

Introduction: European Democracy in Transformation

The history of the European integration project is replete with conflict and rivalry. Deadlocks and stalemates have however been overcome and it has sustained a rapid growth and development, in particular throughout the 1990s. The European integration process is characterized by historians as *revolutionary*,¹ but is not universally embraced. Critique flourishes and support of the European Union (EU) has been declining in parts of Europe. Disagreement stems from different conceptions of the EU qua polity; different conceptions of the nature and direction of the integration process; and different conceptions of democratic legitimacy. Notwithstanding recent confusion and disagreement about its nature and telos, the EU has developed into a political union with extensive competencies and powers. A political order that is distinct from its constituent parts has arisen, one which has transformed the Westphalian truism of sovereignty. Classical international law guaranteed the equal status of sovereign states and the state's independence from outside intrusion. In Europe the nation-states have managed to domesticate international relations among themselves. By institutionalizing supranational dispute mechanisms, a pacific settlement of conflicts is enforced. Today war seems unthinkable among the large European states.

The European integration project was a reaction to a belligerent past. It originated in the ruins of the Second World War, aiming at ending nationalist aggression and inter-state war. From the very outset this was a normative project about the (self) containment of Germany, ending war in Europe, achieving stability and peaceful coexistence. This project has resulted in a new political order without historical precedent, and one which has committed itself to democracy. The European Union has embraced democratic principles, yet it falls short of fulfilling these principles itself; hence the *democratic deficit*. This problem is not confined to the institutional arrangement at the European level as the EU is a complex multi-level entity that impinges on the democratic character and performance of the member states and even on affiliated non-members. This means that we cannot establish the member states' democratic legitimacy without properly taking the effects of the EU into account.

This book deals with the puzzle that democracy, which hitherto has existed only on the nation-state level, now is expected of the EU to appear in a post-national

¹ See Hitchcock 2003: 436. See also Juidt 2005.

union. What does this mean in theoretical terms, can it be realized at all, and if so, how far has European integration proceeded along this developmental path? The book purports to contribute to democratic theory under conditions of globalization and intensive *interdependence* as well as to the understanding of the EU from a democratic point of view. The EU is the most advanced experiment in democracy beyond the nation-state, and one which challenges widely held assumptions about the preconditions for democracy.

The debate on supranational democracy in Europe hinges on the fact that there is something to legitimize, that is, that the EU is not merely an intergovernmental organization controlled by the nation-states. The EU at present consists of twenty-seven member states and influences states and citizens directly. The overall claim in this book is that the EU can no longer be understood as an international organization whose legitimacy derives solely from the member states but should be seen instead as *a polity in its own right* with direct links to the citizens. The topicality of the question as to whether there can be democracy beyond the nation-state is sharpened by the fact that Europeanization and globalization are frequently held to undermine national democracy. But can post-national democracy be realized at all?

It goes without saying that democracy is always unfinished. It is a contested concept and an ideal that can never be fully realized. We can therefore only talk about *democratization* of established power structures as a measure of democracy. Thus, the end product is not democracy *tout court* but a state of affairs that complies better with proper standards than the present state of affairs in Europe. By democratization we generally mean curtailing the level of domination in society and increasing the possibilities for collective self-determination. In line with the theory of deliberative democracy, democratization is here further specified to mean increasing the possibilities for offering the citizens justifications for the power structures they are subjected to.

In this introduction, I will start by spelling out some of the supranational aspects of the multi-level constellation that makes up the European Union, which distinguish it from an ordinary international organization. Then, I outline the presumption about democracy as the legitimation principle of power and discuss why constitutionalism rather than state sovereignty comes to the fore in a post-Westphalian order. Thereafter I revisit the debate on European democracy, which I group into three different positions. Lastly, I present an overview of the chapters making up the rest of the book.

BEYOND SIMPLE INTERGOVERNMENTALISM

The new political order was brought about in a cooperative and voluntary manner and through the means of enhanced economic collaboration. Starting with the Coal and Steel Community (ECSC) in 1952 between Germany, France, Italy, and the Benelux countries, it has emerged into a forceful political entity. This was the first time powers were delegated to a supranational organization—the High

Authority, which later became the powerful European Commission—that took hold over a policy area of vital interest to the nation-states. Coal and steel are what weapons are made from and should therefore be reciprocally controlled. Or as the Schuman declaration (1950) put it:

By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.

European integration was brought about by bold initiatives from committed European leaders and supported by stakeholders in different countries. In one perspective it has been an elite-led project, and one confined to cooperation in areas of mutual interest. Conflicts with regard to the expansion of the Communities' competences were resolved through complex rounds of bargaining at Intergovernmental Conferences (IGCs). At late hours and in closed-doors settings deals were made and bargains struck on Treaty changes.

