1/hi/english/uk_politics/newsid_1831000/1831959.stm (accessed 21 February 2002).

⁶ House of Lords Select Committee on the European Union, *EU Charter of Fundamental Rights (Eighth Report, Session 1999–2000)* (2000, HMSO) paras 34–35; J. Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of EC Law' (2001) 38 *CMLR* 1171, 1174–1176.

uttered with regard to some further purpose, the performative context is important. As this process will presume some prior understandings, the epistemic context is also central. Finally, the organisational or institutional context will provide a set of conditions which will pattern and hierarchalise conversations.

Any deliberative strategy also requires a strategy of organisational reform, which patterns these contexts in a way that they both contribute effectively to the practical tasks they address and meet deliberation's ideals. The value of deliberation as a political strategy lies in the possibilities it can offer as a consequence of this for the organisational re-imagining of the Union.

The first step in such a task is to determine the constitutional remit of deliberation by setting out what can be talked about, namely the tasks of the Union. Historically, three teleologies have underscored the work of the Union. It is concerned, first of all, with polity-building, the creation of a series of common political institutions and a form of politics which transcends the Nation State. Second, the Union is concerned with problem solving. Its remit is to act where there is a dimension to problem that cannot be effectively resolved by a Member State acting unilaterally. Finally, the Union forces us to reconsider who we are and the nature of our existing political communities. The discourse here is that of citizenship. New Insider/Outsider distinctions and membership rights are formed which lead to the transgression and recasting of existing boundaries, the granting of new membership rights within our political communities and the emergence of wholly new communities.

At any one time any Union debate is performing one of these tasks. They, *per se*, do not entail organisational reform. What does is locating these debates in those organisational contexts best suited to securing their goals. This is not a reform-lite, as it will entail the establishment of different institutional structures for each of the three teleologies in question. Furthermore, the demands imposed on each organisational structure are considerable. They have not only to be able to monitor, constrain and sanction the activities of their subjects. They have also to be capable of generating new shared meanings and collective identities, as well as orienting their subjects to new norms or values, so that these have the sense of what relations are appropriate for the pursuit of a particular task.

The bulk of this article is considering the institutional structures within the Union that are best suited to realising the three teleologies of the Union of polity-building, problem solving and the negotiation of political community. Yet there is also an epistemic context to deliberation, namely what arguments should count. To be sure, each teleology will generate its own demands. The knowledge required for recycling of motor vehicles is very different from that for asylum procedures. Yet deliberation, as a particular form of communication, superimposes further demands. It requires that arguments be justified in terms of its four ideals—transformation, validity, relationality and self-government. To deliberate in a European way requires, furthermore, that it be justified by references to European traditions of understanding of these four ideals.

This tradition not only serves to coordinate and unify the different types of debate. It also imposes a number of normative constraints on any deliberative procedure. The European tradition of freedom informs the value of transformation, by suggesting that any decision be justified along two dimensions, those of self-overcoming and those of solidarity with individual singularity. The European tradition of modernity has, by contrast, developed a culture of faith in an admixture of institutions, the State and market and Natural Science, whose existence must be respected and act as a starting point for any debate. The tradition of relationality developed within the European Union

imposes three further elements—the possibility of creating new public goods or forms of collective action; respect for the principle of alignment, so that no community may impose unnecessary externalities on other parties; and respect for the principle of supranationality the reconsideration of existing communities and collective practices in the light of alternative interests and values. The European tradition of self-government requires that political procedures be aligned around some notion of autonomous political community, that they justify themselves through reliance upon public reason and that the government be governed by procedures of authorisation and accountability. The benefit of focusing deliberation around these structures entails, in this way, that deliberation is not simply instituted to legitimate ‘Europe’, a monolithic, empty and ultimately slightly fascistic ideal. Instead the European ideal becomes something which is required to, and is measured against its ability to, contribute to these practical tasks. It becomes a cipher for each political community to construct its own polity, solutions to problems and membership rights.

II Fixing the Terms of the Debate

A *The Conditions of Deliberation*

Deliberative democracy requires:

a framework of institutional and social conditions that both facilitates free discussion among equal decisions by providing favourable conditions for expression, association, discussion and ties the authorisation to exercise public power—and the exercise of it—to such discussion, by establishing a framework ensuring the responsiveness and accountability of political power to it.⁷

It is thus an idealisation, which, first conditions the *reasons* used by participants in debate. It implies a commitment to the pursuit of agreement with other participants. This requires a process of justification whereby the individual argues her interests in terms and values in a manner that might not be accepted but ‘would count as a good reason for all others involved.’⁸ Deliberative democracy also conditions the *qualities of the participants* involved. Its starting point is the autonomy and equality of the individual actors involved. Deliberative models therefore presume that any individual whose autonomy is compromised by a collective decision should have the right to participate in its debate.⁹ Yet a condition for entry into debate is recognition that the other participants have autonomous deliberative capacities that will be treated on an equal basis to one’s own.¹⁰ Finally, deliberative democracy implies a *causal relationship between the debate and the decision* taken. Some authors insist on a tight link arguing that

⁷ J. Cohen and C. Sabel, ‘Directly-Deliberative Polyarchy’ (1997) 3 ELJ 313, 320.

⁸ S. Benhabib, ‘Towards a Deliberative Model of Democratic Legitimacy’, in S. Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1994) 67, 71–72. This point has been advanced in most detail by J. Cohen, ‘Procedure and Substance in Deliberative Democracy’ in the same volume. Although see *contra* J. Fearon, ‘Deliberation as Discussion’, in J. Elster (ed.) *Deliberative Democracy* (Cambridge University Press, 1998).

⁹ For recent observations on this in a transnational context see J. Dryzek, ‘Transnational Democracy’ (1999) 7 *Journal of Political Philosophy* 30, 44; M. Zurn, ‘Democratic Governance Beyond the Nation-State: The EU and Other International Institutions’ (2000) 6 *European Journal of International Relations* 183, 202 *et seq.*

¹⁰ E.g. J. Cohen, ‘Deliberation and Democratic Legitimacy’, in J. Bohman and W. Rehg (eds), *Deliberative Democracy* (MIT Press, 1997) 67, 72–73; J. Habermas, *Between Facts and Norms* (Polity Press, 1996) 107–109; I. Young, *Inclusion and Democracy* (Oxford University Press, 2000) 53–57.

deliberation requires any decision taken must do so on the basis of the argument which is commonly agreed as the best.¹¹ Others note that it is impossible to measure the relationship empirically and that the mere process is sufficient.¹² It is sufficient to draw a relationship that is more hermeneutic in nature. Any decision must legitimate itself in terms which perceive the preceding debate as providing it with a series of persuasive and autonomous reasons for action.¹³ Thus, aggregative¹⁴ and unreasoned¹⁵ decisions are condemned.

B The Explanatory Value of Deliberation in EU Studies

Deliberative rationality first acts to explain *What For*. It serves as a principle of justification for the European Community. This argument runs along the lines that there is a need for transnational political communication and political debate transcending the Nation State. Such deliberation can 'add value' by fostering mutual self-understanding, resolution of disputes, curbing the excesses of the Nation State and acting as a bulwark against the destabilising consequences of globalisation.¹⁶ The European Community is the only régime in the world which provides the institutional conditions that enable such debate to take place on a sufficiently stable and intense basis.¹⁷

Deliberation is also seen as providing the answer to the question of *Why the Union emerged*. It is argued that EU policy and law-making are, at heart, practical processes of argumentation. A distinctive and central feature of these activities is:

a constant discursive struggle over the criteria of social classification, the boundaries of problem categories, the intersubjective interpretation of common experiences, the conceptual framing of problems, and the definitions of ideas that guide the ways people create the shared meanings which motivate them to act.¹⁸

Within this process participants may communicate and generate collective understandings through either coercion or persuasion. Coercion has a limited effect however, as it can never fully shift preferences or transform understandings. It seems particularly inappropriate in the EU context, with its multiple veto actors and multiple veto points. Persuasion, a coda for deliberation, is thus the central means of reaching agreement.¹⁹ Through its processes of repetition and socialisation, it stabilises and

¹¹ S. Stokes, 'Pathologies of Deliberation' in J. Elster (ed.) *Deliberative Democracy* (Cambridge University Press, 1998). A. Prezeworski, 'Deliberation and Ideological Domination' at 123 in the same volume.

¹² J. Elster, 'Introduction' 1, 8 in J. Elster (ed.) *Deliberative Democracy* (Cambridge University Press, 1998).

¹³ M. Walzer, *Spheres of Justice: a defence of pluralism and equality* (Blackwell, 1985) 313–315.

¹⁴ J. Cohen, 'Procedure and Substance in Deliberative Democracy', in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1994).

¹⁵ B. Manin, 'Of Legitimacy and Political Deliberation' (1987) 15 *Political Theory* 338.

¹⁶ On the latter see J. Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship' (1996) 9 *Ratio Juris* 125.

¹⁷ J. Habermas, 'Die postnationale Konstellation und die Zukunft der Demokratie' in *Die postnationale Konstellation: Politische Essays* (Suhrkamp, 1998); E. Eriksen and J. E. Fossum, 'Conclusion: legitimation through deliberation', in E. Eriksen and J. E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (Routledge, 2000).

¹⁸ F. Fischer and J. Forester (eds) 'Editors Introduction' 1, 1–2 in F. Fischer and J. Forester (eds) *The Argumentative Turn in Policy Analysis and Planning* (UCL Press, 1993). See also D. Stone, *Policy Paradox and Political Reason* (Scott Foresman, 1988).

¹⁹ The most authoritative advocate of this line of reason in EU studies and international relations is Thomas Risse. T. Risse, 'International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area' (1999) 27 *Politics and Society* 529; T. Risse, "'Lets Argue!'" Communicative Action in World Politics' (2000) 54 *International Organization* 1.

institutionalises its understandings and preferences, so that they become the *basis* for future negotiation and debate.²⁰ Deliberative approaches have thus been highly influential in EU policy-studies writing.²¹ They have been used to explain the operation of certain EU institutions, most notably comitology²² and the Economic and Social Committee.²³ They have also been used to explain certain policies,²⁴ and both general resistance to integration²⁵ and why certain polities are more resistant to EU integration than others.²⁶

Finally, deliberative rationality is utilised as a *regulative ideal*. It is both a principle through which holders of political power justify the exercise of that power and a more general principle of political justification. Deliberative rationality becomes, thereby, a form of immanent critique. It provides elements of partial legitimation for the European Union, but also imposes a *telos* to which the European Union must aspire. Those invoking the logic of deliberative rationality have thus criticised the European Union for the weak density and quality of debate.²⁷ It has also been criticised for foreclosing the number of participants who may take part in political debate or submit arguments

²⁰ On the sequential effects of deliberation see M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

²¹ For a critique, however, see A. Moravcsik, 'Is there something rotten in the state of Denmark? Constructivism and European integration' (1999) 6 *JEPP* 669.

²² C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Case of Comitology' (1997) 3 *ELJ* 273. See also J. Neyer, 'The Comitology Challenge to Analytical Integration Theory' and C. Joerges, "'Good Governance" Through Comitology' in C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999); J. Neyer, 'Justifying Comitology: The Promise of Deliberation', in K. Neunreither and A. Wiener (eds), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, 2000). See also J. Trondal and F. Veggeland, 'Access, Voice and Loyalty: The Representation of Domestic Civil Servants in EU Committees' *ARENA Working Paper 00/8*.

²³ S. Smismans, *The European Economic and Social Committee: towards deliberative democracy via a functional assembly* in (2000) 4 *European Integration online Papers* (EIoP) 12 (<http://eiop.or.at/eiop/texte/2000-12a.htm>).

²⁴ At this point deliberative rationality fuses with mild forms of constructivism in that it considers communication and dialogues constitute and frame certain policies. For case studies concerning the former see K. Armstrong and S. Bulmer, *The Governance of the Single European Market* (Manchester University Press, 1998); C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Problem-Solving: European comitology in the Foodstuff Sector' (1997) 4 *JEPP* 609; J. Lewis, 'Is the "Hard Bargaining" Image of the Council Misleading? The Committee of Permanent Representatives and the Local Elections Directive' (1998) 36 *JCMS* 479; K. Glarbo, 'Wide awake diplomacy: reconstructing the common foreign and security policy of the European Union' (1999) 6 *JEPP* 634. Possibly the most extensive study using the latter approach is that of A. Wiener, *European 'citizenship' practice: building institutions of a non-State* (Westview, 1998); K. Fierke and A. Wiener, 'Constructing institutional interests: EU and NATO Enlargement' (1999) 6 *JEPP* 721.

²⁵ C. Meyer, 'Political Legitimacy and the Invisibility of Politics: Exploring the European Union's Communication Deficit' (1999) 37 *JCMS* 617.

²⁶ M. Marcussen, T. Risse, D. Englemann-Martin, H. Knopf and K. Roscher, 'Constructing Europe? The Evolution of French, British, and German Nation-State Identities' (1999) 6 *JEPP* 614; D. Englemann-Martin et al., 'To Euro or Not to Euro? The EMU and Identity Politics in the European Union' (1999) 5 *European Journal of International Relations* 147.

²⁷ E.g. C. Harlow, 'Codification of Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot' (1996) 2 *ELJ* 3; H. Nehl, *Principles of Administrative Procedure in EC Law* (Hart, 1999) 161–164. cf the caution issued in M. Shapiro, 'The Institutionalisation of European Administrative Space' in A. Stone Sweet, W. Sandholtz and N. Fligstein (eds), *The Institutionalization of Europe* (Oxford University Press, 2001) 110–112.

to political institutions,²⁸ and for not being sufficiently sensitive to different types of discourse or the articulation of different types of identity.²⁹

C Contesting Deliberation

What can be so unreasonable about allowing people to talk? Quite a lot according to deliberation's critics. They observe that it structurally disadvantages some groups and individuals by privileging modes of address that are formalistic, self-contained and explicitly rationalistic in their argumentation over other styles of address, such as narrative, greeting and rhetoric.³⁰ Open-ended debates can also lead to self-interested élites convincing the public of erroneous causal effects of particular policies or to administrators acting on a mistaken understanding of public opinion.³¹ Deliberative government, furthermore, is primarily cooptive in nature in that it can lead disadvantaged or marginalised groups to assert their interests less strongly on the grounds that they must arrive at a 'reasonable' consensus with advantaged groups or lead to their acceptance of disadvantageous policies under the illusion of participation in their formation.³² Experience of deliberative experiments, in particular, confronts the European Union with three uncomfortable realities.

The first concerns deliberation's capacity to bring about political change. For deliberation has proved to be ineffective at generating political agreement where there is a heterogeneity of viewpoints amongst participants. The empirical literature is very clear that it is most likely to be successful, by contrast, in settings which are insulated, within groups in which the majority of those present feel themselves to be insiders and where the debate is not highly ideologised.³³ It is specialisation and 'technicisation' that renders agreement tractable. The examples given of successful 'deliberative practices' within the EU such as the development of comitology and EC health and safety law are examples of this. Debate took place amongst a relatively small number of experts

²⁸ See generally M. Everson, 'Administering Europe' (1998) 36 *JCMS* 195. On comitology see D. Bignami, 'The Democratic Deficit in European Community Rule-making: A Call for Notice and Comment' (1999) 40 *Harvard International Law Journal* 451; the structural funds, J. Scott, 'Law, Legitimacy and EC Governance: Prospects for "Partnership"' (1998) 36 *JCMS* 175; EMU, M. Everson, 'The Constitutional Law of the Euro? Disciplining European Governance', in P. Beaumont and N. Walker (eds), *Legal Framework of the Single European Currency* (Hart, 1999).

²⁹ This is implicit in the recent writings of Jo Shaw who argues for processes of 'constitutional negotiation' in which the EU should enter into a more intense dialogue with a greater variety of cultures, communities and identities, J. Shaw, 'Process and Constitutional Discourse in the European Union' (2000) 27 *JLS* 4.

³⁰ I. Young, 'Communication and the Other: Beyond Deliberative Democracy' in S. Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1994) at 123; I. Young, 'Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought' (1997) 3 *Constellations* 340; L. Sanders, 'Against Deliberation' (1997) 25 *Political Theory* 347. For a strong critique of this line of reasoning see L. Simpson, 'Communication and the Politics of Difference: Reading Iris Young' (2000) 7 *Constellations* 430.

³¹ See, in the context of the debate on health-care reform in the first Clinton administration, S. Stokes, 'Pathologies of Deliberation', in J. Elster (ed.), *Deliberative Democracy* (Cambridge University Press, 1998).

³² B. Cruikshank, 'The will to empower: technologies of citizenship and the war on poverty' (1994) 23(4) *Socialist Review* 29.

³³ J. Checkel, 'Taking Deliberation Seriously' *ARENA WP 01/14*.

who shared convergent epistemic horizons and whose work strongly followed the logic of this epistemology.³⁴

The second is that more heterogeneous settings involving a broader spectrum of groups tend to produce more mean-spirited decisions. A series of analyses show that, as group recognition and membership is central to individual self-esteem, nearly all individuals extend a lower quality of treatment to persons not from their group than to members of their groups.³⁵ They are equally more suspicious of and less receptive to authority from persons or organisations outside the group than that from those within the group. Insofar as the latter generate values or collective goods, the corollary of this is that individuals tend to take a more instrumental view of these—what is in it for me?—when they are derived from communities with which they do not strongly identify. A number of studies have shown this pattern to be well-entrenched within the Union where support for the Union or any particular policy has largely followed a shallow, cost-based logic (e.g. what do I get out of it?) rather than any form of identity-based politics.³⁶ This very weak European civic identity creates particular problems for mechanisms such as Union referenda, which contain a strong deliberative element. Quite simply, because individuals do not identify with the source of the vision upon which they are voting, they will require a vision which both demands less of them and satisfies more pre-conceived interests than if that vision came from a community of which they felt part. A vision, no matter how differentiated and multi-tiered, that is pan-European is likely to be weaker in its demands of law and politics than those which allow the roles of law and politics to be conceived and communicated in different ways across different communities.

The problem here goes deeper than simply the production of ideologically awkward outcomes. It goes to the ability to install effective deliberative procedures in the first place. Sunstein, the godfather of deliberation has noted that individuals, when faced with the possibility of dialogue, tend to visit sites that reinforce and confirm their views. They are less inclined to participate in venues that challenge their views or with which they do not affiliate.³⁷ This problem is a significant one if one looks at the 1999 elections for the European Parliament. Such elections are high profile and voting is easy, often related to local issues, and involves little personal cost to the individual. Yet, in those elections, less than 1 in 2 EU citizens voted (49.4%), and in three Member States, the United Kingdom (24%), Finland (30.1%) and the Netherlands (29.9%) less than 1

³⁴ V. Eichener, 'Effective problem-solving: lessons from the regulation of occupational safety and environmental protection' (1997) 4 JEPP 591, 601–602; J. Trondal and F. Veggeled, 'Access, Voice and Loyalty: The Representation of Domestic Civil Servants in the EU Committees', *ARENA Working Paper 00/8*;

³⁵ A review of the literature is contained in H. Smith, T. Tyler, Y. Huo, D. Ortiz and E. Lund, 'The Self-Relevant Implications of the Group Value Model: Group Membership, Self Worth, and Treatment Quality' (1998) 34 *Journal of Experimental & Social Psychology* 470.

³⁶ M. Gabel & H. Palmer, 'Understanding Variation in Public Support for European Integration' (1995) 27 *European Journal of Political Research* 3; M. Gabel, *Interests and Integration: Market Liberalisation, Public Opinion and European Union* (University of Michigan Press, 1998); J. Schild, 'National v. European Identities? French and Germans in the European Multi-Level System' (2001) 39 *JCMS* 331. Some studies suggest interlocking identities so that European identities tend to be strong where national or regional identities are strong, but such studies do not measure the level of affective support, L. Hooghe and G. Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield, 2001) Chapter 3. A similar pattern is present in responses to Court of Justice judgements. D. Chalmers, 'The Positioning of EU Judicial Politics in the United Kingdom' (2000) 23(4) *WEP* 169, 187–194.

³⁷ C. Sunstein, 'The Daily We: Is the Internet really a blessing for democracy?' *Boston Review* <http://bostonreview.mit.edu> (accessed 6 August 2001).

in 3 voted.³⁸ Heterogeneous settings therefore face the dangerous risk of either their procedures being unrepresentative in that they become hijacked by a particular group or being faced with finding some way to coopt or coerce the citizenry into participating in them.

The third danger goes to the quality of the debate. The impressive study by Verba suggests that deliberative politics fall back more easily upon traditionalist, reactionary solutions than other forms. The views of more marginalised communities rarely 'speak' to each others' needs with the consequence that it is only more conservative meanings, which do not in any way challenge the status quo, which carry any weight at all. Similarly, Sunstein has belatedly had to admit that deliberation polarises rather than unites, and silences those with 'low status' views, who are neither encouraged to express those views or listened to when they do.³⁹ Asymmetries of power that existed more broadly within society are carried over into the political sphere rather than the latter acting as a counterweight to these, so that economic resources, family income, education, recruitment networks and political engagement were the central variables to *who* would participate in discussions.⁴⁰

D The Ideals of Deliberation

Deliberative rationalists are impatient of many of these criticisms. They observe that deliberation contains its own internal critique countering such dangers in the 'ideal-speech situation'. For deliberative rationality will only truly take place if all participants enjoy equal liberty, respect and opportunity to participate during the deliberation.⁴¹ Many of the examples given, they argue, do not approximate to this situation. There is a danger in such a defence, for controversy thus ultimately hinges around the completely unprovable question of the attainability of the ideal-speech situation or the level of correspondence between it and particular realities.⁴²

More pertinently, the author will argue that deliberative democracy is the only strategy that expresses a series of political ideals which are particularly germane in the modern world. If, traditionally, the values of freedom and equality were the benchmarks against which most constitutional polities were evaluated, it is less clear that they alone are now sufficient. A feature of most law and certainly most EC law—be it labour,

³⁸ Analysis can be found on http://www3.europarl.eu.int/election/results/en/maps_en.htm (accessed 5 July 2002).

³⁹ C. Sunstein, 'Deliberative Trouble? Why Groups Go to Extremes' (2000) 110 *Yale Law Journal* 71.

⁴⁰ S. Verba *et al.*, *Voice and Equality: Civic Voluntarism in American Politics* (Harvard University Press, 1995) 461–508. The latter note that weaker actors are disempowered by the modes of address used. Thus, debates about economic policy tended to privilege preferences rather than other politically relevant characteristics, such as observations on economic or demographic circumstances. For a theoretical discussion of this see E. Laclau, 'Democracy and the Question of Power' (2001) 8 *Constellations* 3.

⁴¹ The 'ideal-speech situation' is of course derived from Habermas. As with all his writings, he does not dwell on which institutional arrangements might satisfy this. On the latter see A. Gutmann and D. Thompson, *Democracy and Disagreement* (Harvard University Press, 1996).

