

Making the European Polity

Reflexive integration in the EU

Edited by
Erik Oddvar Eriksen

Routledge studies on democratizing Europe

Making the European Polity

The EU has developed beyond a mere market and is more than an international organization. But is it becoming a state, something less or something different? This book asks whether the EU is developing into a regulatory entity, a value-based polity or a rights-based post-national union. On the basis of in-depth analyses of social and tax policy, foreign and security policy, identity formation, the reform process and the constitutional effects of enlargement, the authors find that the Union has moved in the direction of a post-national union.

Making the European Polity sets out a reflexive approach to integration. It conceives of the EU as a law-based supranational polity lacking the identity of a people as well as the coercive means of a state. It seeks to compensate for this lack through extensive processes of deliberation. The EU is a polity with no sole apex of authority, but with an organized (limited) capacity to act. It has no sovereign demos – no people – but is involved in reflexive processes of constitutionalizing itself. It is a polity premised on a thin kind of statehood – a supranational polity with a deliberative imprint.

This book will appeal to social theorists and political scientists and particularly to students of European Politics.

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Edited by Erik Oddvar Eriksen and John Erik Fossum

ARENA, University of Oslo

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Edited by Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez

2 Making the European Polity

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Erik O. Eriksen
Oslo, 30 September 2004

Introduction

Erik O. Eriksen

The EU is the first grand-scale project of integration to be driven by peace rather than force. Hostility and conflict in Europe have been replaced by peaceful cooperation. We are witnessing the reorganization of political power in Europe and the transformation of government structures. These transformations are part of a process through which the European nation states transcend the Westphalian order. This order, which prioritized state sovereignty, is being transformed by legal developments that constrain the will power of the state on the basis of the rights of the citizens. Has the EU emerged beyond the status of an international regime or international organization based on the sovereignty of the state? It is a *large-scale experiment* searching for binding constitutional principles and institutional arrangements beyond the mode of rule entrenched in the nation state. It testifies to the fact that societies learn, not only individuals, to talk with Klaus Eder.

There is, however, confusion and disagreement about the core characteristics of the EU as well as about its future design. Currently, there are different notions of the EU as well as different theories of how to explain the integration process. The point of departure of this book is that, while inter-state relations of the Westphalian phase were conducted through diplomacy and intergovernmental bargaining, we are now increasingly witnessing problem-solving, goal attainment and conflict resolution in policy networks and transnational institutions as well as in supranational organizations such as the European Parliament, the European Court of Justice and the Commission. What are the main characteristics of this political order and how can we explain its emergence and sustainability?

Both positive political science and political theory are struggling to comprehend the nature of this creature. Whilst positive political science searches for new ways of conceptualizing political orders 'above' intergovernmentalism and 'below' statism, normative theory is struggling with the yardsticks of democracy when assessing a polity which is more than an international regime but less than a state. Deliberative theory, which underpins the reflexive approach, is interesting because it attempts to bridge the gap between normative and positive theory. Deliberationists

hold that integration is conducted through intelligent problem-solving and arguing in relation to shared norms and not solely according to the interests of the contracting partners. In this book a particular variant of this perspective is thought of as a theoretical alternative both to (neo)functionalism and liberal intergovernmentalism, which sees integration driven by ‘unreflexive’ spillover processes and ‘non-deliberated’ interest maximation respectively.

What does the reflexive approach contribute to in conceiving of the European integration process? This is the first question of this book. The second is how far the EU has moved beyond an international organization, a mere market regime in the hands of the member states, towards a polity in its own right, capable of collective action. What kind of order do the constitutive norms and values of the Union reflect and in what direction are present developments pointing? In addition to the option of a *market regime*, three alternatives are presented: a *regulatory entity* based on transnational structures of governance, a *value-based polity* premised on a common European identity and a *rights-based post-national union* – a federation – based on a full-fledged political citizenship.

The reason for asking such questions is that the Union is currently involved in a process of reforming itself by forging a constitution. Does this mean that the EU is moving towards becoming a sovereign government, a full-blown political polity based on:

- a fixed, contiguous and clearly delimited territory;
- a legitimate authority and entrenched hierarchical principles of law;
- a collective identity derived from a common history, tradition or fate;
- a cultural substrate associated with the nation; and/or
- a public sphere that performs catalytic functions for identity-formation;

or are we witnessing something less than a state, namely, a transnational regime based on a set of explicit principles established and sanctioned by international law?

The first part of the book lays out the reflexive approach to the integration processes and spells out its ramifications. The task is to explicate post-national integration and the ongoing constitutionalizing process. However, the authors disagree about how much ‘statehood’ a post-national democracy requires. In the first chapter I launch the reflexive approach to integration and underline the role of law and political institutions. James Bohman in Chapter 2 reconstructs the EU as a transnational regime based on multiperspectival deliberative inquiry. Compared to this, Rainer Schmalz-Bruns’ take on reflexive integration, in Chapter 3, puts a stronger onus on hierarchical elements. In Chapter 4, Bernhard Peters conceives of the resources for integration much in line with the statehood model and is hence pessimistic with regard to post-national integration.