In another perspective, the focus is on Community-established institutions and procedures for identifying and solving common problems on their own. Autonomous cooperation freed from political bargains and political struggle for power has also been a conspicuous feature of the European integration process, creating a basis for increased understanding, more compromises and progress. Trust and faith in the integration process, which has been fostered through continuous contact and cooperation in more or less independent problem-solving sites, has prepared the way for new initiatives—for further deepening: from the Paris (1951) and Rome (1957) Treaties, through the Single European Act (SEA) (1986), Maastricht (1992) and Amsterdam (1997) to the Nice Treaty (2001), and further to the Laeken Declaration (2001), the rejected Treaty establishing a Constitution for Europe (2004) and the ensuing Lisbon Treaty (2007). Through these processes of steadily firmer and more institutionalized forms of cooperation, the European nation-states have been transformed. They have been 'Europeanized'. The nation-states have voluntarily circumscribed their sovereignty and reduced their autonomy. In many areas the nation-states have surrendered their veto powers.² As noted by the European Court of Justice (ECJ):

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.³

² They have accepted restrictions on their sovereignty not only for the sake of cooperation with other states but also for the establishment of a 'legal system of peace and justice between nations' as it is stated in the Italian Constitution, Article 11. Other European states' constitutions contain similar paragraphs.

³ Case 6/64, *Costa v Enel*.

The supranational character of the legal structure of the EU started with the acceptance of a constitutional reading of the founding treaties, already in the 1950s, and explicitly in the 1960s,⁴ which transformed the European Economic Community (EEC) from an international regime into a quasi-federal legal system based on the precepts of higher-law constitutionalism. This was generated by the ECJ in the combined doctrines of *direct effect*, which affirms the full legal character, under certain conditions, of EC norms; and *supremacy of Union law*, stating that national norms must give way to Community ones when an irreducible conflict arises within the scope of application of the Treaties. This has been coupled with the growth of the number of EU provisions and Court rulings, where the Court acts as a trustee of the Treaty and not as an agent of the member states. The EU appears to have reached a stable political form based on a *material constitution* (Menéndez 2004).

The upshot is that European citizens are subjected to decisions that have not been decided unanimously among the states but by qualified majority vote in the Council. A state rights clause is non-existent in the Treaties. In its place there is a subsidiarity clause claiming that ‘decisions are taken as closely as possible to the citizen’, with little legal bite (Somek 2008). Slowly, the European Community emerged into a supranational organization with legal personality and a legal system based on the precepts of higher-law constitutionalism. It has materialized into a *polity in its own right* and one with a democratic vocation.

Democracy came to the fullest expression through the decision in 1976 to elect the representatives of the European Parliament (EP) by direct universal suffrage, making it the only genuinely supranational parliament in the world. Further, the Treaty of Maastricht established European Union citizenship, and this as well as other individual rights make up critical components of democracy as self-legislation. In the Amsterdam Treaty, the commitment to democracy was entrenched. The EU is more than an international organization forged on the basis of the mutual interests of the member states. It is also inadequate to see the process of conflict resolution *solely* as a result of threat-based bargaining, because how can unequally situated governments, each in pursuit of its own self-interest, bargain rationally with one another, and yet arrive at a system with some form of democratic imprint? The EU, unlike an international organization, carries out its affairs not through diplomacy and crude bargaining, but through a set of institutions and procedures. The European Treaties have the function of a constitution as they establish both a unitary European citizenry distinct from national ones and a set of autonomous European bodies: the European Commission, the European Council, the Council of the European Union, the European Court of Justice and the European Parliament, which make European-wide law and are devoted to the Union itself.

The system is endowed with an *authoritative dispute resolution mechanism*—the ECJ, which bases its rulings on recognition of the primacy of Union law. The

⁴ See the leading cases: 26/62 *Van Gend en Loos* and 6/64 *Costa v Enel*. On the supranational character of EC law, see Weiler 1999a; Alter 2001; Stone Sweet 2004.

EU is, thus, an entity with competences and capabilities of its own. Moreover, it has in recent years undertaken steps to reduce its democratic deficit. All legal persons, and not only states, have judicially enforceable rights, and legitimacy established through domestic channels, through national democracy, has been supplemented with direct channels of influence. The European Parliament has obtained more power and majority vote has replaced unanimity as the means of arriving at decisions in the Council in most policy fields. Moreover, the Charter of Fundamental Rights of the European Union (2000), as *consolidation* of existing law, applies to all citizens of Europe and strengthens the protection of the citizens at the supranational level. Hence, the EU is a Union both of *states* and of *citizens*.

The European Union is a novel type of entity whose principled and constitutional status is ambiguous and incomplete and whose underlying telos is not clear. It is burdened with legitimacy deficits with regard to structure, process and project. *Structural* problems refer to the EU's weakly developed legislative structures, including the lack of European political parties, a proper public sphere, a cumbersome and executive-driven policy process, and an 'incomplete' constitutional arrangement imbued with an inadequate separation of branches of powers. The *process* of integration is widely criticized, although the critics often do not agree, nor do they emphasize the same problems. For instance, some critics are concerned with costs and efficiency, others with technocracy and lack of popular participation and due process, and yet others with the absence of a sense of community and identity. Also as a *project* the EU is criticized. Is it a good idea, what are its merits and whose interests does it serve? Some denounce the EU for its lack of ambition, others for its overly strong ambition. In the member states, many are sceptical concerning the Union's policies. This distrust is manifest not only in the low turnout in the elections to the European Parliament, but also in the loudly voiced opposition of anti-modernization and anti-globalization groups. Such scepticism was revealed in the popular rejections of the Constitutional Treaty (CT) in France and the Netherlands in 2005 and of the ensuing Lisbon Treaty in Ireland in 2008. With the treaty-reform process coming to a halt, many commentators have been prompt to assert that the European Union is in crisis. This stands in stark contrast to the euphoria with regard to the 2004 enlargement of the Union to ten new countries from the East and the South and with regard to the Constitutional Treaty signing ceremony in Rome later the same year.