⁴² Critics thus point to the utopianism of the ideal-speech situation, J. Johnson, 'Arguing for Deliberation' in 'Deliberation as Discussion', in J. Elster (ed.), *Deliberative Democracy* (Cambridge University Press, 1998) at 173. Supporters observe that, without a theory of communication, the critics have no foundations for explaining inter-subjective meaning, J. Habermas, 'Reply to Symposium Participants, Benjamin N. Cardozo School of Law', in M. Rosenfeld and A. Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, 1998) 421 *et seq.* It is telling that supporters can not argue whether, failing the ideal-speech situation, whether some deliberation is better than none and that critics cannot indicate when deliberation 'adds value'.

environmental, consumer, single market, competition—is that it is a form of ‘social law’ concerned above all with balancing the relationship between two or more social actors.⁴³ In such arenas the ‘freedom and equality’ of one party is only secured at the expense of the ‘freedom and equality’ of the other, and the terms are so imprecise as to offer very little steering value or ‘safeguards’. Focus is therefore not upon *a priori* principles but the question of distribution of burdens and risks between actors and the relative value of everything vis-à-vis each other. As this balancing process takes place in already constituted areas, it often has to be done according to the prevalent customs and habits of a group at a given moment. If the democratic constitutionalist project is not to succumb to either the dangers of relativism by simply accepting the mores of these groups or irrelevance by harping on blindly about freedom and equality, it must construct a series of ideals which can structure and guide the government of these processes. Deliberative democracy is well-suited to doing this as it extracts a series of ideals from the process of communication itself. As this process of communication is central to the constitution of all forms of social law, it suggests that there are certain ideals—four in all—that all forms of social law should address.

a) Transformation

A central concern of deliberation is the question of ‘Should something be done differently or not?’ This question is inherent in the process of argumentation. For argumentation involves revisiting existing issues in new ways. It is circular to argue that there ‘is a better candidate for doing the same old things which we did when we spoke in the old way’.⁴⁴ Instead, the idea of the ‘better argument’ tries to create new forms of justification and description to provide the basis for change:

The method is to redescribe lots and lots of things in new ways, until you have created a pattern of linguistic behaviour which will tempt the rising generation to adopt it, thereby causing them to look for appropriate new forms of non-linguistic behaviour, for example the adoption of new scientific equipment or new social institutions.⁴⁵

What takes place therefore is a form of collective self-overcoming in which the argumentation process is used to find and create new ways of improving and justifying things. This process of revisiting and self-overcoming occurs even with decisions that appear to maintain the status quo. For they will provide new understandings and justifications of the present in the light of new circumstances and alternatives as a basis for maintaining the present. There will be some shift, however small, in the justification given for them and how we understand ourselves in relation to them. At the most formal level, the EU is replete with examples of this. Each IGC, as a forum for deliberation about the future of the EC, has thus often created a new terminology, be it the ‘internal market’, ‘economic and monetary union’, ‘area of freedom, security and justice’ as justifications for particular policies. These phrases reinvent the identity of the Union by, on the one hand, providing it with new panoramas and justifications for action and, on the other, creating new ways of understanding the relationship between its past and present actions.

b) Validity

Deliberation places constraints upon the extent of transformation possible. Any suggestion must be plausible for other participants. Limits are placed on the ingenuity of

⁴³ F. Ewald, ‘A Concept of Social Law’, in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (De Gruyter, 1986).

⁴⁴ R. Rorty, *Contingency, Irony and Solidarity* (Cambridge University Press, 1989) 9.

⁴⁵ *Ibid.*

the utterance in that it must coincide with the range of existing understandings of the process being discussed. The standard of evaluation will be how commensurable the proposition is with the experience and knowledge of the other protagonists in the light of what is being sought. If it is simply incommensurable, it will be discarded as either manipulating reality or irrelevant to the task in hand.⁴⁶

c) *Relationality*

Deliberation establishes interdependencies. It requires letting go of one's own idea and considering the view of others. It thus implies that parties be aware of 'their own finitude, that their understandings are partial, and so seek the views of others'.⁴⁷ It therefore calls for an enlarged sense of 'Us' which imposes certain solidarities. It suggests a search for common similarities, notwithstanding the considerable differences between participants.⁴⁸ Furthermore, deliberative rationality seeks to expand this sense of solidarity wherever possible through applying processes of deliberation to all kinds of different activity and through including all those with an interest in that activity.

d) *Self-Government*

The basis given by supporters of deliberation for its obedience and compliance with a decision is that all those interested in the adoption of the decision are deemed to have had the possibility of participating in its formulation.⁴⁹ This participation creates a series of shared references and narratives upon which participants can draw, and which serve as the basis for future normative dialogue. Not all participants will necessarily agree upon how the debate is resolved, but a consensus will emerge about how to vision the problem, categorise it, stipulate what is relevant and what is distinct.⁵⁰ Once a particular epistemic reality has been forged, a process of broad dissemination serves to reinforce this vision further. In theory, all those affected by a decision will have deliberated in it with the consequence that they will bring a convergent understanding to bear on the implementation and application of that decision in other arenas. Even where that is not the case, the broad and representative nature of participants results in a feedback process where there is not merely a plurality of voices within the debating chamber, but the voice of the debating chamber is carried back to a wide variety of settings and groupings.

To be sure, these four ideals are vague and conflict with each other. Any decision, however, to carry conviction must be able to respond to *each* of these demands. A failure to do so will leave it open to the criticisms that it is either reactionary, irrational, unfair or procedurally flawed.

E The Contexts of Deliberation

The reasons for the disparity between the noble ideals and the more ignominious practice of deliberation lies in a failure to consider how deliberation as a process can realise the goals it sets. It is a political strategy which gives pre-eminence to the process of communication through elevating that process to the status of an institution in its own

⁴⁶ L. Pellizoni, 'The myth of the best argument: power, deliberation and reason' (2001) 52 *British Journal of Sociology* 59, 69–81.

⁴⁷ N. McAfee, *Habermas, Kristeva and Citizenship* (Cornell University Press, 2000) 190.

⁴⁸ On this see R. Rorty, *op. cit.* note 44 *supra*, 189–198.

⁴⁹ F. Michelman, 'Law's Republic' (1988) 97 *Yale Law Journal* 1493. See also, within a transnational context, J. Dryzek, 'Transnational Democracy' (1999) 7 *Journal of Political Philosophy* 30, 44

⁵⁰ On interpretive communities and their development see S. Fish, *Doing What Comes Naturally* (Oxford University Press, 1989) 141 *et seq.*

right, whose ideals and dynamics are to govern the practice of politics. Language, the fulcrum of communication, is treated, however, merely as a decontextualised, transparent medium through which participants express some pre-existing reality or situation. Since the insights of Wittgenstein more than 50 years ago, there are few who study communication—be they in the fields of philosophy of language, conversation analysis or ethno-methodology—who support this model of language.⁵¹ In *Philosophical Investigations* Wittgenstein renounced his earlier work in which he treated language as closed virtual order, which floated free of historical and geographical circumstances and argued that communicative context was central to the generation of meaning. The point has been made well by Hanks:

In order for two or more people to communicate, at whatever effectiveness, it is neither sufficient nor necessary that they 'share' the same grammar. What they must share to a variable degree, is the ability to orient themselves verbally, perceptually and physically to each other and to their social world. This implies that they have commensurate but not identical categories, plus commensurate ways of locating themselves in relation to them.⁵²

Meaning and mutual understanding within the process of deliberation, its constituent parts, are therefore not merely influenced by, but largely determined by and inseparable from the contexts surrounding an utterance. These influence not merely motivation but also determine the deeper question of understanding about what has been communicated. This contextuality renders it impossible to either support or condemn deliberation unconditionally. Talk, *per se*, can be good or bad, meaningful or meaningless. Its value or meaning will be informed by those three communicative contexts—performative, epistemic and institutional—which interact to inform the notion of meaning and value of any deliberative exchange.

F The Performativity of Deliberation

A feature of speech is that it cannot talk about itself. Any utterance is thus also a performative act. It is never merely a representation but also occupies the world, and, insofar as it presupposes understanding, implies a joint action, a mutual endeavour in which each party gears itself to the other.⁵³ Deliberation is instigated and is only given meaning through its relationship to the performance of some further political task (teleology), which constructs the terms of the debate, informs assessments about its legitimacy and understandings of arguments within the debate. The power of this teleology is such that it acts as a precondition for the process of understanding and communication within deliberative process. For, as any utterance must be related to the performance of some broader task, the latter brings meaning to the communication and provides it with direction.⁵⁴

To give but one example; the deliberative procedures in the Integrated Pollution Prevention and Control and Environmental Impact Assessment Directives allowing interested parties to make representations are well-trumpeted.⁵⁵ Yet the subject matter of

⁵¹ L. Wittgenstein, *Philosophical Investigations* trans. G. Anscombe (Blackwell, 1997).

⁵² W. Hanks, *Language and Communicative Practices* (Westview, 1996) at 229.

⁵³ H. Clark, *Using Language* (Cambridge University Press, 1996); M. Kohn, 'Language, Power and Persuasion: Toward a Critique of Deliberative Democracy' (2000) 7 *Constellations* 408.

⁵⁴ Wittgenstein famously gave the example of a builder who points to a slab and says 'Slab'. Understanding depends on the context in which he said it e.g. was he pointing it out or asking it to be brought to him? *op. cit.* note 51 *supra*, paras 2 and 19–21.

⁵⁵ Directive 96/61/EC concerning integrated pollution prevention and control, OJ 1996, L 257/25, Art 15; Directive 97/11/EC amending Directive 85/337/EEC on the effects of certain public and private projects, OJ 1997, L 73/5, Art 5–8.

the process determines the content of the deliberations. For both are concerned with project development that affects a confined part of the environment, pollution over the immediate environs in the case of the first and despoliation of local habitats in the case of the latter. This necessarily results in certain arguments that might otherwise be relevant (e.g. certain broader environmental concerns, job losses, regional impacts) simply not counting and the proceedings necessarily being highly oppositional, as they are concerned not with restoration of the environment but further despoliation.⁵⁶

G The Epistemic Context of Deliberation

Deliberation is also an exercise in the *production and reproduction of knowledge*. As all deliberation discusses some other activity, mutual understanding of a communication will depend on a knowledge of the wider activity in which this activity is located, and the patterns of interaction of that activity.⁵⁷ It is this knowledge which both provides continuity and meaning between the utterance in question and previous uses and provides a system of categorisation, which allows individuals to describe the world and evaluate it.

There is thus no clear boundary between knowing a language and knowing one's way around the world generally.⁵⁸ The deliberative process sacralises this relationship by granting it mastery over the political process. As it privileges the position of the person who provides the right answer, conflicts become expressed in terms of the relative superiority of the argument or information. Through this a hierarchy of knowledge emerges according to which contributions are evaluated. EU case studies have therefore shown that the perception that any actor is bringing valuable knowledge to a policy-making process is central to the level of its influence. European Parliament officials have noted that one of the important variables in determining Parliamentary influence is whether it is perceived as providing new valuable information.⁵⁹ Interest representation studies have also suggested that the extent to which individual businesses can influence the Commission is determined by the extent to which they either provide expertise which can be integrated into the legislation or information about the impacts of the proposal.⁶⁰

As knowledge is being developed to address specific tasks, its adequacy is not measured against the abstract question of its truthfulness, but is rather invoked to justify personal beliefs in particular solutions'.⁶¹ The types of knowledge valued will vary according to the nature of the task being addressed and the institutional context in

⁵⁶ To cope with this limited purview, a directive on 'strategic' environmental impact assessment was therefore introduced, Directive 2001/42/EC on the assessment of the effects of certain plans and programmes, OJ 2001, L 197/30.

⁵⁷ S. Levinson, 'Activity Types and Language', in P. Drew and J. Heritage (eds), *Talk at Work: Interaction in Institutional Settings* (Cambridge University Press, 1992); M. Williams, 'Wittgenstein and Davidson on the Sociality of Language' (2000) 30 *Journal for the Theory of Social Behaviour* 299.

⁵⁸ D. Davidson, D. Earnshaw and D. Cowan, 'A Nice Derangement of Epitaths', in E. Lepore (ed.), *Truth and Interpretation: Perspectives on the Philosophy of David Davidson* (Blackwell, 1986).

⁵⁹ D. Judge et al., 'Ripples or waves: the European Parliament in the European Community policy process' (1994) 1 *JEPP* 27, 47–48.

⁶⁰ For a survey of the literature on this point see S. Hix, *The Political System of the European Union* (Macmillan, 1999) 206–207.

⁶¹ I. Nonaka and T. Nishiguchi, 'Emergence of "Ba": A Conceptual Framework for the Continuous and Self-transcending Process of Knowledge Creation', in I. Nonaka and T. Nishiguchi (eds), *Knowledge Emergence* 13, 14 (Oxford University Press, 2001); G. Krogh and S. Grand, 'Justification in Knowledge Creation', in G. von Krogh, I. Nonaka and T. Nishiguchi (eds), *Knowledge Creation: A Source of Value* (Macmillan, 2000).

which debate takes place. In some instances, more formal forms of knowledge will be valued.⁶² In comitology, participants have stated that the technical quality of expert advice is central to the regard they have for a particular argument.⁶³ In other instances, the impact of 'tacit' knowledge is more evident.⁶⁴ Landfried, in his study on the development of EC regulation of biotechnology found the 'micro-level' views and self-assessments of individual actors to be central to the process.⁶⁵ A recent study has shown how media coverage and particular iconographic events were central (and not simply in a restrictive way) to changes in asylum policy in the United Kingdom and France.⁶⁶ The most in-depth study of the negotiations leading to Economic and Monetary Union has emphasised the key role of Hans-Dietrich Genscher and the centrality of his very personal beliefs on both economics and the European Union to the project.⁶⁷

H *The Institutional Context of Deliberation*

A feature of any utterance is that meaning cannot be reinvented anew for every communication. Instead, communication is invariably 'institutionalised'. That is to say, any communication relies upon a relatively stable collection of practices and rules, which will set out standards for how participants are to interact with one another.⁶⁸ The relative formality and immutability of these rules and practices provides a series of leitmotifs which allows participants to locate their debate vis-à-vis other debates. It is

⁶² A distinction is usually made between formal and tacit knowledge. The former is found in the formal discourses, norms and institutions associated with formal Reason. It is concerned with the application of a dominant logic, which claims universal status for itself in that it can be equally applied to settings other than the one in hand. It will contain a number of internal procedures to maintain its rigour, which include determining arguments count as knowledge, internal standards of coherence and relevance; and who is to be regarded as authoritative in providing the knowledge. I. Arminen, 'On the context sensitivity of institutional interaction' (2000) 11 *Discourse & Society* 442–443.

⁶³ J. Trondal and F. Veggeled, 'Access, Voice and Loyalty: The Representation of Domestic Civil Servants in the EU Committees', *ARENA Working Paper 00/8*.

⁶⁴ Tacit knowledge derives from knowledge's necessarily involving specific ways of engaging with the world. Based upon personal experiences, it is informed by practices that are often internalised in a manner that is cognitive and pre-linguistic in form. These 'bring to action an immense stock of sedimented social knowledge in the form of unreflective habits and common-sense perceptions' W. Hanks *op. cit.* note 52 *supra*, at 238. The theory of tacit knowledge was first established in M. Polanyi, *The Tacit Dimension* (Mass, 1966). This point was initially taken up in the philosophy of language by B. Whorf, 'The Relation of Habitual Thought and Behaviour to Language', in J. Carroll (ed.), *Language, Thought and Reality: Selected Writings of Benjamin Lee Whorf* (MIT Press, 1941).

⁶⁵ C. Landfried, 'Regulation of Biotechnology by Polycratic Governance' 173, 185 *et seq.* in C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999).

⁶⁶ F. Alink, A. Boin and P. T'Hart, 'Institutional crises and reforms in a policy sector: the case of asylum in Europe' (2001) 8 *JEPP* 286.

⁶⁷ It was Genscher who set the agenda most strongly for German unification to be tied to further European integration, which was in turn to be structured around the German *ordo-liberal* mode. K. Dyson and K. Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press, 1999) 306–369. Whilst the style of interaction may vary, all 'knowledge' evolves from a process of interaction between 'formal' and 'tacit' knowledge. The formality of the institutional setting will dictate the weight given to each dimension, with more formal settings relying more explicitly on formal knowledge, and the converse being true of less formal settings. Yet, as the imparting of knowledge from one person to another relies upon the latter being able to relate it to her experiences, both are always present. L. Suchman, *Plans and Situated Actions: The Problem of Human-Machine Communication* (Cambridge University Press, 1987).

⁶⁸ For a discussion of institutionalisation in an international context see J. March and J. Olsen, 'The Institutional Dynamics of International Political Order' *ARENA WP 98/5*, 6–11.

through the bracketing of two debates under the same institutional heading that it is possible for analogies, precedents and, in turn, distinctions to be made. Thus, the feature that has enabled the Court of Justice to provide a similar form of analysis in the last year to matters as diverse as Spanish laws on digital television, French and Irish counterfeit laws, Greek laws on petrol reserves and Swedish laws on advertising of alcohol is not so much that they raises questions of free movement of goods, but that they did so in the manner set out by Article 28 EC.⁶⁹

These forms of institution vary. Some determine the material context for deliberation—the formality of the setting, the nature of the participants (e.g. who one talks with), the rules of the game regarding order and length of participation, the rules of the game regarding how a decision is reached. All these will influence the rhythm and pace of the conversation, how one utterance is understood and responded to, how participants interpret their political strategies, the sequencing of particular contribution, the intensity and length of debate. This was understood by the European Parliament in the strategy it adopted vis-à-vis the Conciliation Committee, with its insistence that Council and Parliament members should be individually interspersed and seated around a round table. It has been underlined in studies of voting rules within the Council above all changed the terms of debate.⁷⁰ Until recently very few votes were actually taken, but understandings of the divisiveness and political dangers of voting led to more consensual approaches to debate and the famous shift from a veto-asserting to a problem-solving ethos.⁷¹ Other rules and practices act at a more deep-seated level by allocating different identities and roles for the various participants. These weight understandings of particular communications by bestowing authority upon some participants whilst removing it from others. For example, at the heart of the new European Food Safety Authority sit a Scientific Committee and eight Scientific Panels whose duty is to provide scientific opinions to the Authority.⁷² Their ‘scientific’ role downgrades any advice they would give on the ethics or questions of distributions of power associated with genetically modified organisms. Yet, insofar as these panels are to be composed of ‘experts’ in their field, their role upgrades the value of any advice on the safety of an organism.

I Revisiting the Strategies of Deliberation

Deliberation is a highly strategic form of communication. It conceives itself as something that is autonomous from and exercises systematic and reflexive control over its environment. Outcomes of deliberative processes therefore invariably express a series of strategies. These include strategies of evaluation regarding the improvement of the processes of regulation; strategies of coordination that propose common actions and emphasise the

⁶⁹ The cases respectively are Case C-390/99 *Canal Satélite Digital v Administración General del Estado*, Judgment of 22 January 2002; Case C-398/98 *Commission v Greece*, [2001] ECR I-7915; Case C-84/00 *Commission v France* [2001] ECR I-4553; Case C-30/99 *Commission v Ireland* [2001] ECR I-4619; Case C-405/98 *Konsumentombudsmannen v Gourmet International Products* [2001] ECR I-1795.

⁷⁰ R. Corbett, F. Jacobs and M. Shackleton, *The European Parliament* 4th edition (John Harper, 2000) 199–200.

⁷¹ The most detailed study on this is M. Mattila and J. Lane ‘Why Unanimity in the Council? A Roll-Call Analysis of Council Voting’ (2001) 2 EUP 31.

⁷² Regulation 178/2002 laying down general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002, L31/1, Art 28.

interdependencies and solidarities between participants and strategies of interpretation that seek to secure a common interpretation of the processes amongst participants.

From the preceding section, it is apparent that it is insufficient for deliberation merely to have strategies about goals; it must also set strategies for the means for realising these goals. This involves paying attention to the contexts of deliberation. To be sure, there is nothing deterministic in this process. Certain outcomes cannot be secured simply through configuring the settings in which deliberation takes place. Yet, as the value and meaning of deliberation depend upon the goals of the debate, it would seem to be a constitutional task of the first order to set out what it is legitimate to debate and what it is not. Such a process is not curtailing 'free speech' in any meaningful way, but is setting out the constitutional remit of the Union. It is setting out the tasks of the Union, its powers and constraints on the exercise of these powers. All these are standard matters of constitutional law.

As the performative, epistemic and institutional dimensions of deliberation interact with and affect the performance of each other, the choice of goal will affect and be affected by the institutional settings in which deliberation takes place and the types of argument valued. Thought therefore has to be given to which types of institution are most suited to realisation of particular goals, and which types of knowledge are valuable to the attainment of these goals.

In this regard, it will be argued that the European Union is a multi-perspectival polity. It has three central goals—the creation of new common institutions, problem solving and the renegotiation of ethical self-understanding of the political communities in which we live. A particular piece of legislation may cut across these goals. A directive on the legal patenting of biotechnological inventions raises questions about the institutional powers of the EC—namely a) whether it should be developing property rights—problem-solving; b) the development of a European biotechnological industry; and c) questions of political community—the bioethics of genetic modification. Yet, as a feature of communication is that it can discuss only one thing at a time, these goals act relatively discretely from each other. This leads to a need to balance nuance and coordination. On the one hand, each one of these teleologies requires their own special admixture of knowledge and institutions. On the other, the coordination of the European Union as a system requires not merely that each be sensitive to the demands of the other, but that there be certain steering ideals that bring together and give the Union an overall direction. It will be argued that this central coordinating principle is a certain idea of 'Europeanness' and, in particular, a shared European tradition of the ideals of deliberation. This tradition not only unifies the different types of debate—they are all 'European' debates—it also provides the added value in debating these matters at a 'European' level and provides a justification for Union action.

III Deliberative Reason and Institution-Building

The roots of linking deliberative democratic processes to the creation of common European political institutions lie in civic republicanism.⁷³ Civic republicanism centres the

⁷³ Significant academic contributions in EU studies here include R. Bellamy and A. Warleigh, 'From an Ethics of Integration to an Ethics of Participation: Citizenship and the Future of the European Union'

activity of politics around the pursuit of the 'common good'. Its distinctive contribution lies in its considering this good neither to be a universal ideal nor something that can be reduced to collective sentiment. Instead, it crystallises in those decisions which both recognisably reflect the collective will and are informed by public reason and debate.⁷⁴ Institution-building is integral to this.⁷⁵ As there is no fixed vision of the common good, it becomes what is agreed by the collective through reasoned debate within political institutions.⁷⁶ In this, the nexus between ethos of participation and political institution-building is central in two ways. Participation in these institutions secures 'self-government' in that it is only through free and equal participation by individuals in the public sphere that any kind of collective authorship over binding acts can be established.⁷⁷ Yet civic republicanism has a strongly transformative notion of deliberation in that it also suggests that it is only through participation in political processes that individuals move from private, essentially self-oriented beings to public-minded citizens oriented towards the common good and the interests and values of fellow-citizens.⁷⁸

Models within the European Union context have therefore seen deliberation in common institutions as providing a number of common goods. It legitimises the Union through providing a new institutional ethic which inculcates EU citizens into reaching agreements which balance their 'various communitarian commitments in ways that reflect a cosmopolitan regard for fairness'.⁷⁹ It is a source of visioning which can disclose certain truths or beliefs about the collective, telling it what is of significant value to it.⁸⁰ Finally, within a multi-centred polity, such as the Union, it coordinates institutional behaviour in a way that can lead to the realisation of otherwise unattainable

(1998) 27 *Millennium* 447; R. Bellamy, 'European Citizenship', in N. O'Sullivan (ed.), *Political Theory in Transition* (UCL, 2000); R. Bellamy, 'The "Right to Have Rights": Citizenship Practice and the Political Constitution of the European Union', in R. Bellamy and A. Warleigh (eds), *Citizenship and Governance in the European Union* (Continuum, 2001); R. Bellamy and D. Castiglione, 'Normative Theory and the European Union: Legitimising the Euro-Polity and Its Regime', in L. Trägårdh (ed.), *After National Democracy: Rights, Law and Power in America and the New Europe* (Hart, 2002); N. McCormick, *Questioning Sovereignty* (Oxford University Press, 1999) Chapter 9.