Can there be a legitimate system of rule when there is no European demos – no European people based on a common identity?

As the EU is a complex organization, and processes are multifaceted and different areas of integration proceed by their own logic and speed – the institutional dynamics are diverse – it is important to conduct issue-specific studies. We therefore in Part II undertake analyses of the steps towards a common social and tax policy and a common foreign policy (Chapters 7, 8 and 9). Together with studies of identity formation, constitution-making reforms, and the constitutional effects of enlargement (Chapters 5, 6 and 10), these make up the second part of the book. Chapter 11 synthesizes the findings.

In Chapter 1, I give a brief account of the deliberative, reflexive perspective on the European integration process. Integration may occur through coercion and intergovernmental bargaining – through blackmail, path-dependency, functional adaptation, copying, diffusion or exit – but it may also occur through reflexive reason-giving and entrenched commitments. I examine integration from a deliberative perspective. Deliberation has to be supplemented with law and trust in order to explain integration. Moreover, in a full-blown polity problem-solving must be complemented with mechanisms of collective goal attainment and impartial conflict resolution. This constitutes the basis for delineating the four stylized analytical models of the EU – a market regime, a regulatory entity, a value-based polity and a rights-based post-national union.

In Chapter 2, Bohman outlines a reflexive approach to integration focused on the constitution-making process of the Union. He conceives of the EU as a *polycentric system of transnational governance* – a regulatory entity. As this system is presently tormented by legal domination it is in need of democratization. The basic normative category is non-domination according to the dictum of ‘interdependence without subordination’. The insufficiency of the rule of law for non-domination at the transnational scale, suggests a deliberative framework and reflexive testing of the normative legal framework. Bohman sees the EU as a diverse polity, with multiple overlapping demoi and no apex of authority, where sovereignty is pooled and competencies shared. The solution to the problem of legal domination is that the constitution institute a reflexive legal order best realized in spontaneous and horizontally dispersed polyarchies. This requires a process of practical testing, which is possible only if deliberation can be properly organized. But can such an approach be sustained in normative terms?

Based on a desubstantialized notion of a sovereign demos, Schmalz-Bruns in the next chapter sets out to establish a conceptual alternative that is based on internally linking the idea of people’s sovereignty, the principle of public and inclusive justification, with the idea of a demos. This is a normative model of a *transnational polity* of internally deliberative institutions, which is sufficiently reflexive so as to make it democratic, in

the sense that political issues, rights and duties, can be passed through the public deliberation of citizens. It is, on the basis of a constitution and the capacity to act that meaning and content can be given to the idea of reflexive integration. Thus a democratic polity must have a hierarchical element, it cannot be just a multiperspectival and horizontally dispersed structure of governance as Bohman contends. In Part II of the book we return to the question of whether the EU is actually becoming more than a polycentric transnational polity. But first we need to know more about the connection between deliberation, identity and a democratic polity.

Peters addresses, in Chapter 4, the relationship between the concepts in the *magic quadrangle* of political theory: discourse, democracy, identity and legitimacy. They represent the conceptual constellation of any political order that aspires to democratic self-government. On the basis of such a model it is hard to see how the EU could establish the necessary conditions, not to say replicate the conditions of nation-state democracy. Is post-national democracy really viable and on what basis should assessments and predictions be made? The answer to what kind of political order is required to ensure basic rights and collective goal attainment beyond the nation state depends to a large degree on empirical facts that we do not possess sufficient knowledge of. Due to the present state of affairs in the media, where the dramatization of conflict and disagreement prevails over the search for consensus, Peters is cautious on the extent to which public deliberation on its own can bear the burden of legitimation. In Europe the public debate is also constrained by the lack of an imagined collective 'we' beyond national borders – *a common European identity*.

These chapters make up the first part of the book. A concept of reflexive integration based on the mechanisms of public deliberation has been established, with the necessary complements in the form of *law* – the requirements of legal rules and sanctions, and *trust* – the requirements of common values and identity. In the second part of the book we apply the four stylized notions of the EU that were fleshed out in Chapter 1 to different policy areas of the Union and ask whether we see a rights-based union in the making. This is undertaken with regard to the constitutional reform process, foreign and security policy, tax and social policy and the constitutional implications of enlargement. But first we ask how we should conceive of a European identity?

Gerard Delanty in Chapter 5 explores what kind of a collective identity a poly-ethnic society such as the EU can possibly have. On the basis of current research on post-national identifications he contends that a European identity should be conceived of in cosmopolitan terms, as embodied in the everyday life of Europeans and not in a supranational European identity. Rather than an official EU identity in tension with national identities, the core characteristic of European identities is found in the pluralized cultural models of a societal identity. One of the striking features of European identities is that they arise in discursive contexts – they are

highly diverse and are often *reflexively* articulated – but as identities, they all unavoidably have a familiar European dimension. This amounts to a kind of *cosmopolitan societal identity*, which speaks to the option of the EU as a post-national rights-based polity. The European identity is a form of post-national self-understanding that expresses itself within, as much as beyond, national identities.