IN SEARCH OF JUSTIFICATION

The problem of the legitimacy deficit of the EU raises the question of *the nature of the entity*, which values it promotes and how it can be justified. In this book, I start from the premise that the EU exists as a powerful entity; it is a system that makes authoritatively binding decisions and exerts influence over its subjects. Such an order of dominance is in need of justification. In particular, it requires a set of procedural norms through which legitimacy can be claimed and contested.

I am not concerned with why the EU is, or whether it should be, in place. Rather, given the fact that it has been brought into existence and affects the interests and identities of European citizens and states in a profound manner, the question is whether it can achieve legitimacy, and on what grounds. A European basic structure exists—with economic, political, legal, and cultural institutions involving citizens in comprehensive schemes of social cooperation, the effects of which are far-reaching and for the most part unchosen by the people.

The point of departure is that the EU is a *large-scale experiment* searching for binding constitutional principles and institutional arrangements beyond the mode of rule entrenched in the nation-state. State power is being domesticated by supranational law, and the only possible legitimacy basis for this law, I contend, comes from the constitutional developments in Europe that emerged in the wake of the French Revolution, and which for more than 200 years now have contributed massively to both the creation and stabilization of nation-states. It was in *The French Declaration of the Rights of Man and Citizen* (1789) that for the first time the members of a European polity were conceived of as *social and political equals*. In the republican tradition constitutions are arrangements for respecting the equality and the freedom of the individual in the realization of the idea of popular self-government; or as it is stated in §6 of the same declaration:

Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives, in its formation; it must be the same for all, whether it protects or punishes.

The argument in this book is that it is this notion of a democratic sovereign—a self-governing polity—that animates the criticism of the integration process, the accusation of an elitist and technocratic driven process, as well as many of the reforms undertaken to meet the criticism. In democratic states there is a presumed link between the normative validity of a political order and the social acceptance of this order. One therefore can expect that when integration has reached a point where the supranational institutions wield influence over the citizens and the states—when the EU is not merely an international organization—there is a requirement of democracy because this is the only justifiable standard of political legitimation available in Europe.

I make two claims. First, that democracy (however understood) is the only morally sound principle for the legitimation of political domination. The EU needs legitimation and such can be accomplished only through institutionalizing democratic rights and procedures through which the addressees of the laws can exert influence and put decision-makers to account. At a minimum these entail equal political rights, civil liberties, freedom of expression, and principles for accountability. Second, that the reform processes of the Union testify to the emergence of a post-national union with democratic features. The latter is a contentious claim that needs further empirical investigation to be corroborated. My argument is that the political system of domination already in place at the European level requires and aspires to direct legitimation—from the citizens

themselves; and not only indirect—derived from the member states. This can be achieved only by making the EU into a democratic polity.

In particular since the establishment of a directly elected European Parliament in 1979, and after the hard-won referenda over the Maastricht Treaty in the early 1990s, we have witnessed a reform process oriented towards repairing the democratic deficit of the Union. Two conspicuous traits stand out. First, the Charter of Fundamental Rights of the European Union, proclaimed at the Nice IGC in December 2000. The Charter, which made up Part II of the Constitutional Treaty, is in the Lisbon Treaty replaced by a cross reference, which makes the Charter binding and gives it the same legal value as the Treaties.⁵ The Charter of Fundamental Rights lends credence to the notion of the EU as an organization of legal consociates rather than a market. Second, the decision to establish the Convention on the Future of Europe at the Laeken Summit (European Council 2001a), later dubbed the *Constitutional Convention*, which drafted the Constitutional Treaty (ratified in eighteen member states⁶ but rejected in the two popular referenda in France and the Netherlands).⁷ The ensuing Lisbon Treaty is at the time of writing in limbo after being rejected in an Irish referendum in 2008, but expected to come into force in 2010. These two developments are the most important signs that the EU is involved in democratic constitution-making.

One may however ask whether democracy is at all possible beyond the nation-state. Are the resources in the form of a *uniformity of interests* that Tocqueville (1835–40) required; the *mutual sympathy among the populations* that John Stuart Mill (1861) saw as a condition; the ‘*reflexive homogeneity*’ that Claus Offe (2003a) holds to be intrinsically linked to democracy, available at the European level? Or are they at all necessary for post-national democracy? To this date, democracy has relied on criteria that are derived from the nation-state. As there are global and post-national forms of governance, there may be a need for a conception of democracy that is decoupled from the nation-state model.