⁷⁴ P. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, 1999) 17–18.

⁷⁵ More precisely, arguments are usually nowadays for the creation of an institutional settlement which both decentres institutional power between and within different levels of government and prevents capture of the institutional process by one powerful power through the domination of a one single institution, as there an antipathy towards institutional centralisation and an idealisation of institutional checks and balances, P. Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon, 1997) 177–180.

⁷⁶ This is subject to one constraint, that of 'freedom from domination'. This forecloses collective decisions or policies, no matter how reasoned, which might oppress or exclude particular individuals or groups. P. Pettit, *ibid.*, especially Chapter 5.

⁷⁷ F. Michelman, "'Protecting the People from Themselves", or How Direct Can Democracy Be?' (1998) 45 *UCLA Law Review* 1717, 1732; F. Michelman, 'Constitutional Authorship by the People' (1999) 74 *Notre Dame Law Review* 1605. This is not, *per se*, sufficient. Michelman also notes, as a good deliberativist, that decisions must also be informed by some 'present idea of constitutional reason', *ibid.*, at 1628.

⁷⁸ J. Rousseau, *The Social Contract* trans. J. Brumfitt and J. Hall (Dent, 1993) Chapter VI. Also, more recently, R. Dagger, *Civic Virtues: Rights, Citizenship and Republican Liberalism* (Oxford University Press, 1997) 195–201.

⁷⁹ R. Bellamy and A. Warleigh, *op. cit.* note 73 *supra*, at 448.

⁸⁰ N. McCormick, *op. cit.* note 73 *supra*, 144–145.

collective goods (e.g. EMU, common environment policy), mutual inclusion of each other's citizens and institutional learning.⁸¹

A Polity-Building and Commitment: The Performative Context

Polity-building processes necessitate a richer and deeper commitment, however, than mere invitations to participate in political institutions. For the creation of a polity involves a prior visioning setting out the institutional processes and division of duties within that polity, what politics and law are for within the polity and what political communities they are serving and constituting. It need not be as formalised as a written modern constitution, but must, at the very least, constitute a mode of ordering, which is thick enough to commit citizens to believing in a particular politico-legal reality and generates a coherent set of idealisations about political and legal behaviour:

the politico-legal order constitutes an array of abstract symbols—equality, democracy, sovereignty, the rule of law—each of which are designed to evoke an attitude. The order which is established is ultimately founded on belief and trust. It is sustained by a set of symbols which are not merely products of our intellectual processes, but also stem from our instincts and emotions as expressions of what people need to believe so that they might find comfort in that order. Similarly, the languages of politics and law, although often presenting themselves to us in a strictly logical form, are essentially rhetorical. This does not mean they are mere ornament or trickery; they are persuasive discourses which employ language not simply to describe a state of affairs but to express and reinforce certain values.⁸²

Polity building therefore depends upon a mobilisation of belief. The mobilisation needed for republican polities is greater as this belief must not only be generated in the polity and its institutions, but also in a 'fund of public normative references' upon which 'subjects draw both for identity and, by the same token, for moral and political freedom'.⁸³ These references need not be as tightly scripted as a set of common values, in that they will not typically determine the context in which it is appropriate to apply one argument rather than another, but must provide a shared sense of what may count as valued action.⁸⁴ Without them, deliberation cannot take place as no shared justification for action can emerge. All that can happen is that different parties hope to convert others or remain opposed to prevailing arguments.⁸⁵

B The Institutions of Commitment: The Organisational Context

a) Finding the Institution

The institutions with the resources to mobilise this level of commitment in Europe are few. It is unlikely to emerge through the evolution of participation in EU Institutions,

⁸¹ K. Nicolaidis, 'Conclusion: The Federal Vision Beyond the Federal State', in K. Nicolaidis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States* (Oxford University Press, 2002).

⁸² M. Loughlin, *Sword and Scales: An Examination of the Relationship between Law & Politics* (Hart, 2000) 20.

⁸³ F. Michelman, 'Law's Republic' (1988) 97 *Yale Law Journal* 1493, 1513.

⁸⁴ K. Günther, 'A Normative Conception of Coherence for a Discursive Theory of Legal Justification' (1989) 2 *Ratio Juris* 157.

⁸⁵ It is this unity which transforms 'arguments from merely expressing subjective desires to articulating objective claims' to lead some to criticise deliberative rationality. I. Young, 'Communication and the Other: Beyond Deliberative Democracy', in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1994) at 123; I Young, 'Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought' (1997) 3 *Constellations* 340.

as these do not have the affective ties necessary to mobilise this commitment. The most recent empirical evidence suggests that even in a Europe of 'multiple identities', pan-European identities do badly even in supposedly Europhile States such as France and Germany. There is little affective identification, but most of the support is of an evaluative nature based on the material benefits that a 'politics of association' might bring to the citizen.⁸⁶ The European public sphere, as currently constituted, is, moreover, fickle and not particularly plural. The transnational élites that converge on Brussels still mainly 'comprise of large firms owned by people in particular societies, by and large, dependent on their home governments for several of their activities'.⁸⁷ Such actors use Europe instrumentally and frame their arguments in terms of interests and cultural templates borrowed from the national public spheres.⁸⁸ Third, the EU processes are executive-dominated ones. In addition to traditional zones of executive influence such as the powers of the Commission and COREPER, comitology and the grip national executives have over the IGC process, recent years have witnessed an amazing growth in administrative government with the development of open-method coordination, the establishment of agencies, such as EUROPOL or the European Food Safety Authority, with more wide-sweeping powers. Surveys show that whilst public confidence across Europe in executives (of whatever hue) is stable, this level of trust is not high. Whilst deliberation may make these institutions more representative and accountable, there is little to suggest that these have the resources to mobilise public opinion.⁸⁹ Finally, the EU public sphere faces considerable competitive pressures from pre-established national public spheres. Irrespective of their substantive merits, its central artifices, the 'internal market', 'economic and monetary union' and the 'area of freedom, security and justice' are thus associated with that of adjustment, uncertainty and rupture, whilst the traditions of national public spheres continue to generate very strong centrifugal tendencies.

An alternative to this evolutionary approach to polity building has been to suggest polity building through referenda. These would both provide the grand constitutional moment that would legitimise the polity as well as inform and inculcate the citizenry in the ways of the polity.⁹⁰ Advocates have therefore argued that IGCs,⁹¹ initiatives with significant redistributive consequences⁹² and any subject held important by a qualified number of voters⁹³ are the types of originary moment that could justify recourse to a

⁸⁶ This view also seems peculiarly unaffected by events in the European public sphere and media coverage of it. J. Schild, 'National v European Identities' (2001) 39 *JCMS* 331.

⁸⁷ N. Fligstein and F. Merand, 'Globalisation or Europeanisation? Evidence on the European Economy since 1980', *Centre for Culture, Organisations and Politics, Berkeley, Working Paper 2001/2*, 9.

⁸⁸ P. Hall and D. Soskice, 'An Introduction to Varieties of Capitalism', in P. Hall and D. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

⁸⁹ O. Listhaug and M. Wiberg, 'Confidence in Political and Private Institutions', in H. Klingeman and D. Fuchs (eds), *Citizens and the State* (Oxford University Press, 1995) 304–305.

⁹⁰ M. Zürn, 'Democratic Governance beyond the Nation State', in M. Greven and L. Pauly, *Democracy Beyond the State? The European Dilemma and the Emerging Global Order* (Rowman & Littlefield, 2000) 105.

⁹¹ R. Hrbek, 'Federal Balance and the Problem of Democratic Legitimacy in the EU' (1995) 50 *Aussenwirtschaft* 43; G. de Bürca, 'The Quest for Legitimacy in the European Union' (1996) 59 *MLR* 349, 375–376.

⁹² M. Zürn, *op. cit.* note 90 *supra*, 106–107.

⁹³ J. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999,) 350–351; E. Grande, 'Post-national democracy in Europe' 115, in M. Greven & L. Pauly, *op. cit.* note 90 *supra*, at 131–132;

referendum. Even where referenda can be detached from surrounding debates, evidence from referenda on the European Union suggest their mobilising effects are weak. The Commission's own study on the Irish referendum on Nice found that it left Irish public opinion ill-informed, confused and indifferent. Whilst it led briefly to uncommitted voters committing themselves briefly to either pro- or anti-integration camps, they quickly returned to their position of indifference after the referendum.⁹⁴ Wider studies have found that referenda, if performed regularly, lead to some increased support for European integration, but these increases are small and peter out.⁹⁵

The empirical data suggests there is only one set of institutions in Europe, which is strong enough to engage in polity building—national parliaments. The stability of public support for and trust in parliamentary institutions presented by the huge study by Klingeman and Fuchs suggest that these continue to be the only structures in town which enjoy the hegemony necessary both to generate new collective visions and to bring about the corresponding transformations in the political identities of sufficient numbers of the citizenry of Europe.⁹⁶ If the creation of new institutional settlements also involves the creation of new collective political identities to support, nourish and legitimise these, then only domestic representative institutions have both the resources, levels of participation, associative structures and political trust necessary to bring about the transformations in political culture that extend beyond the administrative élites of national capitals and the self-referential bubble of the Brussels Euro-space.

This is not a call for ownership of polity building to be passed over to some beefed-up version of COSAC. Any document emerging from COSAC would be seen as the product of bargaining rather than deliberation, and as something produced by it not by individual national parliaments. Irrespective of its content, it would only carry the same level of support if Union citizens showed the same levels of trust and interest in the representative institutions of other Member States as in their own. The qualities of national citizenship and the institutional support it breeds are such that this is not the case. Instead polity-building debates must be sited in the 15 individual national parliaments.⁹⁷ This entails that authorship over the future of the European Union and

J. Habermas, 'So Why Does Europe Need a Constitution?' Public Lecture given at Hamburg on 26 June 2001, accessible at www.iue.it/RSC/EU/Reform02.pdf

⁹⁴ EC Commission, *Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice: Analysis and Report by Professor Richard Sinnott* accessible at www.euireland.ie

⁹⁵ R. Eichenberg and H. Dalton, 'Europeans and the European Community: The Dynamics of Public Support for European Integration' (1993) 47 *IO* 507; M. Gabel and H. Parker, 'Understanding Variations in Public Support for European Integration' (1995) 27 *European Journal of Political Research* 3; T. Christin and S. Hug, 'Referendums and Citizen Support for European Integration' (2002) 35 *Comparative Political Studies* 586.

⁹⁶ It is beyond the remit of this article to go into detail on the mass of empirical evidence provided. The study suggested, however that whilst there was a decline in attachment to political parties, there was, conversely, when measured in the level of political discussion, conversely a decline in political apathy. Institutional political participation was stable. In the period to 1990 there was increased support and trust in liberal values and representative institutions. Finally, the decline in political parties was not reflected in a decline in associativism, as reflected in attachment to interest organisations. Furthermore, there was substantial increase in and support for non-institutionalised political participation, be this boycotts, demonstrations, strikes, petitions. H. Klingeman and D. Fuchs (eds), *Citizens and the State* (Oxford University Press, 1995).

⁹⁷ In some States with a strong federal tradition this might be replaced by a composite chamber of national and regional deputies.

its constitutional limits is assigned to these. It will also lead to a transformation in their institutional identities. They will cease to be just national parliaments, but will rather become National Parliaments-in-Europe who will have to locate national interests and preferences in the light of the wider European backdrop.

b) National Parliaments as Polity-Makers: The Creation of a Conference of Parliaments

What does national parliamentary involvement in European polity building involve? The polity-building dimension becomes central, it is suggested, at the great constitution-building moments, currently dominated by the Intergovernmental Conferences, when the EU Treaties are being created or amended. For at such moments the institutional contours of the Union are being rethought, whether through involvement in new competencies, the balance between the institutions being recast or institutional commitments to new sets of norms being made.

Centring national parliaments in this process would lead to the replacement of IGCs by a Conference of Parliaments. This would not be a conference where national parliaments met and negotiated. Rather, it would be a process whereby deliberation would take place within each parliament on the future shape of the European polity. This could only be done on the basis of a common agenda, which could be provided by a convention along the lines of those established for the *EU Charter on Fundamental Rights* and those on *The Future of Europe*.

The first part of the agenda would follow the pattern of the IGCs prior to Nice, by considering whether any new Union policies should be developed or whether there are any existing Union policies in which the Member State does not currently participate, but should. The second would be whether the State in question should *continue* to participate in existing TEU and EC policies. The second is particularly important as the current system breaches a cardinal principle of any democratic settlement that one generation cannot bind its successors indefinitely by providing no clear mechanism for States to exit from unpopular policies. In this, it generates unnecessary systemic tensions, as, in such circumstances, Member States will only have a limited interest in contributing positively to EU structures whose very legitimacy they question. The only other alternative to the State dissenting strongly from a particular policy is that they trigger the Greenland option and press for total withdrawal.

This question of intergenerational equity should also allow for a revisiting of this constitutional process, so that national parliaments at regular periods can re-deliberate their commitments. Yet this principle bumps up against the one that continual amendment would shatter the credibility of the commitments that Member States make to each other and the legal certainties these commitments offer to their and other citizens. Furthermore, even if 'quarantine' periods were put in place prohibiting national parliaments from amending their commitments within a certain period of time, there would still remain the problems that unilateral action by one national parliament would reduce the benefits accruing to others in a very asymmetric manner and that each parliament would probably wish to consider its commitments in light of the commitments that it envisages other parliaments might make.

The above would require that the process of revisiting be done simultaneously by the different national parliaments. Simultaneity would have the added advantage of allowing the debates to feed into one another. The question is how often this 'constitutional convention' should occur. This matter is not one of high principle, but there is

something to be said for using the same period, that of eight years, as was adopted for the Executive Board of the European Central Bank.⁹⁸ This period was chosen as it exceeded the electoral cycle of any Member State. It thus give the Board a sufficient term to build up credibility and also required any government to be re-elected before it could be involved in the appointment of a new Board. Analogous principles would apply here. Eight years is sufficient time to make and undertake substantial credible commitments. It also prevents any principle of 'double representation', which would allow any parliament on the basis of a single electoral mandate to determine twice the constitutional future of the Union.

There is also an inter-spatial dimension. Fifteen national parliamentary debates provide the possibility of 15 different visions of Europe. This would provide the near certainty of à la carte geometry. Problems of legal certainty, exclusive clubs and diminishing rights for participation in Union policies would emerge if Member States were free not only to determine what competencies they participated in, but with which other Member States. It seems right therefore that something close to a Most-Favoured-Nation condition be added. If a Member State participates in a Union competence, it must do so under the common institutional structures provided for that competency and in tandem with all other Member States that wish to participate in that competence.

c) National Parliaments as Guardians of the Polity: Litigators before the Constitutional Council

There is a second task concerned with polity building—policing the exercise of powers by the legislative, executive and judicial institutions of the EU. For a question becomes one of polity building when a legislative, executive or judicial decision is seen as institutionally trespassing on the prerogatives of national or regional institutions. This can be either when it is seen as going beyond the powers of the Union as a whole, or going beyond the conventions of subsidiarity. In a Union of à-la-carte variable geometry, it can also take place when Union action is based upon an incorrect Treaty base, thereby committing Member States who thought they had opted-out of a particular Union competence.⁹⁹

In such circumstances, it seems appropriate that national parliaments should after appropriate deliberation be able to challenge it.¹⁰⁰ The issue, however, is not simply one of national parliamentary choice, but also of commitments that these parliaments made at the time of the Conference of Parliaments to other States, parliaments, traders and citizens. If the national parliament should be able to challenge, then who should adjudicate? The task is an interpretive one, and is probably therefore not best left to a body of parliamentarians. To give it to the European Court of Justice leaves the latter

⁹⁸ Article 112(2)(b) EC; Article 11(2) Protocol on the Statute of the European System of Central Banks and of the European Central Bank.

⁹⁹ For example, if a Member State has signed up for EC competence in the single market, but not environment, the choice of Article 95 EC or Article 175 EC will be central to the balance of powers between it and other member States.

¹⁰⁰ This is also the view of Working Group IV of the European Convention on the 'The Role of National Parliaments'. In its final report this Group argued against a new body to police subsidiarity, but argued in favour of allowing national parliaments to express views on the question of subsidiarity through the legislative process. The European Convention, *Final Report of Working Group IV on the role of national parliaments*, CONV 353/02, paras 21–26.

in a vulnerable position by requiring it to decide between opposing, often polemical claims.

The solution suggested is a variation of that supplied by Joseph Weiler.¹⁰¹ He argued that questions of competencies should be decided by a European Constitutional Council, presided over by the President of the European Court of Justice and comprising of the sitting members of the constitutional courts or their equivalents in the Member States. This would restore confidence in questions of policing by transforming the process into one that is not solely concerned with the limits of EC competencies, but also one concerned with protecting the integrity of national constitutional norms. There are, however, two modifications one could make. The first concerns the question of majoritarian bias. Weiler was concerned with questions of general competence rather than the policing of boundaries between one Member State's legal system and that of the EC. He therefore proposed that decisions should be taken by majority. Here the concerns are particularly acute to one Member State, and any 'legitimacy' doubts will not be assuaged by the fact that other national judges thought a particular way.¹⁰² A way of responding to this is to give the Council a floating membership. In any instance, the members adjudicating upon it would be nine in number—a third of whom would come from the Member State's constitutional court, a third from other national constitutional courts and a third from the European Court of Justice. The requisite majority for the matter to be one of 'EC competence' would still be a majority one, but the measure would fall if all three 'national' judges voted against it.¹⁰³ The second modification is to make the process more deliberative in nature. The task of the Constitutional Council is both an interpretive one and one concerned with reshaping of the European polity with all the latter's affective connotations. There is therefore not only a case for the Council listening to a wide number of submissions, but for its reasoning to be openly available, and for it to be guided by the same four values of deliberation that contributed to the shaping of the polity initially.

V Deliberative Rationality and Problem Solving

An alternative justification for deliberative rationality is that it provides better problem solving.¹⁰⁴ The conception of government here is a more managerial one in which the

¹⁰¹ J. Weiler, 'The European Union Belongs to Its Citizens: Three Immodest Proposals' (1997) 22 ELR 150, 155–156.

¹⁰² The same criticism would apply to a proposal, initially floated by the British Commissioner, Lord Brittan, in 1994, that has been since been adopted by the French Senate, which is to create a second chamber of national parliament representatives one of whose duties would be to police the subsidiarity principle through referring any text over which it had doubts to the European Court of Justice. *Rapport d'information au nom de la délégation du Sénat pour l'Union européenne sur une deuxième chambre européenne*, rapporteur M. Daniel Hoeffel, No. 381, session ordinaire de 2000–2001. For an English translation of the Report see House of Lords Select Committee on the European Union, *A Second Parliament Chamber for Europe: An Unreal Solution to Some Real Problems* (Session 2001–2002, 7th Report, HMSO) Appendix 4.

¹⁰³ To be sure, triangular situations could arise whereby more than one national competence is at stake, and these 'interests' conflict. The solution here is just to increase the membership of the Council. If a legal base cannot be found that does not result in a national judicial veto, the simple answer is for the measure to fall with those Member States that wish to pursue it through EC Institutions using the Enhanced Cooperation procedures.

¹⁰⁴ Within EU studies the central examples of this are to be in the work on 'deliberative supranationalism' by Christian Joerges and that on 'deliberative polyarchy' by Charles Sabel, Oliver Gerstenberg and others.

central concern of government is 'the pursuit of the perfection and intensification of the processes which it directs'.¹⁰⁵ This tradition, inspired by the pragmatist philosopher John Dewey, is concerned that these processes 'must be reckoned with on their own account, not as something capable of equation with and transformation into something else'.¹⁰⁶ Deliberation acts in this context as a knowledge-generating device, which generates new wisdoms about the world we live in. Deliberativists have argued this is not simply about facilitating the route to the 'right answer'. Majone's early work on persuasion and the policy process argued, therefore, that an exclusive concern with outcomes was only justified in those rare circumstances where there was no doubt about either the correctness or the fairness of these. In other circumstances, a concern with process was more important.¹⁰⁷ The latter facilitated policy communication, as the different parties acquired a shared understanding on the different perspectives incorporated into the decision, and policy learning, as criticism would cause policy-makers and innovators to question and revisit some of their initial assumptions.

Deliberation is also used to enlarge the problem-solving process. Since Dewey's work in the 1920s, problem solving has been conceived as not simply a technocratic exercise, but one that necessarily has a public dimension which must incorporate public concerns and public knowledge, for only the public has the ability to judge the bearing of expert knowledge on their common concerns.¹⁰⁸ This dimension has been exposed and highlighted in recent times in the debates on technology and risk.¹⁰⁹ Research has found time again that the public tends to be more concerned with the context surrounding technologies than experts. Questions of ethics, control, voluntarism, redistribution, familiarity intrude more directly with the former, whilst the latter are more focused on the question of whether the processes are technically safe or not.¹¹⁰ Lay

C. Joerges and J. Neyer, 'From intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 ELJ 273; C. Joerges, 'Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance', in C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999). C. Joerges and M. Everson, 'Challenging the Bureaucratic Challenge', in E. Eriksen and J. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (Routledge, 2000). C. Joerges, 'Deliberative Supranationalism—A Defence' in European Integration online Papers (EIOP) Vol 5 (2001) No.8 (<http://eiop.or.at/eiop/texte/2001-5a.htm>); C. Joerges, 'Law, Science and the Management of Risks to Health at the National, European and International Level—Stories on Baby Dummies, Mad Cows and Hormones in Beef' (2001) 7 *Columbia Journal of European Law* 1; J. Cohen and C. Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 ELJ 313; O. Gerstenberg, 'Denationalization and the Very Idea of Democratic Constitutionalism: The Case of the European Community' (2001) 14 *Ratio Juris* 298; O. Gerstenberg and C. Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe', in C. Joerges (ed.), *Good Governance in the European Union* (Oxford University Press, 2002).

¹⁰⁵ M. Foucault, 'Governmentality', in G. Burchill, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, 1991) 95.

¹⁰⁶ J. Dewey, 'Philosophy and Democracy', in D. Morris and I. Shapiro (eds), *John Dewey: The Political Writings* (Hackett, 1993) 38, 46.