THE MYTH OF WESTPHALIA

International organizations occupy an uneasy place in democratic theory. Can such entities develop into democratic organizations, or will they affect established political institutions and identities adversely? The process of European integration

⁵ Article 6.1 Treaty on European Union (TEU), as amended by the Lisbon Treaty (Official Journal C 115 of 9 May 2008). A Protocol introduces specific measures for the UK and Poland seeking to establish national exceptions to the justiciability of the Charter: ‘Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom’. See further Chapters 4 and 5 on this.

⁶ In order of ratification date: Lithuania, Hungary, Slovenia, Italy, Greece, Slovak Republic, Spain, Austria, Germany, Latvia, Cyprus, Malta, Luxembourg, Belgium, Estonia, Finland, Bulgaria, and Romania.

⁷ In the French referendum, held on 31 May 2005, 55 per cent of the voters said ‘no’ to ratifying the Constitutional Treaty. In the Netherlands, a consultative referendum was held on 1 June 2005, in which it was rejected by 61.5 per cent of the Dutch voters.

is spurred by intense *mutual interdependence*, and is linked to processes of globalization and denationalization that pose problems for national democracy. Economic globalization implies that decisions are increasingly made in contexts well beyond national control, and the range of policy options available to national decision-makers is greatly narrowed. In a globalized context, the scope of social organization no longer appears to coincide with national territorial boundaries. Trans-border problems such as capital flight, tax evasion, volatile global financial markets, large-scale population movements, pollution and the like are beyond the reach of nation-state capability. Increasingly, political bodies beyond the nation-state are required to cope with this new problem scenario as well as to curtail arbitrary power. The present delegation of powers to external organizations and the law production in international bodies leads to *juridification, technocratic governance, and executive dominance*. These problems are generally associated not only with globalization but with the European integration process as well, which, however, can also be seen as an effort to catch up with them politically.

Is there any possibility for bringing the common will of the peoples of Europe to bear upon EU decision-makers? Under the established conditions of interdependence, cooperation and institutional responsibility it is difficult to meet the democratic claim that decisions should be either made through a process inclusive of all those who are affected by them, or acceptable to all those who are affected. It is hard to achieve *full political equality* in an international context.

On the other hand, if political communities are no longer only national, the idea of self-government needs to be rethought. Today, the process of globalization is helping to bring forth the emergence of a transnational community and new forms of governance above (as well as below) the state. It is of interest to explore what notions of legitimacy and capability such forms are based on, and whether they do contribute to democracy beyond the nation-state.

European integration is a process in motion, and the EU is an unsettled order. Jacques Delors once called it *un objet politique non-identifié*. The EU provides us with an *experimentarium* for testing alternative ideas of legitimate rule beyond the nation-state. In Europe the political community is no longer merely statal or national, the sovereignty of the states no longer (if it ever was) absolute and undivided. The EU has pooled sovereignty within a territory that it does not fully control. These developments have come to reflect a multi-dimensional and disaggregated conception of sovereignty and a move beyond the Westphalian order, that is an order in which states are held to be sovereign with fixed territorial boundaries and entitled to conduct their internal and external affairs autonomously, without any possibilities for external actors to control the protection of human rights.⁸

⁸ Sovereignty may take different forms, but the classical doctrine states that 'first, no one can be the subject of more than one sovereign, second, only one sovereign power can prevail within a territory, third, all citizens possess the same status and rights, and fourth, the bond between citizen and sovereign excludes the alien' (Linklater 1996: 95).

In this order the international society is in a state of anarchy in the sense that there is no higher authority to appeal to. Anarchy is limited and *organized*, as it is a legally sanctioned attribute of the states system. A further presumption is however that sovereignty is not simply a legal status; it is also a description of state power: states control the main levers of power and have the capacity to exercise territorial control within the legal, economic, and cultural realms. In this sense ‘anarchy is what states make of it’ (Wendt 1992). Deals will be struck that reflect the asymmetrical power relations in the international sphere of states, hence the prevalence of threat-based bargaining with the accompanying characteristics of side-payments, horse-trading and package deals. Within the European setting, where state power varies considerably, no single state is strong enough to enforce its will. Systematic change has occurred in the political order of Europe, moving beyond Westphalia (Ruggie 1993). One should, however, realize, as already Hegel (1821) and Carl Schmitt (2003: 167) did, that state sovereignty was never absolute, not even in its most Hobbesian moments; it rests on shared political norms and *mutual recognition* and on institutionalized procedures for conflict resolution between the states. From this perspective constitutionalism, rather than state sovereignty comes to the fore.

This is more so as legal developments over the last half-century have been remarkable, and one of their main thrusts has been to protect human rights, moving classical international law in the direction of cosmopolitan law. The development of the United Nations (UN) (and regional entities such as the European Convention on Human Rights), whose global entrenchment has been re-enforced through multilateral arrangements for regulating economic international affairs (such as the World Bank Group, GATT, IMF, and the WTO), and their accompanying set of institutions, first delimited, and later redefined, the principle of state sovereignty. Aggressors can now in principle be tried for crimes against humanity, and offensive wars are criminalized. Thus, international law may have changed so that state sovereignty has become *conditional* upon citizens’ sovereignty. *Staatsräson* is no longer the sole priority, as the individual has become the state’s *raison d’être*. On this background, advocates of cosmopolitan democracy challenge the notion of sovereignty and, drawing on the work of Hans Kelsen (1920, 1944) and others, have argued to replace the concept of sovereignty at all levels with *constitutionalism*.