¹⁰⁷ G. Majone, *Evidence, Argument and Persuasion in the Policy Process* (Yale University Press, 1989) Chapters 1 and 8.

¹⁰⁸ J. Dewey, *The Public and Its Problems* (Gateway, 1946) 208–209. This was first published in 1927.

¹⁰⁹ For a starting point on this huge subject see S. Breyer, *Breaking the Vicious Circle: Towards Effective Risk Regulation* (Harvard University Press, 1993). For an up-to-date revisiting see S. Beyer and V. Heyvaert, 'Institutions for Regulating Risk', in R. Revesz, P. Sands and R. Stewart (eds), *Environmental Law, the Economy and Sustainable Development* (Cambridge University Press, 2000).

¹¹⁰ A summary of the literature can be found in N. Juanillo, 'The Risks and Benefits of Agricultural Technology: Can Scientific and Public Talk Meet?' (2001) 44 *American Behavioral Scientist* 1246.

approaches cannot simply be dismissed out of hand as 'irrational'. In many instances they expose limits in the remit or manner in which the expert analysis has been carried out.¹¹¹ Even where this is not the case, technologies depend ultimately on public acceptance and use. Bald repetitions of the safety of technology have been singularly unsuccessful in inculcating obedience on the part of the recalcitrant citizenry. This has led, in more recent times, to a more multi-layered approach to problem solving and a wider characterisation of the process. It becomes a procedure concerned not merely with perfecting the development and application of expert knowledge, but also one that takes into account non-expert views, and addresses and incorporates lay concerns.¹¹² Within such a characterisation, the processes of deliberation and communication become central to weaving these multi-dimensional logics together and resolving conflicts between them.¹¹³

A The Performance of Problem Solving: Knowing the Problems

What does it mean to say that a goal of deliberation is problem solving? Problem solving is the application of knowledge for the prediction and control of certain processes in order to improve their performance. It self-consciously distinguishes itself from other forms of political interaction through the primordial importance it accords to knowledge in the bounding, legitimation and resolution of political questions. A theory of knowledge is thus central to any understanding of the binary codes of problem solving.

Modern organisation theory suggests three elements will be present within any corpus of knowledge.¹¹⁴ There are, first, of all 'technical' interests. These are concerned with extending control over the processes in question through representing these processes as a series of objectified processes. These express themselves most typically through prisms of falsifiability and validity. There are, second, 'practical' interests. These are concerned with fostering mutual understanding. They are more experiential and are concerned with providing a collective making sense of the world. If technical and practical interests compliment each other, the third process, 'emancipatory' interests stand in reaction to the other two. It is an attitude concerned with the undesirable consequences of man-made processes. Whilst casually associated with deep ecologists, it is also strongly present in scientific processes in the so-called 'risk society', where scientists spend considerable time identifying and seeking to solve side-effects from existing industrial and scientific processes.¹¹⁵ These elements are not discrete, however, but

¹¹¹ For a celebrated case study on the radiological effects of Chernobyl see B. Wynne, 'May the Sheep Safely Graze? A Reflexive View of the Expert-Lay Knowledge Divide', in S. Lash, B. Szerszynski and B. Wynne (eds), *Risk, Environment, Modernity: Towards a New Ecology* (Sage, 1996).

¹¹² For example, 'The advent of bio-technologies are highlighting the unprecedented moral and ethical issues thrown up by technology. This underlines the need for a wider range of disciplines and experiences beyond the purely scientific'. EC Commission, *European Governance: A White Paper COM* (2001) 428, 19.

¹¹³ For example, within the United Kingdom see Interdepartmental Liaison Group on Risk Assessment, *Risk Communication: a Guide to Regulatory Practice* (1998, Interdepartmental Liaison Group on Risk Assessment, HMSO).

¹¹⁴ On this see H. Wilmott, 'Management and Organization Studies as Science? Methodologies of OR in Critical Perspective' (1997) 4 *Organization* 309. This draws on the division first drawn up in J. Habermas, *Knowledge and Human Interests* trans. J. Shapiro (Heinemann, 1978).

¹¹⁵ The relationship between the three will vary in any one instance, it is too simplistic to attribute any one of these to any one type of actor, M. Hesse, 'Science and Objectivity', in J. Thompson and D. Held (eds), *Habermas: Critical Debates* (Macmillan, 1982).

interact, with understandings of each informing understandings of the other in such a way that it is impossible to disentangle one from the other. The identification and resolution of any problem involves in each case a unique blend of these three elements. For, as problem solving is concerned with the application of knowledge to a particular context, the knowledge invoked is necessarily situated and action-oriented. It is thus assessed in terms of its plausibility and relevance in the light of the assessment of the problem rather than its universal veracity.¹¹⁶ Even in the case of natural science whose prescriptions seem fairly universalistic and transferable between communities, a variety of case studies have therefore shown that in the BSE crisis understandings and evaluations of the scientific evidence were strongly informed by questions of national identity,¹¹⁷ demographics, economic welfarism and prevailing patterns of consumption.¹¹⁸

There is therefore a duality to problem solving. On the one hand, it is central to human progress and cooperation. On the other, it creates new asymmetries of power and risks of abuse of that power. The solution for a problem in one context may therefore be unsuitable for another or may even cause problems elsewhere. Even where this does not seem problematic, new solutions always generate new dependencies and new regulative ideals—appropriate ways of doing things—which may carry little dangers in some contexts, but considerable ones in others. The empirically rich work of cultural institutionalists suggests therefore that policy learning between institutions is widespread, but off-the-peg structures are typically adopted not on some basis of reciprocity, but because some institutions are weak in that they are short of expertise or financial resources and are subject to severe temporal constraints.¹¹⁹ The ‘learning’ process signifies an absence of power, where one unit must play on a terrain imposed by the other. Kurzer, in her insightful study into the evolution of a variety of national regimes not outlawed but affected by EC law noted that invariably the quality of debate took a backfoot character. Alternatives were not fully considered. Instead policy making frequently become disorganised, chaotic and opportunistic, with pre-existing solidarities often becoming dissolved and new, unpredictable arguments shouting to be heard.¹²⁰ Off-the-peg alternatives are chosen because they are ‘cheaper’ and it is easier

¹¹⁶ For the vast literature on this see: D. Yanow, ‘Seeing Organizational Learning: A “Cultural View”’ (2000) 7 *Organization* 247. An excellent set of case studies is set out in Y. Engeström and D. Middleton (eds), *Cognition and Communication at Work* (Cambridge University Press, 1999).

¹¹⁷ For how this informed Portuguese and British responses respectively see M. Gonçalves, ‘The Importance of Being European: The Science and Politics of BSE in Portugal’ (2000) 25 *Science, Technology, & Human Values* 417; R. Brookes, ‘Newspapers and national identity: the BSE/CJD crisis and the British press’ (1999) 21 *Media, Culture & Society* 247.

¹¹⁸ J. Harvey, G. Erdos, S. Challinor, S. Taylor, R. Ash, S. Ward, C. Gibson, C. Scarr, F. Dixon, A. Hinde and C. Moffat, ‘The relationship between attitudes, demographic factors and perceive consumption of meats and other proteins in relation to the BSE crisis: a regional study in the United Kingdom’ (2001) 3 *Health, Risk & Society* 181; E. Millstone and P van Zwanenberg, ‘Politics of expert advice: lessons from the early history of the BSE saga’ (2001) 28 *Science and Public Policy* 99.

¹¹⁹ J. Meyer, J. Boli, G. Thomas and F. Ramirez, ‘World Society and the Nation State’ (1997) 103 *American Journal of Sociology* 144. See the earlier empirical work of J. Boli, ‘World Polity Sources of Expanding State Authority and Organization, 1870–1970’, in J. Thomas, *Institutional Structure: Constituting State, Society and the Individual* (Sage, 1987).

¹²⁰ P. Kurzer, *Markets and Moral Regulation: Cultural Change in the European Union* (Cambridge University Press, 2001). The policies were Swedish and Finnish alcohol policy, Dutch drug policy and Irish abortion policy. In all cases, these were well-established but derogated from the European norm. In all cases, it was difficult to argue that the States were peripheral and lacking in self-confidence. The interesting point of Europeanisation was that it forces any State into tactical responses on particular issues.

to plan according to ready-made international standards than to 'make development happen'. The lack of investment in the decision-making process and the unsuitability of the plan lead then to a 'decoupling' where a significant gap emerges between implementation and plan, thereby prompting another round of planning.¹²¹

The Union accentuates this problem through generating sentiments of mutual dependency. Within the field of drugs policy, the Dutch Government was therefore continually harangued by the French Government over its policy both because the French Government (and also by the German Government) felt that The Netherlands was both a source of drug tourism for French nationals and drugs into the territory of France leading European-mind officials eventually to concede to customs cooperation in 1997.¹²² In like vein, the economic policy of the Irish was subject to an adverse Recommendation by ECOFIN, despite not breaching any EU norms, on the grounds that the Government was perceived as not doing enough to cool an over-heated economy, leading to anti-EU resentment both within and outside the Government in Ireland.¹²³

The multiple nature of problem solving can also lead to asymmetries within communities. The implementation of 80,000 pages of EU legislation has been concerned primarily with administrative capacity-building, serving either to empower pre-existing centres of administration or as a cipher for a more wide-sweeping centralisation and rationalisation of administrative power.¹²⁴

B Communities of Practice: The Institutions of Problem Solving

Institutional procedures have to accommodate the duality of problem solving caused by its knowledge/power interface. These tensions pull, furthermore, in opposite directions institutionally. Effective problem solving, as the empirical literature in the EU suggests, is most likely to occur in insulated settings within groups in which the majority of those present feel themselves to be insiders.¹²⁵ As was mentioned earlier, a heterogeneous meeting does not pluralise debate, furthermore, in a manner that gives weight to 'outsider' or 'lay' views.¹²⁶ Single large institutional settings therefore hinder problem solving, whilst doing little to empower marginalised views. A diverse institutional framework is called for, therefore, in which difference deliberative institutions put checks and balances on one another. The institutions will need, moreover, to be diverse, not merely territorially, but also in terms of the societal interests which enjoy hegemony within them. If effective problem solving requires procedures in which the expert enjoys particular influence, it needs to be counteracted with institutions where the objects of that research enjoy parallel influence.

The case studies in the EU are supported by the wider organisational theory literature on the micro-processes of problem solving. The framing and solution of problems

¹²¹ J. Meyer *et al.*, *op. cit.* note 119 *supra*, 154–156.

¹²² P. Kurzer, *op. cit.*, note 120 *supra*, 128–134.

¹²³ ECOFIN (2001) 'The 2329th Economic and Finance Ministers' Council Meeting'. Press Release: Brussels (12.02.01), Nr. 696/01. For analysis see D. Hodson and I. Maher, 'The Open Method as a new mode of governance: The case of soft economic policy co-ordination' (2001) 39 *JCMS* 719.

¹²⁴ For recent evidence of this T. Börzel, *States and Regions in the European Union: Implementation and Adaptation in Germany and Spain* (Cambridge University Press, 2002).

¹²⁵ See notes 38 and 39 *supra*.

¹²⁶ See the literature cited in note 5 *supra*.

typically takes place within 'communities of practice'.¹²⁷ These are not necessary formal communities but processes of interaction which involve 'any sustained pursuit of a shared enterprise and the social relations generated by it'.¹²⁸ They are characterised by three sets of bonds that create the internal resources for problem solving.

Mutual engagement requires not merely that persons identify themselves as engaging with a particular form of process, but that all members of the community are included in what is deemed to matter. This mutual engagement may be conflictual, but it must be sustained to generate the trust that connect individuals in anything other than a formal or abstract way. *Joint enterprise* requires that the collective decision reflects the full complexity of mutual engagement in a manner that has resonance for all members of the community. A consequence of this is a community of practice will only exist where there is a strong sense of collective ownership over the final decision. This sense of joint enterprise imposes strong relationships of mutual accountability between members, which go beyond the deliberative process of responding to the other's arguments to include common notions of what requires justification and what does not, what is relevant and what is not, what to foreground or display and what not. Finally, a community of practice will depend on a *shared repertoire*. This does not involve necessarily shared beliefs or even shared meanings. It is rather a set of shared points of reference, which can consist of routines, narratives, words, symbols. It is through this repertoire that the practice of the community can be identified. It provides a vocabulary for community members to utter meaningful statements about the world, a mode of expression through which they can identify themselves and others as part of a community, and a form of collective self-identification through providing a history of mutual engagement and a point of departure for future engagement.

A further feature of such communities is that, as they are practically oriented and arise out of concrete processes of interaction, they straddle formal decision-making processes. They straddle these territorially in that they can be global in nature or very local. They also straddle the public/private divide in that they can be located either in the public sector, the private sector or a mixture of both. Their often open-ended, spontaneous and unbounded nature also means that they cannot be simply formally legally constituted and controlled without destroying the resources that gives them their powers of innovation.

Law's relationship with communities of practice can take two forms. The first is delegation or transfer. One sees this in the much trumpeted decentering of 'public' functions to private parties, the shrinking of the State through formal processes of privatisation, or the onset of both globalisation and risk which have disclosed the presences of autonomous and politically powerful processes and constellations of actors acting beyond and independently of the State.¹²⁹ The older and arguably more common one is through recognition. Almost all regulatory law is concerned not with the establishment of wholly new norms, but with the formal recognition and endorsement of prior norms which were usually first developed and applied within private settings. In

¹²⁷ The term was first developed in J. Lave and E. Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press, 1991). It was used in greater detail in E. Wenger, *Communities of Practice* (Cambridge University Press, 1998); E. Wenger, 'Communities of Practice and Social Learning Systems' (2000) 7 *Organization* 225.

¹²⁸ E. Wenger, *ibid.*, at 45.

¹²⁹ For a brief summary of these arguments see D. Chalmers, 'Postnationalism and the Quest for Constitutional Substitutes' (2000) 27 *Journal of Law & Society* 178.

its Action Plan on Simplifying and Improving the Regulatory Environment, the Commission argued, therefore, that this involved making EC law ‘more attuned to the problems posed . . . and to technical and local conditions’.¹³⁰ Here a symbiotic process occurs where these private processes determine the substantive content of the legal norms (e.g. what is the ‘best available techniques’ in EC environmental law, what ‘safety’ means for the purposes of consumer law or work of equal value for the purposes of Article 141 EC). Developments in the field, whereby one community concedes that the norms of another reflect ‘better practice’, therefore change the content of the law in the question. Yet the law regulates the actions of these communities. It is frequently required to adjudicate between rival ways of doing things, privileging the claims of one community of practice over another or to consider the validity of a particular norm (e.g. is a particular practice safe science?). In such cases, it has the sanction of legal derecognition which formally disempowers the community of practice. If a particular practice, such as feeding cows to cows, is no longer held to be safe, the power of that community of practice is dramatically reduced.

This possibility of derecognition allows law to put a number of demands on communities of practice. It can foster deliberation within a community of practice or between communities of practice through imposing conditions for acceptance any norm (e.g. multiple testing in the field of natural science). More frequently, it will adjudicate between the merits of communities. This process of interaction is moreover an ongoing one that takes place in a number of institutional settings, each of which favours a different configuration of actors. In the case of EC law, for example, even the most simple analysis allows for this interaction taking place at the moments of formulation, transposition, application, enforcement and challenge of EC law. It is through providing the proper institutional conditions for applying deliberation at these moments that the duality of problem solving can be managed.

C Deliberation and the Formulation of EC Law: Learning and Accountability

Law formulation is the first moment at which the law can recognise the norms of a community of practice. And deliberation can, most famously, take place at that moment. The Commission is, indeed, under a formal duty to consult widely before it issues proposals and thereby listen to different communities.¹³¹ Its position within the decision-making process provides incentives for it to take this process quite seriously. The diffusion of power within the Union has encouraged it and the Parliament to coalition-build and develop supporting networks with public and private actors as a means of developing legislative influence:

good consultation serves a double process by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large. Transparent and coherent consultation run by the Commission have another advantage. They not only allow the public to be more involved, they also enhance the legislature’s opportunities for scrutiny of the Commission’s activities.¹³²

¹³⁰ EC Commission, *Action Plan “Simplifying and Improving the Regulatory Environment”* COM (2002) 278, 3.

¹³¹ Protocol No. 7 to the Treaty of Amsterdam on the application of the principles of subsidiarity and proportionality, para 9.

¹³² EC Commission, *Towards a Reinforced Culture of Consultation and Dialogue: Proposal for General Principles and Minimum Standards of Consultation for Interested Parties by the Commission* COM (2002) 277, 5.

There is a relative degree of transparency over the process, which has been enhanced, most recently, by the introduction of a requirement that the EC institutions make available a public register not only the documents drawn up by them, but also the documents received by them.¹³³ Any party making a submission before an EC Institution should, therefore, be in a position where they can see the other submissions received and make a comment on them. The Commission has tried to broaden this culture still further by setting out a series of minimum standards for consultation in its Consultation Paper on the question:

- Any consultative communication should be both clear and concise and providing all the necessary information to facilitate responses. It should provide a summary of the context, scope and objectives of the consultation, setting out issues that are up for discussion and those considered to be particularly important; details of hearings and contact details; and explanations of the Commission's processes for dealing with the contributions.
- There should be adequate awareness-raising publicity and a single point for consultation should be established on the Internet.
- Sufficient time for responses should be provided. This will normally be six weeks for written responses and twenty working days for meetings.
- Acknowledgment of receipt of contributions should be provided, and results of open consultation should be displayed on websites.
- Where consultations are restricted to a limited number of parties, to ensure equitable treatment and an adequate coverage the Commission should ensure that it consults those 'affected' by the policy, involved in its implementation or bodies whose stated objectives give them a 'direct interest' in the policy.¹³⁴

Laudable though the intention of this policy is, experience of EC policy making suggests it will only facilitate problem solving in certain circumstances. Either where the central protagonists share the same 'epistemic horizons' and have a common way of approaching the problem¹³⁵ or where the central political actors have convergent ideologies.¹³⁶ In all these cases one is looking at deliberation-lite, where the prior positions are so convergent, that it is difficult to argue for argument having had a powerful, transformative role. In other instances, one can point to a number of features that might lead to deliberation resulting to the uncritical acceptance of the views of dominant communities of practice.

The first practical difficulty is that of asymmetries of representation. In its Consultation Paper, the Commission acknowledged that open consultations would often be impractical and unstructured. It saw the Economic and Social Committee and Com-

¹³³ Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission Documents, OJ 2001, L 145/43, alinea 10.

¹³⁴ Note 132 *supra*, 12–14.

¹³⁵ J. Trondal, 'Beyond the EU membership-non-membership dichotomy? Supranational identities among national EU decision-makers' (2002) 9 JEPP 468, 479–483.

¹³⁶ See, respectively, on MEPS and national governments. A. Noury, 'Ideology, Nationality and Euro-Parliamentarians' (2002) 3 EuP 33; M. Aspinwall, 'Preferring Europe' (2002) 3 EuP 81.

mittee of the Regions as organising consultations on behalf of the Commission.¹³⁷ This turns the process into a more representative one in which the Committees will filter the opinions that are presented to the Commission. The Commission will also make use of 'focused consultations' in which it listens to a limited number of non-institutional actors directly. In its Consultation Paper the Commission acknowledges that this is a privileged access, which must be rendered transparent—something it does through listing the consultative bodies on its CONECCS database.¹³⁸ The Commission has also committed itself to a policy mix where both open and focused consultations are used.¹³⁹ All this implies asymmetries of representation. The Commission has therefore proposed criteria which would suggest that it will not approach these consultations in a sectoral manner. In deciding whom to consult, it will therefore consider the wider impact of the policy, the need for specific expertise, whether there is a need to involve non-organised interests, the track record of participants, and, finally, the need for a proper balance between the representatives of large and small organisations, social and economic actors, wider constituencies and specific target groups and EU and non-EU organisations. This is all well and good, but experience in the field of the Social Dialogue suggests the process of dealing with representative organisation necessarily excludes certain interests or organisations, as not every voice can be heard, and that consultative processes, such as these, shifts some responsibility for deciding who is involved in the policy-making process away of the Commission to these far less accountable private actors.¹⁴⁰

The second difficulty is non-participation. Notwithstanding the size of the public sphere, what does one do with the situation where citizens or interests, for whatever reason, do not participate in the policy-making process, but are still subsequently antagonised by its outcomes. This problem is a significant one if one looks at poor participation in the 1999 elections for the European Parliament.¹⁴¹ It would be unwise to assume that non-voters are universally and continually disinterested. A wiser assumption is that they might have political interests, but see little benefit from direct participation.

The third difficulty is that of antagonistic interests. Where EU processes have relied on consensus, they have come unstuck where central protagonists have confronting interests. Either no outcome is agreed or only a weak unsatisfactory one is adopted. An example of this is the European standard-setting bodies, which rely upon consensus for bringing about technical standardisation. Whilst the quantity of

¹³⁷ EC Commission, *Towards a reinforced culture of consultation and dialogue—Proposals for general principles and minimum standards of consultation of interested parties*, COM (2002) 77, 7. On this see Protocol on arrangements for cooperation between the Commission, the Committee of the Regions and the Economic and Social Committee signed by their respective Presidents on 20 September 2001, D1 CdR 81/2001 rev.1.

¹³⁸ This can be found at http://www.europa.eu.int/comm/civil_society/coneccs/organe_consultatif/listealpha_cb.cfm?CL=en&lettre=H

¹³⁹ Note 137 *supra*, 8–9.

¹⁴⁰ On the notorious UEAPME saga where a number of trade unions representing employees in small and medium-sized enterprises was barred from inclusion in the dialogue leading to the Parental Leave Directive see N. Bernard, 'Legitimising EU Law: Is the Social Dialogue the Way Forward? Some Reflections around the UEAPME Case', in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart, 2000).

¹⁴¹ See note 38.

standards adopted by these bodies is quite impressive, there has been criticism of the quality of some of these standards and it has been highly difficult for these bodies to agree a common standard where the European market is marked by strong domestic competition, as, in such circumstances, individual undertakings are fearful that any new standard might confer an advantage on their competitor.¹⁴² By analogy, there is a clear fear that deliberative, consensual style politics is likely to lead politics untroubled by innovation or radicalism in which policy movement is unlikely wherever there is significant political contestation.

Notwithstanding this, greater deliberation in the European Union public sphere still has two wider benefits. The first is that it facilitates communication. Law-making is the moment when the battle place for ideas is at its most intensive. It imposes processes of justification on those communities driving forward the legislation. This justificatory process can enlarge the latter's understandings of the problem. As a process of interaction between different communities, it also publicises and politicises the process as other groupings are made aware of the impending norms to which they are subject and acquaint themselves with the potentialities and limits of these norms. Second, EC law-making represents the moment when powerful political communities seek to extend their influence, through law, over other communities. If there is a moment when they should be held to account, then this is it. Classic deliberation does not provide the institutional conditions for this because the element of mutual accountability is lost in the quest for the 'right answer'. In such arguments, counter-arguments to hegemonic arguments are to be refuted rather than incorporated. The weight and authority of the argument becomes everything. It is insufficient, therefore, for deliberation to be just about development of the right answer. The 'right answer' must also justify itself on two counts, that is not unnecessarily intrusive and that it does not extend the reach of inappropriate hegemonies.