The mentioned remarkable legal developments have been hard to account for and the implications have to a large degree gone unnoticed. The myth of the Westphalian order prevails,⁹ and not only in the (much taken for granted) template of international relations (Oslander 2001), but also in the *methodological nationalism* of the social sciences in general (Beck 2003). There is need for theoretical innovation in order to grasp and account for the underlying normative order of the ‘system of states’ as well as the developmental path towards *cosmopolitization*. By this is meant not only trends towards a constitutionalized world order but also the inclusion of universal categories—human rights clauses—in national constitutions.

⁹ See Kelsen 1920. For another take on the myth of state orders, as symbolic orders, see Cassirer 1946.

First of all there is a need for reassessing sovereignty. Nominally, it depicts the legal capacity to act on common action norms independently and ‘the right to issue orders backed by threats which are generally obeyed’ (Hart 1997: 25). It is a principle stating that an order is free if it is not dominated by others, but it does not any longer depict the status of territorially limited absolute powers. It is an ordering principle of international affairs, as well as a status and a set of rights and privileges (Morgan 2005: 139). However, increasingly it has been legally circumscribed and embedded in a normative structure of mutual recognition. A state does not cease to be sovereign even if it has delegated certain of its rights, powers and privileges to a supranational order whose decisions it cannot veto; but a state can reach a point wherein it has delegated so much that other states no longer regard it as a sovereign state. In Europe, borders are not absolute barriers, state sovereignty is pooled and delegated, constrained and transformed (Jackson 2000: 346), and the dividing line between domestic and foreign politics is blurred.

Secondly, there is a need for theoretical innovation with regard to accounting for these processes in empirical terms. What notions of agency, of rationality and legitimacy, are required? Max Weber (1946: 280) stated that interests can only be realized as far as they are connected to justificatory ideas, and ideas can only be realized as far as they are connected to existing interests. We need to know what kind of competence and skills, and what social, moral, and cultural resources made the European development possible. A European identity, which could make up the common value base required for effective collective decision-making of a post-national sovereign, is feeble. Is democracy then possible at the European level? Can it be disassociated from its putative nation-state foundation? Is it true that without the ‘enabling condition of sovereignty’—with ‘some form of law, with the centralized authority to determine the rules and a centralized monopoly of power of enforcement’—there can be no justice (Nagel 2005: 116)?

EUROPEAN DEMOCRACY REVISITED

There are different solutions as to how Europe could handle interdependence among the states and the putative democratic deficit of the emerging order.¹⁰ Three positions that cut across ideologies and academic disciplines can be discerned.¹¹ The first, most dominant, takes as its key premise that *the nation-state is the container of democracy*. The challenge facing proponents of national democracy is that in today’s

¹⁰ On this debate see also Majone 1998 and Moravcsik 2002, who contend there is no deficit. According to Moravcsik (2002: 605), ‘Constitutional checks and balances, indirect democratic control via national governments, and the increasing control of the European Parliament are sufficient to ensure that EU policy-making is, in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens.’ For a rejoinder, see Bellamy 2006; Culpepper and Fung 2007; Føllesdal and Hix 2006; Kaina and Karolewski 2007; Schäfer 2006. See also Schmitter 2000.

¹¹ This section draws on Eriksen and Fossum 2008.

Europe, a range of processes generally labelled under the heading of globalization are seen to *undermine* the salience of the nation-state as the embodiment of democratic government. Conservative Eurosceptics see European political integration as synonymous with the factors that drain out the essence of nationhood.¹² Social democrats and communitarians claim that the European integration process sustains a neo-liberal supranational order, an order that undercuts both the systems of risk regulation and the measures of solidarity that were such characteristic traits of the European welfare state.¹³ Taken together, these factors are seen to sustain a system of multi-tiered democratic deficits. Many students of democracy go further and argue that the democratic deficit is not merely a contingent matter relating to the effects of globalization, but refers to a lack of core civic democratic components such as a common European public sphere (Grimm 2004). Some underline the structural character of the problem: it highlights built-in limitations in the *scale* of representative democracy. Robert A. Dahl (1999), for instance, has argued that, beyond a certain scale representative democracy cannot work; thus, extending representative democracy to the European level lengthens the democratic chain of legitimation and *heightens citizens' alienation*. The most obvious solution is to roll back integration. But can the rolling back of European integration *rescue* national democracy under conditions of interdependence and globalization? The merit of this solution is disputed by other analysts who argue that the main challenge to national democracy does not emanate from European integration, but instead from *decisional exclusion* as a result of denationalization and globalization. Dahl's argument about a 'reasonable threshold' of size can also be countered:

- the right size of the republic is not clear as the American federalists already recognized;
- the current interdependent international affairs subject the individuals to foreign decision-making;
- with the deprivation of any form of direct international representation 'the relative weight of each individual's vote should be even more severely discounted' (Marchetti 2006: 302); and
- public deliberation and the mediation of participation through various public spheres may outweigh the loss of direct influence (Bohman 2005: 33).