Even at this level there remain difficulties with the qualities of EC decision-making. There is first a problem with transparency. Documents may be refused to be disclosed under a number of headings.¹⁴³ Secretive submissions on law-making can still be made. Similarly, in the absence of an overriding public interest, institutions can refuse to disclose the content of their internal deliberations where the final decision is not theirs and disclosure would undermine their decision-making processes.¹⁴⁴ A further problem is that there is no requirement for institutions to hold public hearings. There are thus no guarantees that submissions will be heard on an even formally equal basis.

All these difficulties, whilst not insignificant, could be remedied. There seems to be a case for generalising the 'public interest' defence so that a document could be disclosed if the Court of First Instance or Court of Justice think it is in the public interest, no matter what area is being considered. It is surely unacceptable that a blanket ban be imposed on disclosure of certain forms of document, when a case-by-case

¹⁴² R. Werle, 'Institutional aspects of standardization—jurisdictional conflicts and the choice of standardization organizations' (2001) 8 JEPP 392.

¹⁴³ These include public security, defence and military matters, international relations, protection of financial, monetary or economic policy of an EC institution or Member State; protection of commercial interests, court proceedings and inspections and audits. Note 133 *supra*, Art 4(1) and (2).

¹⁴⁴ *Ibid.*, Art 4(3).

analysis might show that, with many, disclosure is in the public interest and affects little else. In this regard, it would seem any document submitted to an EC institution with the intention that it contribute to a legislative debate should be disclosed. It is surely in the public interest that the broader public knows who public institutions are listening to during the process of legislation. In like vein, it would not be difficult for the EC institutions to agree a Decision imposing formal requirements to hold public hearings.

The second problem is that individual governments have insufficient protection against majoritarian bias and excessive intrusion, the situation where a decision is taken by qualified majority that is widely opposed within the domestic political settlement but intrudes deeply into it. The central check that any legislation must set out the reasons why it complies with the subsidiarity principle is a weak one.¹⁴⁵ For the Court of Justice does not scrutinise the detail of the reasons or level of reasoning given for why EC measures comply with the subsidiarity principle, thereby reducing the requirement to little more than a formulaic one.¹⁴⁶ There is also no guarantees against subsequent ‘activist’ or integrationist interpretation of these norms by the court of Justice. The Council has developed a means of countering this by attaching declarations to legislative texts with a view to guiding their subsequent interpretation and application. Yet whilst the Court of Justice will attach interpretative value to declarations of the EC institutions made at the time of the adoption of the instrument¹⁴⁷ it will attach no value to declarations made by individual governments.¹⁴⁸

A reform to this could be made on the basis of Article 10 EC. The provision currently requires a Member State to provide information which facilitates EC institutions in the discharge of their duties. The duty could require in a corollary way that EC institutions should be required to provide any information to Member States which not merely enables them to discharge their EC legal duties,¹⁴⁹ but also enables them to determine the extent of these duties. On the basis of this, any Member State or EC institution¹⁵⁰ opposing a measure that would have three months to put objections to the final decision-maker—be this the Council or Parliament and Council—and ask how the instrument should be interpreted to meet these concerns. The duty of cooperation in Article 10 EC would require that the latter could not dismiss these concerns, for they would have to set out the extent of the Member States’ legal duties, but would have to respond. In light of the subsidiarity and proportionality principles, this document, in essence a declaration, would have to set out why the measure was not excessively intrusive and why it was appropriate for the Member State in question. The resulting

¹⁴⁵ Protocol No. 30 to the EC Treaty on Subsidiarity and Proportionality, para 5. Although no stated in the Protocol, this principle also applies to any amendments proposed by the other Institutions to a Commission proposal, EC Interinstitutional declaration on democracy, transparency and subsidiarity, *EC Bulletin 10–1993*, 118.

¹⁴⁶ Case C-233/94 *Germany v Parliament & Council* [1997] ECR I-2405.

¹⁴⁷ Joined Cases C-289/96, C-293/96 and C-299/96 *Denmark, Germany & France v Commission* [1999] ECR I-1541.

¹⁴⁸ Most recently, Case C-375/98 *Ministério Público v Espa Europe* [2000] ECR I-4243.

¹⁴⁹ This is currently the case. Case C-2/88Imm *Zwartveld* [1990] ECR I-3365.

¹⁵⁰ This would include not merely the Commission and the Parliament, but also the Economic and Social Committee and Committee of the Regions.

document, whose agenda would have been set by the dissenting Member States or EC institutions and would set a preserve for national autonomy, would bind the Court of Justice in its interpretations.

D Deliberation and Transposition: Holding the National Administrator of EC Law to Account

Transposition is distinguished from EC law-making in that it is concerned with the *management* rather than the *creation* of change. The different processes of formulating, applying and enforcing EC law increasingly get interconnected at this point as the development of norms are assessed against their operability. 'Learning by doing' feeds more directly into it than into the Brussels process with the accumulation of evidence on what works on the ground and the managerial question of what norms can be successfully and effectively applied being particularly acute. It is therefore the point at which the demands of local particularism and universalism can most productively feed off and inform each other in processes of mutual evaluation and benchmarking, whilst still provide for the greatest cultural continuity and the lowest institutional and economic costs in the management of this change within particular territories. IMPEL is an example of this.¹⁵¹ A network of all the national environmental agencies, it was established in 1992 to discuss not merely the monitoring and enforcement questions of EC environmental law, but also the translation of EC legal standards into particular activities and the elaboration of national law as required by EC law.¹⁵² Allan Duncan, of the British Environment Agency has noted that what took place was a strong clash of views about how to see certain problems occurring initially with a dominant model emerging over time. This led in time to a 'seamless community' emerging based on strong feelings of mutual trust and accountability—in every sense a community of practice—which insiders found extremely rewarding, but whose informal *modi operandi* were extremely opaque to outsiders.¹⁵³

Yet, in this, transposition provokes problems of accountability and power that are often internecine to national societies. For a danger of EC law-making is not only the marginalisation or isolation of particular territories, but also its use by national élites to reinforce their power within their respective societies and to exclude further marginalised members of these societies. This question becomes particularly acute at the moment of transposition, for it is at this moment that the cultural discontinuities and

¹⁵¹ Another example of this is the limited but growing recourse to collective agreements to implement EC Directive norms in the fields of employment and environmental policy in which the central private actors subject to the Directive's obligations set out legally binding collective understandings as to how these will be applied. In the case of social law, this is expressly provided for by Article 137(4) EC. The Commission has pushed for greater use of collective agreements in EC environment law since they were allowed in Directive 94/62/EC on packaging and packaging waste, OJ 1994, L 365/10, Article 15. It has had only limited success and was rebuffed in its attempt to use them for car emission limits. On this see I. Bailey, 'Flexibility and Harmonization in EU Environmental Policy' (1999) 39 JCMS 549; A. Friedrich, M. Tappe and R. Wurzel, 'A new approach to EU environmental policy-making? The Auto-Oil I Programme' (2000) 7 JEPP 593; G. van Calster and K. Ketelaere 'The Use of Voluntary Agreements in the European Community's Environment Policy', in E. Orts and K. Dektelaere (eds), *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer, 2001).

¹⁵² The history and remit of IMPEL can be found on <http://europa.eu.int/comm/environment/impel/>

¹⁵³ A. Duncan, 'The History of IMPEL' Conference on Compliance and Enforcement in Villach, Austria on 11–13 October 2000.

asymmetries of power that EC law provokes within individual national territories must be addressed.

Transposition processes must therefore both take account of wider processes and wisdom from other jurisdictions and give an account of themselves to those they disenfranchise or further marginalise. The former can be operationalised through requiring national administrations to give other administrations a hearing during the transposition procedure. The best way of implementing the latter is through requiring national administrations to carry out a social impact assessment in relation to any measure which reacts to or transposes EC law. Social impact assessments require a study to be made to predict the social effects of a measure on individuals and communities. Typically, such an assessment will consider the beneficiaries and losers of a measure, its consequences on community institutions, how it might change behaviour amongst certain groups, demographic impacts, changes in social control institutions, whether it reduces or enhances employment, regional impacts, as well as impacts on gender and different ethnic groups.¹⁵⁴ There is inevitably a crudeness to such studies, but they have been described as attempts to develop a 'social well-being account for policy-makers'.

Deliberation fits into this model in that once the assessment has been performed, any groups identified as directly affected or disadvantaged by the measure could make representations to the administration to ask how the measure taken by the administration was going to minimise the negative impacts of the measure vis-à-vis them. The administration, estopped by the social impact assessment, would not be able to dismiss or avoid commenting on these submissions, but would have to provide a document indicating how this would be done.¹⁵⁵ This document would be an interpretive tool which would bind national courts in their application of the measure in question. Given that socially marginalised groups will be least equipped to present their case, there might also be a duty to impose certain substantive requirements as well. In a polity as complex and diverse as the European Union or any Member State, it is impossible to impose any form of *Pareto* optimality, namely that a policy will only be legitimate if it benefits certain individuals whilst not making somebody else worse off. A far more realistic requirement is that where any policy disadvantages a group or individual, there should be a requirement of compensation where it is shown that the individual already enjoys a disadvantaged position within their society.¹⁵⁶

The foundations for such an approach were taken at the 2001 Göteborg European Council where the European Council instructed the Commission, as part of the 'Better Regulation' initiative, to attach a 'sustainability impact' assessment to all major proposals, which would measure the economic, social and environmental impact of these proposals.¹⁵⁷ On the basis of this the Commission has proposed to carry out impact

¹⁵⁴ For a broad overview of the procedure see C. Barrow, *Social Impact Assessment: an Introduction* (Arnold, 2000).

¹⁵⁵ This would entail a change in the case law. In Article 253 EC at the moment to give reasons only applies to EC institutions and not Member States, Case C-70/95 *Sodemare v Regione Lombardia* [1997] ECR I-3395.

¹⁵⁶ The *Kaldor Hicks* criterion of optimality entails that any policy is only legitimate if its gains are such that they could compensate all the losers. This adds the requirement that where the losers already enjoy a disadvantaged position, they will be compensated for further disadvantage. For a useful comparison of *Pareto* and *Kaldor Hicks* optimality see A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford University Press, 1994) 23–25.

¹⁵⁷ Presidency Conclusions of the European Council of 15 and 16 June 2001, para 25.

assessments on all policy initiatives, which are major in that they have been identified in its Annual Policy Strategies or Work Programmes.¹⁵⁸ Yet there are difficulties. These duties seem only to bind the EC institutions, not the national administrations administering or transposing EC law. Moreover, the impact assessments being proposed are to include not merely social impacts, but also environmental and economic ones.¹⁵⁹ The procedures are thus very catholic ones, which, in their generality, focus less on redistribution and more on reflexivity and forward planning in which policy making is rendered more 'evidence' based.

To require national administrations as part of the transposition process to carry out a social impact assessment would, at first sight, seem intrusive, as it reduces the discretion available in the transposition process. That this is not such an outlandish or difficult idea is illustrated by the EC Commission Green Paper on corporate social responsibility which has opened up consultations on the desirability of requiring private companies to carry out social impact assessments in relation to business projects which are particularly likely to affect particular communities adversely.¹⁶⁰ If the EC is ready to consider private undertakings engaging in such activities that it should not be beyond its remit to apply a parallel régime to national administrations with their wider responsibilities. There was an opportunity for this to happen with the establishment of the Mandelkern Group on 'Better Regulation' by the Lisbon European Council in April 2000.¹⁶¹ The Group, whose conclusions were accepted by the Barcelona European Council in March 2002, commented favourably on regulatory impact assessments being carried out in regard to both national as well as EU regulation. It did not consider this was necessary in relation to national transposition of EU legislation. For it saw regulatory impact assessment as simply making policy making more 'evidence-based', and thus as something that need only be carried out once in the formulation of any law. Its possibilities as a redistributive tool were ignored.

E Deliberation and the Enforcement of EC Law: Laying the Antagonism of EC Law Bare

Even allowing for all the above, 'effective problem solving' by EC law will create new fault lines of inclusion and exclusion, which no amount of 'talk' can cover. Politics presupposes individuals who are 'nevertheless the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible'.¹⁶² Different collective identities and forms of public reason will result in losers in political debate therefore simply not accepting the 'rightness' of the solutions decided.

Constitutional democracy has traditionally tried to minimise these tensions by seeking to vest as much credibility as possible in the process of selecting political 'winners', namely in deciding who exercises political authority and whose arguments

¹⁵⁸ EC Commission, *Impact Assessment* COM (2002) 276, 5–6.

¹⁵⁹ *Ibid.*, Annex II.

¹⁶⁰ EC Commission, *Green Paper Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 final.

¹⁶¹ Mandelkern Group on Better Regulation Final Report, 13 November 2001. This is to be found at <http://www.irlgov.ie/taoiseach/publication/smi/Mandelkern%20Group%20Final%20Report.pdf> (accessed 25 June 2002).

¹⁶² C. Schmitt, *The Concept of the Political* trans. J. Harvey Lomax (University of Chicago Press, 1996) 27.

hold sway. Yet, accepting that this will not normally be sufficient, constitutional democracies place constraints on how the winners can treat the losers. The winners are thus required to observe certain procedures set out by constitutional and administrative law, and are limited in the substantive policies they can develop through the provision of human-rights norms. Any constitutional democracy also provides for the regular reconstitution of political power on a regular basis. It therefore holds out the possibility that today's losers may be tomorrow's winners, and, thereby, provides both incentives and assurances for today's outsiders to exercise voice within the system. The difficulty within the European Union is that neither of these guarantees are sufficiently present within its current settlement with the consequence that political tensions cannot be accommodated within its politico-legal system but must be expressed against its politico-legal system.

a) Guarantees on the Treatment of Today's Losers by Today's Winners

The claim that EC law provides insufficient guarantees against the misuse of power seems, on the face of it, an odd one to make. Every student spends a considerable amount of time learning the daunting number of legislative and administrative procedures in EC law. Every student also knows that EC law also offers substantive guarantees against the abuse of EC law through requiring EC Institutions and Member States acting within the field of EC law to comply with fundamental rights norms.

The difficulty, however, is that fundamental rights protect against excessive infringement of a subject's liberties or autonomy, be this economic, political or civil. Very little of EC law, however, can be analysed simply through the prism of whether it has a freedom-granting or freedom-restricting quality in the sense of generating or curbing individual rights. It is rather concerned with what Weber termed 'reglementations', laws instrumental to securing the effectiveness of policies pursuing collective goals.¹⁶³ A feature of such laws is that, as they are concerned with steering formally organised domains of action (the single market, employment policy, environment policy), their functional nature makes it impossible to question them in terms of their freedom-guaranteeing or freedom-reducing character.¹⁶⁴

The evidence for this is the emergence of the action plan or programme as the central structure of EU policy making. Today, almost all the central areas of EC law are pivoted around such programmes. These knit and systematise legislation around wider policies and processes of problem solving, creating linkages between individual pieces of legislation, whilst providing collective goals against which the legislation is monitored and assessed. Only a tiny proportion of legislation is 'freedom asserting' in the sense that it generates individual rights which are invoked before national courts. Research that I have carried out elsewhere showed that, notwithstanding copious pages of secondary legislation adopted, the articles of the EC Treaty still remained the provisions that were invoked most frequently in reported cases before the British courts. Furthermore, notwithstanding that the directive is the instrument that impinges upon more domains of activity than any other, a mere five directives accounted for 73% of the total.¹⁶⁵

¹⁶³ M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, trans. by G. Roth and C. Wittich (University of California Press, 1978) at 644.

¹⁶⁴ J. Habermas, *Between Facts and Norms* trans. W. Rehg (Polity, 1996) 364–365.

¹⁶⁵ D. Chalmers, 'The Positioning of EU Judicial Politics within the United Kingdom' (2000) 23 WEP 169. To be sure, reported cases involve a small fraction of judicial activity and an even smaller fraction of legal activity, but assertion of one's rights before a court is the most evident manner in which to invoke the 'freedom-giving' qualities of law.

This results in the central conflicts provoked between EC law being between it and local life-worlds, and not between it and individual rights. The most heated controversies prompted by Europeanisation have, thus, involved Swedish laws on snuff and restrictions on the sale, Italian furore about pasta, German laws on beer purity, Greek laws on the composition and origin of feta cheese, Dutch laws on the possession of marijuana, Irish rules on abortion, the quality of British beef and, most recently, the replacement of British imperial measurements with metric measurements. Whilst these debates seem amusingly arcane, their intensity frequently penetrates into almost all the avenues of the domestic political settlement. The challenges to metrification for example have resulted in a series of publicised cases.¹⁶⁶ It also resulted in a pledge from the central opposition party during the 2001 electoral campaign to pass legislation which would flagrantly breach EC law but would retain British Imperial measurements. It also provoked considerable wider resentment amongst the British public. The British newspaper, *The Sun*, ran a long campaign on it and a survey by the British supermarket, Tesco, showed that 76% of shoppers wanted imperial measurements to be given prominence.¹⁶⁷ Indeed, its extent has been such that the Brussels in-house newspaper *European Voice* named the traders who first challenged the legislation as Political Campaigners of the Year for 2001.¹⁶⁸

The reason for this hostility was not a simple alphabetical one, a preference for the letters 'lb' over 'kg'. Instead it lay in that, whilst the measurements are no more than a form of syntax necessary for market integration from the point of view of EC legislation, that syntax is *the* medium for expressing certain mutual understandings and associations for many British people. The point was eloquently expressed by the Sunderland trader, Steve Thorburn, who started the furore:

Steve's tiny market stall, Thoburn's Fruit & Veg, is a veritable EU of greenery: Dutch leeks, Spanish peppers, French apples, British spinach, and, of course, Brussels sprouts. When I stopped by to see the Metric Martyr, he told me he was thoroughly uncomfortable with that title and with the way his case had been turned into a political football. 'I don't give a toss about politics', he said. 'I've never cast a vote. I have nothing against metrics. If somebody comes into me premises and says, "C'mon, love, give us a kilo of bananas", I'll sell it to her. But nobody ever asks for that'. His message for the EU regulators was simple: 'Leave a bloke alone so he can give his customers what they want'.¹⁶⁹

The alienation with EC law is, therefore because it is perceived as intrusive, impersonal and alien in these types of disputes in the sense that it is no way—nor possibly could be—responsive to local contexts and ways of doing things. It is these latter elements that are constructed as liberties, but these are not activities that are in any way ringfenced or protected by fundamental rights documents.

b) The Absence of any Possibility of Recontesting Power

EU law's unpopularity also stems from its seeming remorselessness. The possibility of 'booting the rascals' out is not available in a political system as institutionally decanted as that of the EU. Even if a party outside the mainstream enters power within a Member State, this will result merely in its exercising indirect power through the

¹⁶⁶ The Decisions of the various magistrates courts have been upheld by the Court of Appeal with leave to appeal refused, *Thorburn v Sunderland CC* [2002] 1 CMLR 50.

¹⁶⁷ R. Morrisson, 'Metric Martyrdom' *Times*, 7 November 2000, at 1.

¹⁶⁸ The whole saga can be found on an informative if highly polemical website. www.metricmartyr.com

¹⁶⁹ T. Reid, 'The New Europe' *National Geographic* 1 January 2002.

Council, and having an even more marginal influence within the Commission and the Parliament. The response of a national political system which would be the centralisation of vesting full legislative power in a single parliamentary body (e.g. the European Parliament) would both be politically unacceptable, and would still not address this structural deficit fully. For a central system of authority—however democratic—could never give expression to more than a very limited proportion of the plurality of traditions, collective identities, ways of life that exist within the European Union. If this is increasingly a problem within the national political system, the contestedness and geographical remit of the European Union exacerbate this dilemma exponentially. In the case of particularist identities, in particular, which do not seek to reach out beyond their membership, it is simply unrealistic to assume that these will hold ultimate authority in a polity as diverse and vast as that of the EU.

c) The Revisiting of the Supremacy of EC Law

The disenfranchisement of losers within the EU and the lack of guarantees offered to them coalesce around the enforcement of EC law. It is at this moment that institutional machinery is brought to bear on those who cannot or will not comply with EC norms. The unbending formal supremacy of EC law allows, in principle at least, for no challenge. Losers are required to accept the law of the winners within the EU system simply because it is the law. EC law's language of sovereignty, with all the latter's traditional resonant imagery of being the 'right to take life and let live',¹⁷⁰ emphasises these feelings of subordination and disempowerment.

The sovereignty of EC law must therefore be revisited. The revisiting suggested here treats the question of sovereignty, first of all, as a process of justification. For the power of sovereignty is contingent upon its acceptance by its subjects.¹⁷¹ In the United Kingdom, for example, parliamentary sovereignty is only validated through subsequent obedience of Parliament's laws by its subjects. Sovereignty is, thus, something which can only emerge out of a dialectic between ruler and ruled, which involves a call for recognition by the ruler and a response to that call by the ruled. In so doing, the ruler must present reasons for its claim to sovereignty and allow for the possibility that its claim might not be accepted. In traditional States citizens might obey for a variety of 'illiberal' reasons—tradition, fear, belief in imagined communities. In a polity as contested as the European Union, such reasons are not available. The sovereignty of the EC legal order is far more dependent upon some at least of its subjects accepting the justifications it gives for claiming sovereignty for itself. This requirement to justify its sovereign power more explicitly provides a contingency to EC law which *could* allow it to address the question of both how 'outsiders' are treated in EC law and how 'outsiders' can become 'insiders'. For the contingency of EC law acts as a curb on EC law-makers. Insufficiently justified treatment of 'outsiders' carries the risk of disobedience and the calling into question of EC law. The possibility that such disobedience may be recognised by others, simultaneously, offers 'outsiders' the possibility that their vision could carry the day, and that they could become 'winners'.

A series of meta-norms have emerged out of the praxis of judicial interaction within the European Union through which the sovereignty of the EC legal order is seen as

¹⁷⁰ M. Foucault, *The History of Sexuality: Volume I* (Allen Lane, 1979) at 136.

¹⁷¹ A. Pottage, 'Power as an art of contingency: Luhmann, Deleuze, Foucault' (1998) 27 *Economy & Society* 1, 16.

dependent on the quality of justifications offered to national courts.¹⁷² The Court of Justice has provided utilitarian and welfarist justifications for the sovereignty of EC law in that it has argued that EC law furthers certain valuable collective goals. In *Van Gend en Loos*, therefore, the justification for the sovereignty of EC law was that the objective of the establishment of a Common Market required it.¹⁷³ Similarly, the reasoning used in *Van Duyn* and *Francoovich* for the establishment of the direct effect of directives and State liability was that these were necessary to secure the effectiveness of EC law as a collective institution.¹⁷⁴ Individual rights were granted on the grounds of their instrumentality to the securing of these institutions and not for any deontological reasons. The broad acceptance of supremacy of EC law by national courts has never challenged this justification nor sought to vet individual EC norms on whether they contributed to the general welfare or not. There is a *prima facie* assumption that EC law is in the general good. Instead, EC law must meet a series of other conditions for national judicial acceptance.