Many of the decisions affecting national citizens are made elsewhere; or the necessary collective decisions are not made at all. Indeed, these processes reveal decreasing steering capacities on the part of the nation-state.¹⁴ When framed in

¹² For a selection of Eurosceptical writings, see M. Holmes 1996. See also the special issues of *European Union Politics* on 'What Drives Euroscepticism?' (Hooghe 2007) and of *Acta Politica* on 'Understanding Euroscepticism' (Hooghe and Marks 2007).

¹³ See Greven 2000; Miller 1995; Offe 2000, 2003a; Scharpf 1999; Streek 2000. Siedentop (2000) gives this argument a special twist. Whilst supporting a European federal state, he argues that the present integration process is an unhappy marriage of French *étatisme* and neo-liberal economism. This mixture threatens to undercut the prospect for democracy in Europe.

¹⁴ See Nielsen 2004. Bartolini (2004) sees this in the weakened power of centres' ability to control peripheries. Against this view we find analysts who argue that European integration *strengthens* the state. See, notably, Moravcsik 1994; Milward 1992.

this light, analysts such as Jürgen Habermas (2001a, 2004) see European integration not as the nemesis of democracy, but as a means of *uploading* democracy to the European level. Many representatives of both positions take the nation-state as their frame of reference and discuss the prospects for democracy in these terms. Proponents of a European federal state (e.g. Mancini 1998; Morgan 2005) would for instance argue that instituting democracy at the supranational level is the best assurance for sustaining democracy also at the member-state level. Within such a configuration, the member states could no longer be sovereign nation-states. But will they relinquish national identity, and can a European federation develop an acceptable and viable European identity? The answer hinges, at least in part, on how central to democracy is the claim to the effect that without a collective identity, there can be no democracy.

The second position is made up of transnationalists and multi-level governance scholars who argue that the challenge facing Europe is neither to rescue the nation-state nor to upload state-based democracy to the EU level. The EU is seen as a *sui generis* entity, a possible alternative to the nation-state model.¹⁵ Further, some analysts hold the EU up as a type of polity that has prospects for developing democracy *beyond* the nation-state.¹⁶ Ruggie (1993) sees the EU as a case of unbundling of state authority and with this a change in the constitutive principle of territorial sovereignty. Transnationalists and multi-level governance scholars portray the EU as made up of a host of *new governance structures* that combine to make up an alternative to a government above the nation-state. To them, sovereignty resides with the problem-solving units themselves.¹⁷ A variety of supranational organizations, transnational ‘private global authorities’ and governance networks engage in rule-making and regulation beyond the state. They are based upon the private law framework of legal institutions but claim legitimacy, serving the public interest. Dense transnational networks and administrative systems of coordination have been intrinsic to the legitimacy of the EU, and some see these as amounting to a form of *transnational constitutionalism* (Fischer-Lescano and Teubner 2006; Joerges et al. 2004). This debate focuses on the conditions under which decision-making in such issue areas can be deemed to be legitimate. If the self-governing collectivity is part of several communities—national, international, and global—the locus-focus of democracy becomes a puzzling matter (Held 1995: 225).

The crucial question that this debate brings forth is whether the state form and a collective identity are necessary preconditions for democracy to prevail, or whether a leaner structure made up of legal procedures and criss-crossing public discourse can ensure democratic legitimation. In short, can democracy prevail without state and nation?

¹⁵ Hooghe and Marks (2003) outline two models of multi-level governance, among which ‘MLG II’ is the one closest to the non-state approach to governance.

¹⁶ See notably Schmitter 1996, 2000. See also Hoskyns and Newman 2000; Preuss 1996; Weiler 1999a, 2001a; Zürn 1998.

¹⁷ See for example Bohman 2007a; Cohen and Sabel 1997, 2003; Dryzek 2006; Gerstenberg 2002.

The third ‘cosmopolitan’ position in the debate focuses on Europe as a particularly relevant site, for the emergence of *cosmopolitanism* (Archibugi 1998; Beck and Grande 2004; Delanty and Rumford 2005). Scholars from different disciplines draw variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU’s global transformative potential through acting as a ‘normative power’ or ‘civilian power’ (Manners 2002; Sjursen 2007a). Even though cosmopolitanism ‘is not part of the self-identity of the EU’ (Rumford 2005: 5), scholars nevertheless recognize the EU as a part of, and as a vanguard for, an emerging democratic world order. It is seen to connect to the changed parameters of power politics through which sovereignty has turned conditional upon respecting democracy and human rights. It can be posited as one of several emerging regional-cosmopolitan entities that intermediate between the nation-state and the (reformed) UN, and which become recognized as a legitimate independent source of law.