First, it must not intrude too extensively on the national political settlement. Stated most aggressively by the German and Danish Constitutional Courts,¹⁷⁵ a number of courts from other States, notably Belgium,¹⁷⁶ Spain,¹⁷⁷ France,¹⁷⁸ the United Kingdom¹⁷⁹ and Italy,¹⁸⁰ have asserted that the sovereignty of the EC has a limited material remit and cannot be extended beyond the powers, as they see it, conferred by the Treaty. Second, EC law must not violate fundamental rights recognised in the national constitutions. Notwithstanding the development of EC law on fundamental rights, national courts will disregard EC law if they see it as violating national fundamental rights, and have guarded this power jealously for themselves. There has been well-noted resistance to intervention by EC law and the Court of Justice in Italy,¹⁸¹ Germany,¹⁸² Sweden¹⁸³ and Ireland¹⁸⁴ on this point.

¹⁷² For two important accounts see M. Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice and the Fate of the European Market for Bananas' (1999) 36 CMLR 351; M. la Torre, 'Legal Pluralism as Evolutionary Achievement of Community Law' (1999) 12 *Ratio Juris* 182.

¹⁷³ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁷⁴ Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Joined Cases C-6/90 & C-9/90 *Francoovich & Others v Italian State* [1991] ECR I-5357.

¹⁷⁵ *Brunner v European Union Treaty* [1994] 1 CMLR 57; *Carlsen v Rasmussen*, Judgment of the Danish Constitutional Court of 6 April 1998, available at <http://www.um.dk/udenrigspolitik/europa/domeng>

¹⁷⁶ CA, 3 February 1994, *Ecole Européenne*, Case No 12/94, B6.

¹⁷⁷ *Re Treaty on European Union*, Judgment of 1 July 1992 of Spanish Constitutional Court [1994] 3 CMLR 101.

¹⁷⁸ *Re Treaty on European Union*, Decision 92-308 of the Constitutional Council, *Journal Officiel de la République Française* 1992, No 5354.

¹⁷⁹ *R v MAFF ex parte First City Trading* [1997] 1 CMLR 250; *Marks & Spencer v CCE* [1999] 1 CMLR 1152.

¹⁸⁰ *Granital Foro*, it. 1984, I, 2064.

¹⁸¹ *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372.

¹⁸² The current German position is that the German Constitutional Court will not review individual EC acts for their compliance with fundamental rights norms but reserves the right to do so if the general level of protection is not assured. *Bundesverfassungsgericht* 7 June 2000, (2000) EuZW 702

¹⁸³ The amendment to the Swedish Constitution, Chapter 10 Section 5, that paved the way for accession provides for supremacy of EC law on the condition that it comply with the European Convention on Human Rights, U. Bernitz, 'Sweden and the European Union: On Sweden's Implementation and Application of European Law' (2001) 38 CMLR 903, 910-911.

¹⁸⁴ *Attorney General v X* [1992] 2 CMLR 277.

There is a third occasion when national courts will not accept the authority of EC law. The resistance here is less structured and less explicit, but it appears, from research I have done in the United Kingdom, that national judges will be loath to apply EC law where it seems to undermine the national legal system's capacity to secure societal conformity. In this regard there were two forms of conformity they did not wish to see undermined. Repressive conformity concerned law's securing central distinctive symbols of society (e.g. criminal law, immigration law). There was therefore a very strong resistance against applying EC migration law or using EC law as a defence against criminal charges. The other is restitutionary conformity, which concerns itself with securing the operation of the market through the provision of governance structures, property rights and contracts. Where EC law was seen as undermining these by being too deregulatory, allowing individuals to disregard contracts or hindering the exercise of property rights, there was once again strong resistance. In all other areas, there was enthusiasm for EC law, notably where it extended law's reach.¹⁸⁵

Whilst this process of justification has become increasingly sophisticated, the narrowness of the conversation is striking. The only participants are national courts. The exclusivity of the participation is reflected in the types of justifications used. National courts have been concerned to protect the liberal institutions of the State—its central institutions, its political values and its political economy—but do not challenge the question of whether EC law brings collective benefits or question of the distribution of its costs and benefits. The notion of judicial restraint sees these as matters for the executive or legislature. Yet it is precisely these matters of policy that provoke unease amongst the EU's citizens. For it is the intrusion of these norms on local life-worlds that divides politically and alienates in that there seem neither any constraints on the process nor any possibility for local life-worlds to assert themselves over EC law. This not only generates a legitimacy crisis but also renders the sovereignty of EC law at times little more than a formal artifice. For sovereignty, at the end of the day, is a continuum whose fullest authority depends on the acceptance of all its subjects. If a large number do not accept its commands, it becomes little more than an artefact. Thus, the German Beer decision of the Court of Justice which compelled Germany to open its beer markets may allow now the possibility now of drinking a Belgian Kriek, an Irish stout or a British bitter in a German bar, but because it violated German understandings of what drinking beer involved has resulted in almost no import penetration into what is, after all, the second-largest beer market in the world.¹⁸⁶

These difficulties can be resolved if sovereignty regains its social character. That is to say that sovereignty becomes a justificatory process in which citizens of the Union be allowed to be put forward before national courts different justifications for which normative order that should govern them. The basis for resolution of this process would not be a formal one (e.g. EC law requires it) but rather which justification is better suited to the individual facts of the case. This already happens to some extent. But the current pigeon-holes, breach of the principle of conferred powers, violation of fundamental rights and challenging judicial notions of societal conformity, are too narrow, given the nature of EC law. And formally, because of the absurd *Fotofrost* doctrine, national courts are not supposed to engage in such a process.¹⁸⁷

¹⁸⁵ The empirical evidence is provided in D. Chalmers, *op. cit.* note 165 *supra*, 194–199.

¹⁸⁶ Case 178/84 *Commission v Germany* [1987] ECR 1227.

¹⁸⁷ In principle, national courts cannot declare acts of the EC Institutions invalid. This is a power reserved for the Court of Justice. Whilst they can informally disapply primary EC law by interpreting the EC

Not only should *Fotofrost* be abolished, but a new justification for not applying EC law should be created of a defence of protection 'collective identities'. It should be possible to argue for the legal value of those norms which enable the formation of life-worlds, collective identities, communities of practice etc against the value of EC law. A number of elements would be central to such a defence. The first would be proof of a collective dimension to the identity in question. It must be shown that the norm fosters mutual understanding, socialisation of individuals and social integration. As such, it would be hard for the norm to be advanced on behalf of isolated individuals. It is rather something that would need to be advanced in the context of 'public interest' litigation. There are a variety of forms this could take. It could be open to a number of public interest groupings, recognised as advocates of a particular collective viewpoint to bring action. National governments could appoint a public counsel to act on behalf of such claims and to bring them where she considers they have value. Finally, individuals may be able to bring such claims if they could show sufficient public support for their action through the use of petitions or other proof. The second dimension to such a defence is proof of authenticity. The norm must be shown to be central to the practice in question, and the practice must be shown to be valued significantly by the community. Such a process would require analysis of the popularity of the practice and the level of its use. It would also involve considering the evocativeness and symbolism of the practice—the particular points of reference, traditions and narratives it provides. The third dimension to the defence is an evaluative one. It cannot be sufficient to deny the supremacy of EC law to show that it impinges upon a collective identity. Some collective identities are pernicious. In other instances, the impact upon the collective identity may be marginal, but the effect of upholding it extremely disruptive for EC law. The evaluative process is therefore a three-stage one. The value of the collective identity must, first, be assessed. In particular, the extent to which it oppresses or marginalised outsiders must be considered. If the practice is determined to be of some value, the court must then engage in a balancing act where it gauges the valued effects of the practice in question versus the disruptive effects its continuance would have on EC law.¹⁸⁸ Similarly, if the national judge was to disapply EC law, they must do this in a manner that minimises disruptive effects.

The benefits of allowing such agonism to enter into the application of EC law are twofold. On the one hand, minorities would be protected against majoritarian bias in the system and would have the opportunity of scoring local victories. On the other, it would allow EC law to bring added value to local democratic debate. For it opens up the possibility for citizens to repoliticise and open up to contestation the growth of the regulatory State and the increased bureaucratic intrusion it has brought into industrial and daily life. Microprocesses, whose complexity had led to a corresponding technicisation and depoliticisation of much of the government of daily lives could be opened up and discussed for the first time. This contestation would take place neither before

Treaty in the most minimalist manner possible, declaring the most capricious Commission Declaration invalid is beyond them. Case 314/85 *Firma Fotofrost v Hauptzollamt Lübeck Ost* [1987] ECR 4199.

¹⁸⁸ The test proposed is not substantially different from that proposed by Wils for the ambit of Article 28 EC. He suggested that the valued regulatory effect of a measure be weighed against its effect on trade. His test examined the value attached by a national political community, however. The test here suggests that there are a plurality of communities within and beyond the Nation State. It is the value attached by these communities to a measure that should be measured, cf W. Wils, 'The Search for the Rule in Article 30 EEC: Much Ado About Nothing?' (1993) 18 ELR 475.

legislatures, who do not have the time or attention span to deal with them, nor before ministries, who are captured by experts, but before courts, who are used to adjudicating between different processes of justification.

VI Deliberative Rationality and the Quest for Political Community

The final teleology of deliberation addresses the nature of the political communities within the European polity. Whilst accepting that any political community must bound itself, it concerns itself with the critique of this 'boundary fixing'. More particularly, it considers the asymmetries of power that this throws up, be these manifested as distributional inequalities, hierarchies or patterns of exclusion. The tone of this debate has been set out by Linklater:

It is to be deeply troubled by the perennial questions about the distribution of membership, citizenship and global responsibilities which have resurfaced with particular urgency in the context of globalisation and fragmentation.¹⁸⁹

As many identities are formed dialogically, dialogue becomes cherished within this tradition as a form of self-learning and identity-formation.¹⁹⁰ It is also cherished because it contributes to a richer human solidarity.¹⁹¹ This does not necessarily imply change, for the freedom to defend prevailing norms of recognition and boundaries against questioning and challenge is as central and valuable a part of the process as the calls for change,¹⁹² but does imply that a repositioning takes place which gives the individual a heightened awareness of broader communities and processes.

These demands have led to this model of deliberation being conceived in a less singular manner than those of institution building and problem solving. Both empiricists¹⁹³ and theorists¹⁹⁴ have noted that debate with a single, highly institutionalised set of decision-making bodies serves to disadvantage marginalised groups. Deliberation becomes within this paradigm not merely a series of institutional procedures but, also, a mode of discourse, a way of requiring certain issues to be addressed.

This model [of deliberative politics] no longer starts with the macrosubject of a communal whole but with anonymous intermeshing discourses. It shifts the brunt of normative expectations over to democratic procedures and the infrastructure of a political public sphere fueled by spontaneous sources. Today, the mass of the population can exercise rights of political participation only in the sense of being integration into, and having an influence on, an informal circuit of public communication that cannot be organized as a whole but is rather carried by a liberal and egalitarian political culture.¹⁹⁵

¹⁸⁹ A. Linklater, *The Transformation of Political Community* (Polity, 1998) 100.

¹⁹⁰ J. Habermas, 'Struggles for recognition in the Democratic Constitutional State', in C. Taylor, *Multiculturalism: Examining the Politics of Recognition* (ed. A. Gutmann) (Princeton University Press, 1994).

¹⁹¹ There are different views about the ideal form of this community, but significant and diverse interpretations include A. Linklater, *The Transformation of Political Community* (Polity, 1998) 179–212; J. Habermas, 'Die postnationale Konstellation und die Zukunft der Demokratie', in *Die postnationale Konstellation: Politische Essays* (Suhrkamp, 1998); J. Shaw, 'Postnational Constitutionalism in the European Union' (1999) 6 *JEPP* 579; J. Shaw, 'Process and Constitutional Discourse in the European Union' (2000) 27 *Journal of Law & Society* 4.

¹⁹² J. Tully, 'Struggles over Recognition and Distribution' (2000) 7 *Constellations* 469, 472.

¹⁹³ See the literature cited at C. Sunstein, note 39 *supra*, 111–113.

¹⁹⁴ F. Lyotard, *The Postmodern Condition* (Manchester University Press, 1984.) 82; I. Young, 'Communication and the Other: Beyond Deliberative Democracy', in S. Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 120, 125–126.

¹⁹⁵ J. Habermas, *Between Facts and Norms* (Polity, 1996) 505–506.

This model, therefore, not only chooses a broader range of sites for deliberation, it also allows a wide variety of arguments to be raised than the other two models. Whilst there is a considerable range of opinions amongst the different academics writing on this, at their widest, ‘dialogic’ models argue for modes of address such as greeting, rhetoric and narrative to be given equal status with deliberation, as classically conceived.¹⁹⁶

A *The Meanings of Political Community*

The notion of political community discussed here is not concerned with the administrative or regulatory apparatus of the State but with ethical collective self-understanding. Expressed most strongly in the institution of Citizenship, it concerns itself with questions of ‘Who are We?’ and ‘What We Expect and Bestow Upon Each Other?’ It contains three dimensions.

First, membership of a political community is premised upon a discourse of Public Reason which enshrines principle of mutual recognition between members. One hallmark of political discourse is that the political freedom and equality of one member of the community is premised upon recognition of the same level of political freedom and equality of other members of the community.¹⁹⁷ Individual freedom thereby acquires a duality in political debate. It acts both to protect the individual from excessive State intrusion and to regulate relations between individual members of the political community.¹⁹⁸

Second, this mutual recognition is also about collective-building. Karst has observed, therefore, in his work on the contribution of the US Constitution to the development of American Nationhood, that every assertion of one’s own freedom and equality under the US Constitution is also an assertion to belong in the US political community.¹⁹⁹ Similarly, an assertion of somebody else’s political rights is recognition that they belong in the same political community as yourself. The identity of the political community as a whole thus becomes constituted through the claims and counterclaims of its individual members, and the extent to which these are recognised by others.²⁰⁰ Their cultural politics begets its political culture.

Third, the mutual recognition of each other’s co-equality and freedom leads to a commitment to a politics of difference and pluralism. The commitment to individual freedom requires that each individual ‘to be true to their own originality’.²⁰¹ This

¹⁹⁶ I. Young, *Inclusion and Democracy* (Oxford University Press, 2000) 52–77.

¹⁹⁷ The origins of this are captured in J. Habermas, *Between Facts and Norms* (Polity, 1996) 89–93.

¹⁹⁸ The Preamble of EU Charter of Fundamental Rights, alinea 6, therefore reads ‘Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations’. OJ 2000, C 364/1.

¹⁹⁹ K. Karst, ‘Paths to Belonging: The Constitution and Cultural Identity’ (1986) 64 *North Carolina Law Review* 303, 361–377; K. Karst, ‘The Bonds of American Nationhood’ (2000) 21 *Cardozo Law Review* 1141, 1144 *et seq.*; K. Karst, ‘Citizenship, Law and the American Nation’ (2000) *Indiana Journal of Global Legal Studies* 595, 600–601.

²⁰⁰ Nation-building and citizenship have therefore always been inextricably linked, R. Bendix, *Nation-Building and Citizenship* (Wiley, 1964).

²⁰¹ C. Taylor, ‘The Politics of Recognition’, in A. Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994) 25, 31. A similar argument lies at the basis of Walzer’s more communitarian theory of multiculturalism. See M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Blackwell, 1983) 314.

implies a commitment to value the different identities of the community's membership. At its crudest, one could not therefore have a political system which gave a minority members equal rights of representation, but which allowed for discrimination against that minority. The politics of difference results in the question of political community being an unending, continuously ongoing project. For this commitment to valorise difference is not an unqualified one. As each of us has a number of personal multiple identities and there are an almost infinite number of identities, many of which are considered too trivial or too unpleasant to protect politically, political recognition will be given only to identities that are seen as significant and valuable. The process of the politics of difference is, thus, a contentious and time-consuming one, as each new identity must be claimed, negotiated and recognised. This pluralist project leads to the terms of debate and terms of membership of political community being continually renegotiated. For it is not simply about existing members being able to claim entitlements. It is also about existing members becoming 'new' members, in that how they are recognised becomes reconfigured dramatically once a particular identity is recognised. This continual redefining of membership leads inexorably to a corollary ongoing reconsideration of the patterns of exclusion from the community and the justifications for that exclusion.²⁰²

There has been a thickening of Public Reason which has extended its spheres of application. Traditionally, the values of the political community were used to regulate the public sphere and the relationship between the administration and the individual. Citizenship was therefore associated with the grant of relatively narrow civil and political rights. Since the Second World War, and with the growth of the values of welfarism, there has been an acceptance that 'free and equal membership' of a political community generates a wider set of entitlements and responsibilities. Political community values have been extended to regulate socio-economic fields of activity. The institution of citizenship incorporates not merely civil and political rights, but also social rights.²⁰³ The European Union has, indeed, been a beneficiary of this, as the citizenship it has created is 'thin' politically but relatively rich in the socio-economic benefits it provides.²⁰⁴

This thickening has not stopped but continues, as new values and identities have emerged. The EU Charter on Fundamental Rights and Freedom represents a watershed in this regard. The relatively broad composition of the Convention drafting the Charter and its being prevented at an early stage from redrawing the balance of institutional powers allowed the process to include a wide variety of membership rights from a broad range of traditions. It is thus very much a document of the twenty-first century, unique in its ability to bring together a European consensus on the fields of application of political community values. In addition to civil, political, economic

²⁰² One small example is that a new political identity for EU migrants, that of EU citizens, being created in Articles 17 and 18 EC at Maastricht. The creation of this new political identity forced debate on the justifications for the difference in treatment between EU citizens and other lawful migrants. The absence of a meaningful basis for exclusion led at the Tampere European Council in December 1999 to give all long-term resident migrants in the EU equivalent rights to EU citizens, irrespective of their nationality, *Presidency Conclusions of Tampere European Council 1999*, para 21. See, now EC Commission, Proposal for a Council Directive concerning the status of third country nationals who are long term residents, COM(2001)127.

²⁰³ T. Marshall and T. Bottomore, *Citizenship and Social Class* (Pluto, 1992).

²⁰⁴ J. Shaw, 'The Interpretation of Union Citizenship' (1998) 61 C MLR 293.

and social rights, but it also includes environmental,²⁰⁵ artistic²⁰⁶ and consumer ones.²⁰⁷

In doing this the Charter has followed the tradition of political community as something which seeks to draw society around certain central symbols or values and acts as a counterweight to the administration.²⁰⁸ Yet, whilst the values of Public Reason institutionalised in early modern constitutionalism—and incorporated in the classical liberal rights it entrenches—were initially used as a counterweight against raw administrative power of the classical liberal state, the structure of the public sphere has transformed since then. It now concerns itself with preventing industrial power, the bureaucracies of the welfare state and the processes of the regulatory state from behaving in an untrammelled manner. If, in the architecture of modern European societies, there is a *modus vivendi* which accepts that these bring benefits in a parallel manner to that brought by the classic liberal state, there is also an acceptance that these institutions, who impact now as directly and as significantly now on individual lives as the modern liberal state, must behave in a way that contributes to rather than threatens the notion of political community. In the growth of environmental, social and consumer rights, one finds political community mutating to become a counterweight against these as well.

B Here, There and Everywhere: The Sites of Political Community

A feature of many of these rights is that whilst they might have been conceived and initially formulated in the public sphere, their application takes place in the private sphere. This pluralises the sites of political community. For an increasing array of private institutions have recognised responsibilities and powers for the maintenance of the values of political communities in a manner that was not previously the case. In the case of *Netherlands v Parliament and Council*, the giving of the green light by the Court of Justice to the patenting, and therefore use, of biotechnology could therefore be blocked by national or European medical associations.²⁰⁹ For the Court subjects its use to the principles of respect for human dignity and prior and informed consent of the patient. The duty of free and informed consent is a duty imposed, first and foremost, upon doctors, namely they have to verify patients are satisfied with the procedures that are about to be carried out. In discharging this duty, if the medical associations imposed a requirement that donated organs could only be used for non-biotechnological research or that organs used for surgery must come from certified sources to avoid the risk of ‘genetic contamination’. The effect of this would be to eviscerate the market for biotechnological inventions. For these are conceived and marketed mainly for medical purposes. If it becomes unprofitable to develop them either because there is no demand from doctors or the conditions are too restrictive, the possibility of such research remains just that, a formal possibility. If the Charter repre-

²⁰⁵ Note 198 *supra*, article 37.

²⁰⁶ *Ibid.*, article 13.

²⁰⁷ *Ibid.*, article 38.

²⁰⁸ Habermas, in particular, has argued that this is the role of the public sphere within the traditional liberal constitutional State. J. Habermas, *The Structural Transformation of The Public Sphere* (Polity, 1989) 222–235.

²⁰⁹ Case C-377/98 *Netherlands v Parliament & Council* [2001] ECR I-7079.

sents therefore a strong statement of the values of political community within the European Union, the sites for the deliberation of political community become, in a sense, here, there and everywhere. They exist wherever the Charter requires one party to discharge certain responsibilities towards another. If one looks at the Charter, it would cover almost all sites where institutional power is concentrated. For example, under the Charter, employers have responsibilities towards their employees under the Charter with regard, *inter alia*, to data protection, non-discrimination, protection of family life, prohibition of child labour, protection of young people, terms and conditions of employment and dismissal, collective bargaining and general responsibilities of information and consultation. Medical services have responsibilities towards their patients on questions of protection of human dignity, free and informed consent, access to preventive health-care and general levels of health protection. Schools have responsibilities towards parents and children in relation not merely to the quality of the education but to ensure that the latter's religious, philosophical and pedagogical convictions are respected. This does not entail that everything is 'political'. The sites in question only, however, become 'political' when they discuss the values of political community set out in the Charter.

Deliberative structures must therefore be erected to negotiate the values of the Charter wherever these impose mutual responsibilities between parties. In this regard, the strong relational element in deliberation—the duty to take into account the interests, values and arguments of the other—extends the tradition of political community. It transforms the principle of mutual recognition into a stronger duty of mutual accommodation. For the duty to deliberation includes a duty to couch one's argument using generalisable interests. One must put arguments that appeal not just to 'I' but also to 'You'. This duty of mutual accommodation would require each party, therefore, not merely to put its argument in terms of the Charter, but also to explain why pursuit of its rights does not excessively compromise the activities or individuality of others. In short, parties would be required not merely to argue their own case but also the case of the other party.²¹⁰ For example, a school which provided for only certain religious or cultural traditions to be represented in its syllabus would have to explain to parents why it was not infringing their rights. Conversely, they would have to explain why this did not impose too onerous or costly a duty upon the school.

How might this be implemented? It must be borne in mind that this deliberative schema is not intended to replace national or international systems of human rights. The values of the European political community may overlap with those of other political communities, but the notion of a European political community must be something which is additional to, autonomous and qualitatively different from these. This is, indeed, suggested by the Union's activities.²¹¹

This could be brought about by giving national courts no power to determine the substantive content of the Charter provisions, but giving them instead a power to require parties to deliberate with each other with a view to determining their mutual

²¹⁰ On this see D. Chalmers, 'The Mistakes of the Good European', in S. Fredman (ed.), *International Human Rights: The Case of Racism* (Oxford University Press, 2001) 193, 243–246.

²¹¹ Article 53 of the Charter makes clear, in particular, that nothing based on the Charter can restrict or adversely affect the application of other human rights systems and Article 17(1) EC, makes it clear that the EC does not impede the development of the values of other political communities.

responsibilities towards each other under the Charter. This requirement of deliberation would be without prejudice to the substantive content of national or international human rights guarantees. The notion of European political community would therefore be something individual institutional settings construct and own, albeit one that they construct on the basis of universalist terminology. It would be additional to the floor of rights that already governs their actions. To give bite to this duty to deliberate, a national court could find that a failure to deliberate in good faith would constitute an actionable infringement of the Charter in the case of respondents who hold responsibilities under the Charter, and would render these liable. Correspondingly, a failure by the applicants would nullify any action for the infringement of their Charter rights. To meet the objection of respondents that this would require them to negotiate with frivolous or far-fetched claimed, a requirement could be imposed that they need only negotiate with applications that are made in good faith. To meet the objection of applicants that this would seem to impose a procedural obligation on them to negotiate, even where violation of their rights was clearly established, it could be observed that, in such circumstances, nothing prevents them using national or other international remedies.

IX Europe as a Discursive Condition of Deliberation

‘Talking European’ concerns itself with how the European condition can contribute to and enlarge these deliberative processes. Within the context of deliberation Europe can be nothing other than a discursive condition, which sets the terms of debate and unites the different procedures. For, as with any item of debate, it can be no more than a term of discourse. Its introduction imposes a requirement that any of the above debates acknowledge that they take place against a wider European backdrop, and that they must therefore take account of the resources offered by Europe and of the broader interests or values included within the term ‘Europe’.

What does this entail to talk in a ‘European way? As with any imagined community, Europe creates a uniform mode of communication, Europeanness, which allows its members to identify themselves as part of the same community. Yet the hallmark of the European imagined community which distinguishes it from national ones is that it offers a set of meanings that are simultaneously alternate and internal to those who consider themselves Europeans. Because it does not have the affective ties of nationalism or regionalism, Europe is always the place that is external to national, local or particular jurisdictions for most Europeans. When one travels, one stays in London, Berlin, Warsaw, Slovenia, Catalonia, but never in Europe. Europe is the only team not represented at the various European sports championships. Yet, insofar as these places understand themselves as part of Europe, Europe provides a set of meanings that are internal to us. It forms part of our understandings of who we are and the interdependencies we share.

Europe therefore constitutes a series of meanings that are always just beyond the horizon but are also considered to be imminent in the local settlement. It is therefore more equipped than possibly any other symbol to act as a structure which enlarges debate, through requiring existing political settlements to be considered against broader contexts and present *modi vivendi* to be renegotiated. For this internal/externality that inheres to the European idea offers a unique set of rules and resources against which local processes can evaluate themselves. It is in short the radical *Zeitgeist* that allows these processes to transform their understandings of themselves. Europe is something

multiple, transformative, but also, insofar as it is always applied to very material settings, something very practical. It is precisely when this has been lost sight of, and the European idea has tried to model itself upon a more monolithic model that apes that of the Nation State that it comes across as on the one hand shallow and insincere, the world of European anthems and flags, in its attempts to be something that historically it is not, and, on the other, as exclusionary and repressive in that it seeks to impose a single set of meanings and singular definitions of 'Us' and 'Them'.

If Europe, as a general structure, is concerned with the enlargement of local collective consciousnesses, what does it mean to *deliberate* in a European way? It would seem that it would mean that four elements of deliberation (self-overcoming, validity, self-government and relationality) should be re-examined in the light of how these are understood within the European tradition. These have been interpreted within this tradition as the values of self-overcoming, modernity, relationality and self-government.

A The European Tradition of Self-Overcoming

As self-overcoming or transformation is a form of liberation, it is informed above all else by the European tradition of human freedom. Kristeva has pointed out that this tradition contains two strands. The one takes a vision of the human condition centred around a freedom to adapt to 'causes' external to oneself.²¹² It is a conception of freedom as empowering. Freedom is the knowledge that enables one to understand the logic of causes and effects and thus to harness it to one's situation, thereby providing a capacity to adapt to technological or economic events. It is the freedom of problem solving through the harnessing of collective resources to enable action that was not previously possible. The other form of freedom depicted by Kristeva conceives the essence of human freedom as being that of eternal questioning. This questioning is above all concerned with 'privileg(ing) individual singularity over the economic and the scientific'.²¹³ Such singularity is cherished because it contributes to a richer human solidarity based not upon economic or technological mutual dependence or empowerment, but rather the mutual recognition of each other's individuality and vulnerability.²¹⁴ These two conceptions of freedom, despite their containing oppositional elements, form a spectrum. Each represents one extreme of the liberal tradition and acts as a counterweight against the other. Concerns with human autonomy and dignity have always acted to curb the excesses of utilitarianism. By contrast, it has always been recognised that the 'public good' represents a legitimate reason for constraining and regulating individual freedoms. Our individual freedoms have become the instrument through which collective goals are attained—the health or wealth of the nation depends upon my ability to work productively and keep myself healthy—so that most of the time one is only free to behave in a disciplined way.

These dual conceptions of freedom emerge not just from European history but represent the very *leitmotif* of the European Community. In terms of freedom as empowerment, the twin central functions of the European Community have emerged as those of the regulatory state and the stabilisation state. Each of these functions is concerned with the securing and the development of an efficient and effective European market

²¹² J. Kristeva, 'Europhilia, Europhoria' (1998) 3 *Constellations* 321, 327.

²¹³ *Ibid.*, 328

²¹⁴ *Ibid.*, 329.

that transforms, improves and enlarges the existing forms of political economy within Europe. EC regulation has done this through adopting 80,000 pages of legislation addressing all forms of market failure.²¹⁵ The stabilisation function concerns itself more actively with the preservation of economic growth, employment and price stability, both through the monetary powers enjoyed by the ECB and the ESCB and through policy convergence and coordination in fiscal, welfare and employment policy between Member States.²¹⁶ Yet these institutions, and the member States implementing and acting within the field of EC law,²¹⁷ are also constrained by the other tradition of human freedom, that of human singularity, through the discourse of constitutionalism and its progeny, general principles of law and fundamental rights, now thickened and institutionalised further with the onset of the European Union Charter on Fundamental Rights and Freedoms.

B Validity and the European Tradition of Modernity

At the heart of the European tradition lies a paradox. The onset of modernity from the seventeenth century onwards was concerned with the sweeping away of all forms of traditional authority. So successful was it in this that modernity has, in effect, become the European tradition.²¹⁸ Central to the onset of modernity was a belief that every entity has a singular essence which can be discovered through processes of human reason. This allowed a shift from a faith in religious belief and destiny to a faith in human engineered progress. This discovery process was not to be an unstructured one. Instead, a number of institutions, each with an autonomous, inner logic, enjoyed an authoritative status in its mediation.²¹⁹ If politics became increasingly the science of government and the taking of decisions for the public good, the Nation State became the central institution for its operationalisation. A similar relationship was enjoyed between the new discipline of economy (concern with the optimal allocation of resources) and the institution of the market, and natural science and the laws of nature. These institutions—the Nation State, the market and natural science—have played a hegemonic role over the last two to three hundred years over modern life. Even critics of these institutions do so from the starting point of the latter's pre-eminence. The valorisation of existing understandings within a European context requires therefore that deliberative processes refer back to these institutions and take them as the point of reference for debate. The European Union, as a modernist organisation, indeed continues this process through either ringfencing or extending the central structures of these institutions, and it is precisely in those exceptional domains where there is doubt about this that one encounters most national resistance to the Union.

²¹⁵ On this see most famously G. Majone, *Regulating Europe* (Routledge, 1996) Chapters 1–3.

²¹⁶ K. Dyson, *The Politics of the Euro-Zone, Stability or Breakdown?* (Oxford University Press, 2000) especially Chapter 8.

²¹⁷ There is some divergence between the case law of the Court of Justice which covers all national measures falling within the field of EC law, Case C-260/89 *ERT v DEP* [1991] ECR I-2925, and the language of the Charter which only covers national measures implementing Union law, Article 51(1) Charter of Fundamental Rights of the European Union, OJ 2000, C 364/11.

²¹⁸ On the sweeping away of all traditional or 'pre-modern' forms of social order by modernity see A. Giddens, *The Consequences of Modernity* (Stanford University Press, 1990) 4–6.

²¹⁹ A particularly strong study on this tradition is M. Hardt and A. Negri, *Empire* (Harvard University Press, 2000) 69–90.

a) *The Nation State*

Since the seventeenth century the Nation State has been the dominant form of political community of modern Europe.²²⁰ Its status as a level of decision-making which is not required to justify itself is institutionalised in the subsidiarity principle which sets it out as the natural locus for general decision-making.²²¹ The Nation State constitutes both a centralised administration staffed by officials who exercise sovereignty over a territory through bringing 'authority comprehensively and reliably on highly specific groups or matters' in a number of key areas²²² and a population identified not merely by its rule by the administration but by a series of ethno-cultural and civic symbols which the nation-State commits itself to protect.²²³ A feature of the EU is that it has never tried to challenge either these central institutions or symbols of the Nation State.

(i) *The Prerogatives of the National Administration*

National administrations have historically enjoyed if not exclusive responsibility for the organisation of internal and external security, surveillance, administration and taxation.

Internal and External Security. With territoriality being the organising principle of the Nation State for the international system. Membership of that system was premised upon a national administration who enjoyed responsibility for both the internal and external security of the territory.²²⁴ These prerogatives of the Member State are recognised within the EU system. There are a number of general²²⁵ and specific²²⁶ provisions allowing Member States to derogate from their obligations on grounds of national security. Whilst the majority of these do not act as a residuary of reserved powers for Member States,²²⁷ the standards of review are weak.²²⁸ There is an even greater reticence to restrict the 'law and order' powers of the Member States. An incipient European criminal law is emerging providing minimum rules and penalties for a wide number of offences.²²⁹ Yet all these have been of an intergovernmental nature, and it is

²²⁰ E. Gellner, *Nations and Nationalism* (Blackwell, 1983) 3–5. For an informative review of the nature of nationalism see S. Reicher and N. Hopkins, *Self and Nation* (Sage, 2001) 1–27.

²²¹ EC action should only be taken insofar as the objectives of the action cannot be sufficiently achieved by Member States acting unilaterally, Article 5(2) EC. See Protocol no 30 to the EC Treaty on Subsidiarity and Proportionality, para 5.

²²² C. Offe, *Modernity and the State: East, West* (Polity, 1996) 7. The best book on the emergence of the sovereign State is H. Spruyt, *The Sovereign State and Its Competitors: A Systems Analysis* (Princeton University Press, 1994). See also M. Mann, 'The autonomous power of the state: its origins, mechanisms and results' (1984) 25 *European Journal of Sociology* 18. This was characterised 'as the most crucial and unique phenomenon of the Western State'. M. Weber, *The Theory of Social and Economic Organization* (ed. Talcott Parsons) (Free Press, 1964) 337.

²²³ P. James, *Nation Formation* (Sage, 1996) 11–13.

²²⁴ P. Taylor, 'The state as container: territoriality in the modern world-system' (1994) *Progress in Human Geography* 151; J. Hobson, 'The historical sociology of the state and the state of historical sociology in international relations' (1998) 5 *Review of International Political Economy* 284.

²²⁵ Articles 296 and 297 EC.

²²⁶ Articles 39(3), 45, 55 and 68(2) EC, 33 and 35(7) TEU.

²²⁷ Although this does not seem to be the case in relation to Article 68(2) EC where Court of Justice review is precluded.

²²⁸ In only three instances has the Court failed to accept a security argument when posed by a Member State. Case 222/84 *Johnston v RUC* [1986] ECR 1651; Case C-347/88 *Commission v Greece* [1990] ECR I-4747; Case C-398/98 *Commission v Greece* [2001] ECR I-7915.

²²⁹ Article 31(e) TEU.

explicitly provided that they shall neither affect Member State's law and order responsibilities²³⁰ nor permit the Court of Justice to rule on the exercise of these responsibilities.²³¹ In addition, it is true, a number of specific norms require criminal sanctions to be applied if they are breached.²³² Yet the intrusion of EC law is limited to issues which are discrete and delinked from broader questions of security, with the Court of Justice only intervening in those cases where Member States refused to apply any sanctions at all.²³³

A similar pattern is present in the field of external security. The development of a Common Foreign and Security Policy is largely concerned with capacity-building—enabling Member States to achieve through collective actions measures that are not possible individually. It is not concerned with restricting a Member State's external security policy. To that end, it only covers certain forms of 'out of area' activities, notably peacekeeping and tasks of a humanitarian nature,²³⁴ and is without prejudice to the 'specific character of the security and defence policy of certain Member States'.²³⁵

Surveillance Powers of the Nation State. Large parts of EU law are concerned with developing the national administration's powers of surveillance over its territory. Member States to reinforce each others' surveillance capabilities through the exchange of information and creation of common data bases. These processes of coordination and exchange of information have been most heavily institutionalised in the creation of Europol, whose duties are to coordinate activities and provide for the exchange of information in the fields of terrorism, drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings, motor-vehicle crime, and other serious forms of international crime,²³⁶ and the Schengen Information System, which provides, *inter alia*, for the maintenance of a database on persons suspected of committing 'extremely serious' criminal offences.²³⁷

Administrative Powers of the Nation State. Whilst the EC law-making machine has passed a large amount of regulation, but it does not challenge the capacity of the Nation State to administer. It has also been mentioned how the implementation and application of EC law tends to benefit central administrative actors at the expense of other players within the national political system through its leading to dynamics of national centralisation.²³⁸ Yet one is also finding a centring of administrative power in areas that are supposedly the exclusive competence of the EC. In competition law administrative power is now being transferred back to the national authorities,²³⁹ and monetary union is administered largely though national central banks acting within the

²³⁰ Article 33 TEU.

²³¹ Article 35(7) TEU.

²³² Recent examples include Directive 2001/18/EC on the deliberate release of genetically modified organisms into the environment, OJ 2001, L 106/1, article 33; Directive 2000/30/EC on the roadworthiness of commercial vehicles circulating in the Community, OJ 2000, L 203/1, article 10; Regulation 1338/2001 on counterfeiting of the euro, OJ 2001, L 181/6, article 6(2).

²³³ Case 68/88 *Commission v Greece* [1989] ECR 2965; Case C-265/95 *Commission v France* [1997] ECR I-6959.

²³⁴ Article 17(2) TEU.

²³⁵ Article 17(1) TEU. See also the amended Article 17(3) TEU following the Treaty of Nice.

²³⁶ OJ 1995 C 316/1, especially Articles 2, 7 and 8. See also Council Decision of 3 December 1998, OJ 1999, C 26/42.

²³⁷ 1990 Convention Implementing the Schengen Agreement of 14 June 1985 Article 99, OJ 2000, L 176/1.

²³⁸ T. Börzel, *op. cit.* note 124 *supra*.

²³⁹ National courts and competition authorities are therefore to be given responsibility for the daily administration of EC competition law with the Commission stepping back from having predominant

aegis of the ESCB.²⁴⁰ For better or worse, the late 1990s has also witnessed a move away from a 'Europe of the Regions' with moves to curb processes where EC Institutions have sought to cultivate 'subnational' or regional actors.²⁴¹

Fiscal Powers. Fiscal powers, which include both the power to levy and distribute taxes, are inexorably linked to the development of the administrative state as permanent revenue rather than ad hoc charges became necessary to support it. The power to tax became centrally associated with State prerogatives, it was something enjoyed by '*raison d'Etat*'. Similarly, with the advent of liberalism, the right to participate in the process of tax-making ('no taxation without representation') and to be taxed 'impartially, became something that was seen as central to national citizenship.²⁴² Whilst the EU has curbed both the levying and distribution of taxation, the nature of the curbs is that have been limited to securing precise objectives, notably the single market and EMU. As the Commission acknowledged in its most recent Communication, these constraints do no more than place broad limits on a political norm, which is that choice of levels of public expenditure and tax systems is for Member States.²⁴³

(ii) *The Symbols of the National Community*

The European Union has in no significant manner problematised the taken-for-granted qualities of the national community as the central form of political community. Member States are free to determine the conditions and basis of nationality, the building blocks of that community.²⁴⁴ Beyond this, the central symbols of nationality, be these civic or cultural, are also left untouched. EU law is not to prejudice national citizenship rights, the central civic symbol.²⁴⁵ Participation in the administration is something a Member State can reserve for its own nationals where the powers in question 'safeguard the general interests of the State'.²⁴⁶ National elections, still the central electoral process in all Member States, are something that can be reserved for a State's own nationals.²⁴⁷ In relation to ethno-cultural values, whilst EU cultural policy dedicates itself to the development of European cultural dimension to that, central to this is the protection of the cultures and cultural objects of national States that are classified as 'national treasures'.²⁴⁸ Standards of ethics, the binary code of any politico-moral

responsibility for the giving of negative clearances or individual exemptions, Regulation 1/2003/ EC implementing Articles 81 and 82, OJ 2003, L 1/1.

²⁴⁰ Article 105(2) EC, Protocol on the Statute of the European System of Central Banks and of the European Central Bank, article 3.

²⁴¹ On this see J. Sutcliffe, 'The 1999 Reform of the Structural Fund Regulations: Multi-level Governance or Renationalization?', (2000) 7 JEPP 290.

²⁴² A. Menéndez, *Justifying Taxes: Some Elements for a Theory of Democratic Tax Law* (Kluwer, 2001) 91–101.

²⁴³ EC Commission, *Tax Policy in the European Union—Priorities for the year ahead*, COM (2001) 260 final, 9.

²⁴⁴ Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239; Case C-179/98 *Mesbah* [1999] ECR I-7950.

²⁴⁵ Article 17(1) EC.

²⁴⁶ Case 149/79 *Commission v Belgium* [1980] ECR 3881.

²⁴⁷ Article 19 EC only confers electoral rights for EU citizens for municipal and European Parliament elections.

²⁴⁸ Directive 93/7/EC on the return of cultural objects unlawfully removed from the territory of a Member State, OJ 1993, L74/74 as amended by Directive 96/100/EC, OJ 1997, L 60/59 and Directive 2001/38/EC, OJ 2001, L 187/43, article 1; Regulation 3911/92/EEC on the export of cultural goods, OJ 1992, L 395/5, as amended by Regulation 974/2001/EC, OJ 2001, L 137/10, article 2(3).

community, are seen as something that is developed essentially at a national rather than a European, regional or local level. Thus both the case law of the Court of Justice and EC secondary legislation grants Member States a special margin of appreciation and treads carefully around any national legislation that is seen as institutionalising national ethical standards.²⁴⁹ This ethos is reflected in the practice of national courts where they feel that EC law trespasses too explicitly on questions of fundamental rights, whose content and compliance they have wished to police themselves.²⁵⁰

b) The Market

The market was not invented by modernity in the sense that private transactions clearly took place before the eighteenth century. Modernity established the market, however, as an autonomous institution with its own densities and logics. This led to its acquiring a number of dimensions. It came to be associated with a number of beliefs, which, over time, has been formalised as legal rights and responsibilities. It was also associated with a number of microprocesses and institutions that enabled it to function. Finally, the market constitutes a plane of action over which the administration acts and on whose behalf the administration is justified in acting.

(i) Free Trade and Competition

Market rationality places certain formal constraints on the types of intervention that both public and private actors can engage in within the market place. As is well-known, this has been 'constitutionalised' by a series of EC Treaty provisions, which entrench three broad principles. The first is a prohibition on protectionism. All the provisions on free movement prohibit measures which discriminate in favour of national markets. They are reinforced by prohibitions against state monopolies or national subsidy schemes which might, likewise, favour domestic production.²⁵¹ A second is of not unduly restricting competition. Restrictive or monopolistic practices carried out by private actors are prohibited and sanctions, and specific provision is made, in similar vein, for public monopolies. Finally, there is an 'economic due process' requirement on Member States. Although the extent of this requirement differs between provisions, their combined effect is to require Member States to demonstrate that the restrictive effects of a large number of regulatory practices are not disproportionate, irrespective of whether these have any protectionist effects or not.²⁵²

(ii) Political Institutions Must Improve the Workings of the Market

The market is also a plane of action which guides administrative behaviour. In this mode it leads public authorities to seek to improve the processes of the market. There is, first, a perennial preoccupation with regulatory reform. Political institutions con-

²⁴⁹ There is a condition which is that there must be no evidence of arbitrary discrimination. On this margin of appreciation see Case 121/85 *Conegate v CEC* [1986] ECR 1007; Case C-275/92 *Her Majesty's Customs and Excise v Schindler* [1994] E.C.R. I-1039; Directive 89/552/EEC, on the pursuit of television broadcasting services, OJ 1989, L 298/23, as amended by Directive 97/36/EC, OJ 1997, L 202/60, article 22.

²⁵⁰ Notes 179–181 *supra*.

²⁵¹ Although Member States can take discriminatory measures to protect certain public goods, a requirement is that these be done for non-economic reasons, thus precluding protectionist measures (see, most recently Case C-398/98 *Commission v Greece* [2001] ECR I-7915. There is an exception for State aids which do envisage measures being taken for regional and sectoral reasons.

²⁵² M. Poiars Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution* (Hart, 1998) 158–164. The extent to which this requirement applies to EC Institutions is unclear, *ibid.*, 76–79.

tinually assess the market effects of their actions and how they could improve market processes. In the EC this can be traced back from the emergence of the 'New Approach'²⁵³ right through to the wide-ranging Cardiff and Barcelona processes seeking to improve European competitiveness²⁵⁴ and the Commission's broad agenda on reforming governance.²⁵⁵ Second, EC legislation is concerned not only with its market effects but also with providing an economy of government. Government is not merely to be efficient but to be as unobtrusive as possible. The proportionality principle, therefore, establishes a strong presumption in favour of private autonomy, so that public intervention will be illegal unless it can be justified in terms of the public good and can be shown to realise its aims in ways that are least restrictive of individual autonomy. EC action, in particular, must be as simple as possible and it must legislate only to the extent necessary, preferring, other things being equal, directives to regulations and framework directives to detailed measures.²⁵⁶ There has been an attempt more recently to transform this process into a science. Since the Göteborg European Council a whole series of studies have emerged which attempt to measure the costs of compliance with EC legislation through the use of Business Impact Assessment studies in order, as the Community sees it, that the Union can move towards simplifying and improving its regulatory environment.²⁵⁷

(iii) *The Protection of the Central Institutions of the Market Place*

Markets also consist of a number of institutions which mediate relations between private parties and between them and the administration. The economic sociologist, Neil Fligstein, has pointed out that any market will have three formal types of institution. It will contain governance structures which define relations of competition, cooperation and how firms should be organised, rules of exchange defining who can transact and the conditions under which transactions can be carried out, and, finally, property rights setting out rules of ownership and who can claim the profits of market transactions.²⁵⁸ Whilst these institutions do not necessarily have to be regulated at a national level, they are valorised and protected by EU law. This deference is most explicit with regard to property rights. These are not merely protected as fundamental norms of EC law, breach of which renders any EC Institutional action illegal,²⁵⁹ but they are conflated with national reserved powers as the EC Treaty states that national systems of

²⁵³ Council Resolution on a New Approach to Technical Harmonisation and Standards, OJ 1985, C 136/1.