Some, notably Cohen and Sabel (2003, 2006), and Bohman (2007a), opt for a ‘cosmopolitanism restrained’, which blends elements of cosmopolitanism with regional transnational governance. They argue for the normative validity of a polycentric system of *directly deliberative polyarchy* modelled on the European system of governance. This entails a model of direct participation and public deliberation in structures of governance wherein the decision-makers—through ‘soft law’, benchmarking, shaming, blaming, and so forth—are connected to larger strata of civil society. The EU is seen as a multi-level, large-scale and multi-perspectival polity based on the notions of a disaggregated democratic subject and of diverse and dispersed democratic authority.

The debate on European democracy makes clear that the core issue is to establish *what democracy can mean* when the nation-state cannot be taken for granted as the foundation. The EU is an unprecedented, complex, and multi-faceted entity whose identity, legitimacy, and democratic quality are contested. I examine the nature of the Euro-polity by taking stock of recent developments and reform processes within the Union. What kind of political order is it and what type of legitimacy does such an order require? Is it a challenge to the international order or is it adapting to it? Through analysing the compound nature of the multi-level constellation that makes up the EU, I endeavour to shed light on these fundamental questions with regard to democracy beyond the nation-state. More specifically, on the basis of some stylized, and some not so stylized, facts about the reform processes and the present state of affairs of the Union, I seek to clarify the putative values and dilemmas involved in the developments from the point of view of deliberative democracy.

REALIZING EUROPEAN DEMOCRACY

Part I of this book is devoted to developing a theoretical perspective on democracy beyond the nation-state as well as the normative principle of democratic

legitimacy. In Chapter 2, I address the claim to legitimacy and what it means to justify political orders under modern conditions of pluralism and equality. Citizens must be offered justification for the exercise of political power with acceptable reasons. This points us in the direction of *deliberative democracy*, which posits that it is the public use of reason and democratic procedures that confer legitimacy upon laws and policies, and not substantive values or utilities and functional results. Such results are themselves in need of justification. I distinguish between democracy as a *legitimation principle* and an *organizational principle*. What democracy entails in institutional terms cannot be settled properly through scientific analysis or philosophical construction as it entails normative-practical knowledge: it requires the involvement of affected parties. Thus there can only be a quest for *democratization* and not for a particular institutional form of democracy. But according to which concept can democratic legitimacy at the European level be pursued?

This question is addressed in the ensuing Chapter 3, which starts with a conceptual decoupling of democracy and nation. I elaborate the assessment standard for political legitimacy espoused by the discourse theoretical variant of deliberative democracy and question rational consensus as a criterion of legitimacy. Deliberation cannot ensure correct decisions—it cannot ensure full political equality—because the demanding conditions for rational consensus cannot be achieved. Is deliberation then rather needed for ensuring that all voices are heard—the participation of all? I develop two notions of deliberative democracy based on whether deliberation can make clear what is just or ‘equally good for all’, or whether it must be seen rather as a requirement that makes participation possible. The principle of democracy in this second reading does not assert that the laws meet with the rational assent of all, but rather that they are legitimate when they are the outcome of an open, fair, legally institutionalized process and can be defended against criticism and accepted with reasonable reasons. In line with this I replace the criterion of consensus with a less demanding one, that of a *working agreement*. This concept is subsequently used to assess the legitimacy of the Constitutional Treaty, as well as to conceptualize the justifiability of the multi-level constellation that makes up the EU in Chapter 9.

In Part II, I address the components of democratization that can be identified in the EU, starting by assessing three strategies as possible solutions to the Union’s legitimacy problems. In Chapter 4, I distinguish between legitimation through *utility*, *values* and *rights*, which relate to different notions of the EU. The instrumental logic designates the EU as an organization whose special purpose is to solve the perceived problems facing the nation-states and which asserts that legitimacy depends on the ability to solve problems effectively and the capacity to deliver the goods that people demand. In a value-based perspective Europe is more of a community in which the different national modes of allegiance and identification are to be harmonized. The success of the EU depends upon developing a *shared identity* and a value basis for integrating different conceptions of the good life, and a diverse range of societal interests. These two modes of legitimation figure strongly in the debate on, and in aspects of, the EU, but both

have become problematic. A third possibility is to conceive of the EU as a *rights-based polity*; a polity that is in need of *direct legitimation*. In this view, the integration process hinges on the ability to establish a fair system of cooperation founded on basic rights and democratic procedures for deliberation and decision-making. Taking stock of the ongoing constitution-making process, the task is to assess how robust and salient such an alternative is, as opposed to the two other strategies.

In Chapter 5, I discuss the Charter of Fundamental Rights. I see it as needed for securing the interests and the diverse values of the citizens of Europe. The Charter denotes the EU as a union of citizens and not merely as a common market. It has been argued that rights are detrimental to social integration as granting individuals legal rights has *atomistic*—disintegrative—*consequences*. However, human rights are not merely abstract principles which, when positivized, secure negative freedom. When they are constitutionalized and turned into fundamental rights they contain a guarantee for equal freedom of all citizens. A charter of fundamental rights is a means to enhance the legal certainty of the citizens, reduce arbitrariness, and to institutionalize the right to justification. However, as the principle of popular sovereignty points to a particular society, and human rights point to an ideal republic, only with a cosmopolitan order—democracy at a supranational level—can human rights be properly institutionalized.