²⁵⁴ At Cardiff the European Council committed itself, through their comprehensive structural reform, to improving the efficiency of the markets in labour goods, services and capital, Conclusions of the Presidency of the European Council of 15–16 June 1998, paras 12–26. At Barcelona the European Council pressed for further reform in public procurement and state aids, further simplification of the regulatory environment, and the pressing forward with initiatives on corporate governance and implementation of a Charter for Small and Medium Sized Enterprises. Conclusions of the Presidency of the European Council, 15 & 16 March 2002, paras 15–21.

²⁵⁵ EC Commission, *European Governance: A White Paper*, COM (2001) 428.

²⁵⁶ Protocol to the EC Treaty on Subsidiarity and Proportionality, para 6.

²⁵⁷ Conclusions of the Presidency of the European Council of 15–16 June 2001, para 24; EC Commission, *Simplifying and Improving the Regulatory Environment COM* (2001) 726; EC Commission, *Business Impact Assessment - Best Procedure Project Report: Impact Assessment in Member States*, 26 June 2001, http://europa.eu.int/comm/enterprise/regulation/bia/best_procedure/index.htm (accessed 1 April 2002).

²⁵⁸ N. Fligstein, *An Architecture of Markets: An Economic Sociology of Twenty First Century Capitalist Societies* (University of Princeton Press, 2001) 31–35.

²⁵⁹ Case 44/79 *Hauer* [1979] ECR 3727. See also article 19 of the EU Charter on Fundamental Rights and Freedoms.

property ownership should not be prejudiced.²⁶⁰ Insofar as the Court of Justice has had to rule on national property rights, its caution has been expressed in the somewhat artificial distinction between the exercise of property rights, whose conditions the EC legislature can harmonise and it can regulate to secure market integration,²⁶¹ and the existence or presence of these rights, which is seen as standing outside EC law.

c) *Natural Science*

Perhaps nothing has characterised modernity so strongly as a faith in natural science to act as a discovery process which, if used rightly, can enable human progress.²⁶² Whilst much has been made of the ‘crisis of science’, its continued hegemony is reflected by none of its critics coming up with an alternate schema other than unsatisfactory appeals to ‘common sense’, ‘culture’, ‘local knowledge’ or a general pessimism about the capacity of science. In this, the Union is a very ‘modernist’ set of institutions in that none of these doubts seemed to have entered the internal deliberations of the EU Institutions in a significant way, which are dominated by a concern with the authority of expertise. This concern manifests itself in the institution of comitology and European regulatory agencies. Their authority of these lies in the belief that they will provide a specialised expertise that will improve policy making. The European Environment Agency, for example, describes its mission as being to provide a seamless environmental information system that will assist the Community to improve the environment.²⁶³ In a complimentary fashion, the Commission has used the data provided by the Agency as the central basis informing its 6th Action Programme in the Field of the Environment.²⁶⁴ It is also present in the ongoing concern with improving and systematising the processes of information collection, notably the processes of rationalising and specialising the collection of statistics.²⁶⁵ Perhaps most centrally, the norms of the scientific community are enshrined and become the benchmark of legal validity in many areas of EC law, be they environmental, consumer or health and safety law.²⁶⁶

C *The European Tradition of Relationality*

Relationality emphasises our mutual interdependence. If the European tradition of freedom is an old one, the concept of relationality is embedded far more tightly in the structures and traditions of the European Union itself. In this regard, the European Union has developed three particular visions of accommodation.

²⁶⁰ Article 295 EC.

²⁶¹ This distinction was first introduced in Case 15/74 *Centrafarm v Sterling Drug* [1974] ECR 1147. More recently see Case C-377/98 *Netherlands v Parliament & Council* [2001] ECR I-7098.

²⁶² For an informative if highly critical account see B. de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995) 11–17.

²⁶³ European Environment Agency, *Information for Improving Europe’s Environment* (EEA, 1999) 3.

²⁶⁴ EC Commission, *On the Sixth Environment Action Programme of the European Community: Environment 2010, Our Future, Our Choice* COM (2001) 31. The report is the EEA, *Environment in the European Union at The Turn of the Century* (EEA, 1999).

²⁶⁵ For example, Regulation 410/98/EC on structural business statistics, OJ 1998, L 52/1; Regulation 1165/98/EC on short-term statistics, OJ 1998, L 162/; Regulation 2533/98/EC on the collection of statistical information by the European Central Bank, OJ 1998, L 318/8. At the Barcelona European Council there was agreement to harmonise Eurozone statistics and indicators. Conclusions of the Presidency of the European Council of 15–16 March 2002, para 7.

²⁶⁶ I. Sand, ‘Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilised and Competing Institutions’ (1998) 4 ELJ 271.

There is a commitment, first, to *collective action* either within a political community or through action between political communities or through supranational institutions (new political communities). The European Union has, after all, been used historically as a vehicle to create *new transnational public goods and forms of collective action*, be it a single currency, a European defence policy or an EC environmental policy.

The second dimension goes to *alignment*. Political communities should not impose unnecessary costs on other communities through unilateral action. This could be through free-riding at the others' expense, entering zero-sum games where each tries to undercut the other, or seeking to undermine the other through abuse of asymmetries of power. The two foundations for alignment within the EC Treaty are those of Article 10 EC and mutual recognition. Article 10 EC, the duty of cooperation, concerns institutional alignment. In areas of mixed competence it requires all institutions of national government and all EC Institutions to cooperate in a manner that will facilitate rather than frustrate realisation of the Community's objectives. Such duties specifically include the duty to take account of each other's actions and to provide information which will allow other Institutions to carry out their tasks under EC law.²⁶⁷ Mutual recognition goes, by contrast, to policy alignment. The presumption established that Member States should admit onto their own territories anything lawfully provided or produced elsewhere in the EU unless they can provide legitimate reasons for not doing so to require Member States in the policy mix they administer within their territories to take account of and apply the policies of other Member States.²⁶⁸

The third dimension is that of *supranationality*. Supranationality locates itself as a counterpoint to the structures of nationalism and the nation-State. It does not deny the centrality of national processes, but seek to interrogate, vision and police them. Its structures are imminent within the European Union, first, in the latter acting as an alternative structure of government to national government. It does not simply provide new public goods, but also new ways of doing things. It is therefore a point of political experimentation and comparison. Second, it is present in the EU's policing of the boundaries of exclusion in national communities. The most evident example of this is the principle of mutual recognition. Mutual recognition, as a political principle, embodies two philosophies. Member States should not exclude others from the benefits of their political settlement for no good reason and they should strive to see what they have in common with strangers rather than what divides them.

Supranationality has been conceived in two ways, each of which dovetails into the other. One sees supranationality as generating a series of alternate *values* to that provided by the local community. Joseph Weiler sees the national/supranationality as a dichotomy mirroring the communitarian/liberal dichotomy. If the national state provides a set of collective identities and feelings of belonging, supranationality derives its power from providing a series of universal ideals which can both inform and police national action.²⁶⁹ The other sees supranationality's force as being derived from protecting a series of *interests*. Maduro, for example, argues that the notion of national community is structurally

²⁶⁷ Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369; Opinion of Advocate General Fennelly at para 55 in Joined Cases C-15/98 & C-105/99 *Italian Government & Sardegna Ferries v Commission* [2000] ECR I-8885.

²⁶⁸ This is no longer merely a silent assumption. Recent developments within the Commission and the Court make it clear that all legislation must explicitly include mutual recognition clauses. Case C-184/96 *Commission v France* [1998] ECR I-6197; EC Commission, *Mutual Recognition in the Context of the Follow-up to the Action Plan for the Single Market* COM (1999) 299, 11.

²⁶⁹ J. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) especially 332–348.

disposed to privilege members of that community over others. Supranationality's purpose lies in its protecting the interests of others from not being represented or taken into account, particularly when decisions are taken which affect them.²⁷⁰

Until recently supranationality existed within the European Union in a rather stymied form. As a locus of political experimentation, it was concerned above all with ensuring more efficient regulation.²⁷¹ As a policing principle, it was operationalised mainly in the field of the economic freedoms, concerned with securing trade liberalisation rather than the re-imagining of political communities. In recent years, the forms of experimentation have diversified. The EC competencies in the fields of public health, education, culture, consumer policy, set out at Maastricht, can not lead to an EC harmonisation of laws and have centred, instead, on the development of networks and the promotion of mutual learning. Recent measures in the field of education, for example, networks are established to consider what is 'best practice' in school quality evaluation²⁷² and e-learning.²⁷³ In health one finds information networks established to disseminate knowledge and experience about rare diseases,²⁷⁴ pollution-related diseases,²⁷⁵ the risks of exposure to electro-magnetic fields,²⁷⁶ the monitoring and screening of cancer.²⁷⁷ In the field of culture there are Council Resolutions on fostering awareness within Member States of architectural design and urban cultures,²⁷⁸ developing best practices on cinematic restoration²⁷⁹ and conditions for professional artists.²⁸⁰ The advent of Open Method Coordination has led to a further exponential increase in the forms of mutual learning that take place and the areas in which they occur, putting in place, as it has, systems of national cross-evaluation, benchmarking and monitoring in the fields of poverty and social exclusion, pension reform, small business development, education and training systems, research and development, and the information society.²⁸¹

The other manner in which supranationality has diversified is in the range of political communities it recognises and polices. The most striking developments have been the two recent Equal Opportunities Directives, Directive 2000/43/EC prohibiting discrimination of grounds of race or ethnic origin²⁸² and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.²⁸³ The combination of these Directives and the earlier Directives promoting equal treatment

²⁷⁰ The starting point on this interpretation is M. Poiares Maduro, *We, the Court: The European Court of Justice & the European Economic Constitution* (Hart, 1998) 166–174.

²⁷¹ The subsidiarity debate has, for example, been subsumed in the broader question of the quality of its law-making that intervention. See EC Commission, *Better Law Making 2001* COM (2001) 728.

²⁷² Recommendation 2001/166/EC, OJ 2001, L 60/51.

²⁷³ Council Resolution of 13 July 2001 on e-learning, OJ 2001, C 204/3.

²⁷⁴ Decision 1295/1999/EC, OJ 1999, L 155/1.

²⁷⁵ Decision 1296/1999, OJ 1999, L 155/7.

²⁷⁶ Decision 1999/519/EC, OJ 1999, L 199/59.

²⁷⁷ Decision 646/96/EC, OJ 1996, L 95/9.

²⁷⁸ Council Resolution of 12 February 2001, OJ 2001, C 73/3.

²⁷⁹ Council Resolution of 26 June 2000, OJ 2000, C 193/1.

²⁸⁰ Council Resolution of 23 July 2001, OJ 2001, C 213/9.

²⁸¹ For analyses of developments in the field of social policy see, in particular, C. de la Porte and P. Pochet, 'Social Benchmarking, Policy-Making and the Instruments of New Governance in the EU' (2001) 11 *Journal of European Social Policy* 291; D. Trubek & J. Mosher, 'New Governance, EU Employment Policy and the European Social Model' *Jean Monnet Working Paper 15/01*.

²⁸² OJ 2000, L 180/22.

²⁸³ OJ 2000, L 303/16.

between men and women²⁸⁴ is that EC law serves to protect a wide range of identities by prohibiting discrimination on the grounds of sex, race, ethnicity, religion or belief, age, disability or sexual orientation. The identities protected are also more wide-ranging than in most Member States. The valorisation and recognition of this wide variety of identities generates a new politics of understanding what mutual recognition of each other's freedom and equality entails. For a feature of the process of recognition is that it affects the self-understanding of all who participate in this process, both of those doing the recognising and those being recognised. Heterosexual men have to relativise and relocate their sexual identity in recognising homosexual identities. Men have to reconsider the division of labour between themselves and women in applying the norms of equal treatment between the sex. Hegemonic groups have to re-examine their own cultural histories in explaining why certain racial or ethnic groups have come to be structural disadvantaged. This process has been further enlarged by the arenas of its operation being extended in the case of race and ethnicity, at least, beyond the workplace to a whole array of socio-economic institutions—housing, education, the supply of goods and services, membership of professional organisations or trade unions.²⁸⁵

These academic and legal developments have led to supranationality no longer concerning itself with merely teasing and policing the boundaries of the national community, but of all kinds of grouping—those defined by sex, race, ethnicity, age, sexual orientation, physical aptitude, religion. It is a point of re-imagining and self-questioning for political communities where they reconsider themselves in the light of broader processes, values and interests.²⁸⁶ In this it acts as an imaginary defining and describing the limits of a political community, but also instilling a permanent element of incompleteness and discrepancy into that vision and committing members of that community to invest in social visions other than their own about the political settlement.

D The European Tradition of Self-Government

Government by the people for the people has never been associated with direct democracy in the European tradition, but rather with representative government. On the one hand this expresses itself as a relationship between a government and its subjects. The representative is somebody who is independent from her constituency, but is none the less, authorised to act on its behalf and is accountable to it, and is therefore subject to a number of formal mechanisms of accountability and authorisation—elections, judicial review, impeachment etc.²⁸⁷ On the other hand, representation is concerned with the establishment of a collective political subject (political community) which

²⁸⁴ Directive 75/117/EEC relating to the principle of equal pay for men and women, OJ 1975, L 45/19; Directive 76/207/EEC on the principle of equal treatment between men and women, OJ 1976, L 39/40; Directive 79/7/EEC on equal treatment between men and women in social security, OJ 1979, L 6/24; Directive 86/378/EC on equal treatment in occupational social security schemes, OJ 1986, L 225/40 as amended by OJ 1997, L 46/20; Directive 86/616/EEC on equal treatment between men and women engaged in a self-employed activity, OJ 1986, L 359/56; Directive 96/34/EC on parental leave, OJ 1996, L 145/4 as amended by OJ 1998, L 10/24.

²⁸⁵ Directive 2000/43/EC, note 282 *supra*, Article 3(1).

²⁸⁶ This is also present in the more recent literature on supranationality. Somek conceives of it as a general anti-discrimination principle concerned with securing individual liberty. A. Somek, 'On Supranationality' (2001) 5 *EIOP* 3. See also O. Gerstenberg, 'The New Europe: Part of the Problem—or Part of the Solution to the Problem?' (2002) 22 *OJLS* 563.

²⁸⁷ H. Pitkin, *The Concept of Representation* (University of California Press, 1971) Chapter 4.

transcends and is different from the aggregate of private interests within a society. Representatives are therefore *public* figures rather than private actors who act on behalf of the community they represent.²⁸⁸ This community is represented in a unitary manner which dissolves internal differences within the community ('the people', the 'nation') and presupposes a unity of ends ('the will of the people', 'the national interest'). In this, it becomes a construct which enables the political system to manage and resolve conflicting interests within society.²⁸⁹ Representation thereby facilitates the establishment of public reason in that it enables the management of conflict through appeals to generalisable and collective goals, and delegitimises any action that is nakedly sectarian or majoritarian in nature.

The European tradition of self-government would seem to offer little on this basis to deliberative accounts. There is no collective sense of a European 'We' providing adversely affected members of the polity with a reason to believe that measures are being taken on their behalf and therefore to support such measures.²⁹⁰ The absence of a notion of European Community has led to an institutionally decentred system, whereby different institutions representing different interests and constituencies hold each other to account. The difficulty with this is that there is no possibility for interests and citizens to hold the overall performance of the process to account and no possibility for European form of public reason to emerge, which will conciliate different interests. The demise of representative self-government within the European Union process provides a justification for the emergence of alternative structures of participatory government. Yet its traditions suggest that if these are to emerge as form of political self-government, three features must be present.

E The Presence of Political Community

Any decision must be taken on behalf of and over some political community. It is the fact that a decision is a collective decision gives it a public rather than private dimension. This political community must, moreover, be that is affective in nature in that it expresses and establishes feelings of cross-allegiance and mutual recognition between its members. The model set out, it will be suggested, does that.

Participatory processes on polity-building have been sited in the national parliaments, and therefore exercised on behalf of the national community, albeit in a manner that acknowledges its European nature. Deliberation takes place over measures that are to be taken over the national territory and in the national interest. The position with regard to problem solving is more complex. The basis for EC legislation will usually exist in the beliefs of some community of practice, but such legislation must justify itself and not oppress other communities of practice. To that end, it provides three points at which the legislation may be held to account or must be justification. At adoption, the legislation must set out why it does not excessively intrude on some national interest and give a statement of reasons on this that is subsequently binding. At transposition, the administration must carry out a Social Impact Assessment and justify itself on the basis of that assessment. Finally, at enforcement, collective interests can challenge the legislation, and ultimately have it disapplied, if it can be shown that it

²⁸⁸ *Ibid.*, Chapter 5.

²⁸⁹ This paragraph owes an intellectual debt to M. Loughlin, 'Representation and Constitutional Theory' (mimeo).

²⁹⁰ F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999) 6–12.

violates some collective identity without bringing sufficient benefits to the territory in question.

F The Requirement of Public Reason

A requirement of a political decision is that it couched in terms of public reason, in particular that it refers to generalisable rather than private interests. In the process outlined above this happens through parties having to couch their arguments and measures be justified at two levels of discourse. The value of any argument would be measured, first, against how it contributes to any process of polity-building, problem solving or enlargement of political community. It would also be evaluated against how far it meets the European condition. That is to say that it would justify itself in accordance with the European traditions of overcoming, modernity and relationality, and illustrate how it confronts the demands made by each of these. Each of these levels of discourse imposes constraints of a public nature. Yet how these are interpreted is a matter for the political community deliberating the matter.

G The Requirements of Accountability and Authorisation

Representation suggests, finally, that any 'self-governing' political process must have mechanisms of authorisation and accountability. The outlined model provides for 'authorisation' by vesting final authority in all processes in that political community which has the greatest affective ties for the subjects of the process and over which they feel greatest collective ownership. Accountability, by contrast, can only be provided by judicial control of the terms of discourse. In particular, subjects of a decision should be able to challenge any decision which does not allow interests significantly affected by it to participate and which does not justify itself in a sufficient manner in terms of the two layers of discourse described above.

X Conclusion

In all this, European talk is no longer decontextualised and ephemeral. As a form of reorganising the European polities, it suggests a revisiting of some of the sacred cows of both the European Union and the national settlements. But that is a feature of talk. It reorganises and suggests new realities. These may be better or they may be worse, but they are invariably different from the old realities. For those who want a European Union ultimately not too dissimilar, however, from the one we have now, but one that can attach the label 'legitimate' to its breast, it is perhaps better not to suggest that we organise it around discussion, as the outcomes are likely to be very different from those anticipated. For the author, the benefits of talk justify the risks associated with this process. This is simply because he believes nobody should have intellectual ownership over the European condition. There is a perversion of that condition where national governments are required to accept legislation that is not in the interests of their individual societies, where dominant groups are allowed to distort the domestic political settlement or engage in unequal reallocative processes, or where individuals are required to accept and perpetuate individual injustices—all for the sake of 'Europe'. This has been a recurring property of the integration process not because of any malignant spirit, but because 'Europe' has been associated with one narrow set of institutional processes, which, with the best spirit in the world, are inevitably going to perpetuate local injustices for the sake of the greater good.

Europe should rather become a process of justification in which the three practical tasks of politics—polity-building, problem solving and the making of political community—are debated and resolved around the four values that have underpinned the development of politics as a productive process—those of self-overcoming, modernity, relationality and self-government. Faith should be had in the capacity of all the political processes throughout Europe—be these supranational, national, regional, local or quasi-public—to mediate political conflict through the application and justification of these norms. Indeed, historical evidence provides nothing to suggest, as integrationists since Monnet would have us believe us, that supranational institutions are blessed with any greater political integrity than their counterparts. There is a further reason why ownership of the European condition should be liberated. It is do with the boundaries of Europe. If ownership of its meaning is released, gradually the dreadful territorial associations with the European ideal might recede. It might eventually retrieve its early heritage as a set of political beliefs to which any state or political system can accede rather than simply being a hollow space between the Atlantic and the Urals.

Appendix

Teleology	Performative structures (goal of debate)	Institutional conditions (organisational context)	Epistemic conditions (common norms of debate)
Polity-building	Creation of institutional framework that visions, coordinates and legitimates political behaviour within the European Union	<p>Central Site: National Parliaments</p> <p>Conference of Parliaments: Deliberations in national parliaments every 7 years on policies of EU in which they will participate. European Constitutional Council to police competencies.</p>	<p>1. European tradition of freedom</p> <p>Freedom as overcoming Privileging of individual singularity</p> <p>2. Respect for institutions of modernity</p> <p>Nation State: National administrative internal and external security powers, fiscal powers and administrative capacities. Central national civic and ethno-cultural values</p> <p>Market: Market Principles—anti-protectionism, open competition and economic due process. Improvement of working of market Market institutions—governance régimes, rules of exchange and property rights</p>
Problem solving	<p>Application of knowledge to improve and control socio-economic and environmental problems</p> <p>Enlargement of horizons of understanding of problems</p> <p>Resolution of conflicts between and within groups caused by application of this knowledge</p>	<p>Central Site: ‘Communities of Practice.</p> <p>EC law-making All documents to be disclosed that lobby for legislative reform Duty to hold public hearings imposed on all legislative and quasi-legislative processes. Article 10 EC amended to impose obligation on EC legislature to give formal reasons as to why legislation not compromise national interests.</p>	

Teleology	Performative structures (goal of debate)	Institutional conditions (organisational context)	Epistemic conditions (common norms of debate)
<p>Negotiation of political community</p>	<p>Mutual recognition of members' individuality and equality</p> <p>Construction of a collective.</p> <p>Continual renegotiation of membership rights and boundaries of collective</p>	<p>Transposition of EC Law Duty to consult with other national administrations on their practices and forms of transposition. Social Impact Assessment to be carried out which identifies beneficiaries and losers of transposition. Statement of Reasons given as to how impacts on those disadvantaged by measure to be minimalised.</p> <p>Renegotiation of supremacy of EC law: Supremacy of EC law process of justification in which norm of EC law balanced against norms of local collective identities</p> <p>Sites: Any formal setting in which the EU Charter imposes responsibilities on parties</p> <p>Duty of mutual accommodation: Parties to negotiate mutual recognition of each other claims using terms of discourse of the other explaining why their claims do not compromise the other's claims</p>	<p>Natural science</p> <p>3. Relationality</p> <p>Commitment to collective action</p> <p>Alignment: Political communities not impose unnecessary costs on each other.</p> <p>Supranationality: Interrogation of community processes in light of 'outsider' interests and values</p> <p>4. Self-Government</p> <p>Decision must betaken on behalf of a political community.</p> <p>Decision must be couched in terms of generalisable rather than private interests.</p> <p>Decision-making procedures must be accountable and authorised.</p>