In Chapter 6, I continue this line of reasoning with regard to the external policies of the EU. The parameters of power politics have changed in Europe and the EU exports the rule of law, democracy, and human rights worldwide. The threat of *force* is needed to ensure equal rights for all but can find justification only when used to protect human rights. Hence the defining feature of a legitimate polity cannot be the absence of military force. The criterion for judging the polity's normative quality should rather be derived from cosmopolitanism, that is, whether it subjects its actions to the constraints of a higher-ranking law. I establish this criterion, its theoretical and institutional underpinnings, and provisionally assess whether the EU in fact complies with it.

The development of post-national democracy in Europe depends not merely on rights but also on the emergence of an overarching communicative space that functions as a public sphere. But can there be a public sphere when there is no collective identity? In Chapter 7, I deal with this problem. Despite the fact that the European Union is neither a state nor a nation, its development as a new kind of polity is closely connected to the formation of a common communicative space. European cooperation and problem-solving create public spaces but have not produced a single, non-exclusive, general European public sphere. Rather, what we find is a layered public sphere. There are transnational, *segmented publics* evolving around policy networks constituted by the common interest in certain policy fields, which are found wanting with regard to proper political justification. The EU also harbours many legally institutionalized discourses—*strong publics*—that are specialized on collective will formation close to the centre of the political system, and which have been promoters of democratic reforms. Selected institutional aspects of the EU pertaining to Comitology, the Court,

the European Parliament are analysed, as well as aspects of the process of constitution-making. What are their contributions to democratizing the EU? The lack of a truly European public sphere can be seen as the consequence of the democratic deficit, the deeper causes of which may be seen as a result of a weak European civic solidarity, of 'no-demos'.

Part III of this book is devoted to the analysis of what kind of post-national order is developing in Europe. The EU is theoretically challenging, as it constitutes a new type of political order, which does not fit into the traditional dichotomy of intergovernmental and nation-state entities. In Chapter 8, I address the prospects for *democratizing* transnational governance structures and ask whether democracy can be disassociated from *government*. Hierarchical government is supplanted by policy networks, epistemic communities and committees and other arrangements for common problem-solving. The European Union itself has, more recently, come to be seen as a *system of multi-level and multi-centric governance*. Legislation and implementation are diffused to networks, partnerships, and private actors in transnational structures. The exercise of authority is no longer exclusively statal as the generation of norms takes place transnationally via practices of governance in spontaneous coordination processes, in committees and networks. Governance by performance and evaluation is a method for dealing with political controversies on the basis of 'soft law'. The *White Paper on European Governance* suggests networking and partnership models of integration as a means to bring the EU closer to its citizens. Such measures may help in rationalizing policy-making and implementation but, I contend, do not contribute much to close the legitimacy gap. On the contrary their effects on democratic legitimacy may be perverse.

Is the EU a transnational governance system or a nascent system of government? The new governance approach is deeply critical of the nation-state, but is under-theorized both with regard to the relevant conception of the 'nature of the beast' and its putative normative credibility. I examine the strengths and weaknesses of transnational governance and reconceptualize *government* as opposed to both *governance* and *state-based perspectives* on post-national democracy.

The rights development of the European Union is an important step in the process of constitutionalizing a regional cosmopolitan order in which all European citizens are empowered to claim their right to legal action and protection. However, the process of Europeanization is tainted with juridification and executive dominance. The citizens have obtained rights but they have not been able to give these rights to themselves. *There is rule of law without self-legislation* (Brunkhorst 2008). The protracted constitution-making process of the EU testifies to a promising, but yet unaccomplished mission of democratization, and in Chapter 9, I ask what form of democracy is needed in the post-national configuration. Does it require a state-like government or something less? Further, can there be constitutions without a state and a sovereign people? The EU is not a state and its power is limited. Even though the member states hold the means of legitimate violence in reserve, the EU has achieved competences and capabilities similar to authoritative government. The point of government is democratic

institutions. A non-state entity can, I maintain, amount to government in so far as it performs the functions of *authorized* jurisdictions. In line with this, the Union can be considered as an emerging *state-less government*—a quasi federation—that finds part of its justification as a regional subset of a larger cosmopolitan order. The legitimacy requirement of such a governmental order must be different from that of a fully authorized power-wielding polity. Nevertheless, due to the democratic deficit of the Union, it is not possible to establish the conditions under which a process of public justification would be deemed legitimate.

In the last chapter, I address the puzzle as to why parliamentary democracy has become the legitimacy standard for the EU when there is no demos. We witness a development from a situation in which democracy served as a guiding norm for national systems only, to one where democracy has become an increasingly relevant standard also for evaluating the EU. But why has the reform process taken the form of support for a parliamentary model of representative democracy when central conditions for it to work properly are not in place? The solution to the puzzle is sought in the normative thrust of the parliamentary principle as the main embodiment of popular rule. But the lingering question is whether there can be democracy based on an empowered parliament without a political community.