John Erik Fossum assesses, in Chapter 6, the question of the EU's legitimacy on the basis of the practice and the results of the Constitutional Convention. Contemporary European constitution-making is made more reflexive. The Convention came up with a draft Constitutional Treaty and represents an exercise that has moved the Union closer to a rights-based polity. On the one hand, in terms of overarching principles, the EU draws on those that mark the *common* constitutional traditions of the member states, and then on already justified norms. But the Convention continued the Union's unique mix of the common constitutional traditions of the member states and treaty law with the effort to distil a constitution from the *acquis*. The draft reduced the polycentricity and enhanced the legal unity and democratic character of the Union. It depicts the EU as a bi-cephalous entity and represents a new blend of intergovernmental and supranational structures.

In Chapter 7, Helene Sjursen analyses the trends towards a post-national foreign and security policy. Discussions about forging a common foreign and security policy have been a central part of the agenda of European integration from its very inception. Since the early 1970s a gradual building of common institutions, positions and policies has taken place. Sjursen questions the predominant perception of the foreign-policy field within the EU that speaks to the EU as a 'problem-solving entity', with little onus on collective tasks and obligations beyond the interests and preferences of the member states. The output is not limited when taking into consideration the institutions and procedures in the making in this field. But as the EU lacks military capability of its own, it is more of an instrument for human security – peacekeeping and rescue tasks.

Agustín José Menéndez, in Chapter 8, reviews the actual powers of the European Union with regard to taxation. The power to tax is one major indicator of a state-like polity, but the EU has very limited legislative tax competencies. However, on the basis of a proper unpacking of the treaty provisions, seeing that it has to do both with 'ordinary' and constitutional politics, Menéndez finds that the legislative power to tax is shared between the Union and the member states. The EU has power to tax, although limited, and has obtained a tax base of its own. In order to establish what this tells us concerning the political nature of the Union, he tests out three models of a taxing EU. The tax base is all too limited for the Union to grasp with its task portfolio, which however also pertains to the lack of effective instruments of policy-making.

In the wake of the Lisbon summit in 2000 the Open Method of

Coordination (OMC) has developed into an important action-coordinating strategy of the EU. In Chapter 9, Kerstin Jacobsson and Åsa Vifell examine the integration potential of this method from a deliberative perspective. OMC makes possible concerted European action in policy areas which are under member-state jurisdiction, such as social and employment policies. Focusing on employment-policy coordination, the authors analyse preparatory committees placed between the Commission and the Council. In spite of the elitist and economic character of deliberation in these committees, where agreements are reached because competing views are excluded, the OMC includes a wide circle of actors and has allowed a *functional expansion* of cooperation into new – and sensitive – welfare areas. While hardly able in itself to balance the problematic aspects of European economic integration, this soft coordination at least serves to complement it by raising other types of concerns and by institutionalizing discourse on them.

In Chapter 10, John Erik Fossum, Helene Sjursen and I address the constitutional effects of enlargement. Does enlargement merely mean the widening of the present Union or does it have further polity implications? The European Union requires that the applicant countries comply with normative principles such as the rule of law, human rights and democracy. However, the Union does not itself comply with these. Due to reason-giving and critical scrutiny promoted through public debate and institutionalized deliberation, living by double standards becomes problematic. But the EU is in the process of reforming itself; and the Constitutional Treaty includes a Charter of Fundamental Rights containing provisions on civil, political, social and economic rights generally associated with constitutional provisions. This analysis not only shows that the EU has moved beyond the principles laid down in the Treaty of Westphalia, it also shows that this transformation is conducted according to the criteria of legitimate government. The EU has left the fate of the new constitution in the hands of states that are still not formally members. What kind of polity is the EU then?

On the basis of preceding chapters, in Chapter 11, I find that the EU has proceeded towards a polity in its own right capable of collective action. Even though the EU is a complex organization where concerted action varies across levels and policy fields, it has amended its competences in most areas and has moved into a quasi-democratic, supranational legal system based on the precepts of higher-law constitutionalism. The pillar structure has been weakened; the allocation of competencies of the decision-making bodies has been circumscribed; the European Parliament empowered. The EU is a law-based supranational polity lacking the identity as well as the coercive means of a state, a lack it attempts to compensate for through extensive processes of deliberation. Hence the concept of *deliberative supranationalism*, which depicts the Euro-polity as a law-based government premised on a particular mode of interaction generating allegiance and making for collective decision-making.

Part I

**Reflexive polity-building
and post-national
integration**

1 Reflexive integration in Europe

Erik O. Eriksen

Today's Europe is marked by a remarkable pace of integration. Major changes have taken place within a short period of time. The integration is deepening – a wide range of new policy fields have been subjected to integrated action and collective decision-making – as well as widening.¹ The European Union (EU) now consists of 25 member states. However, there is confusion and disagreement about its future design among experts as well as laymen. But despite disagreement the EU is currently about to transform itself and establish itself as an autonomous polity. It is about to proclaim itself as a political union with extended competencies. Since the late 1980s, European cooperation has progressed and changed the cooperative scheme of an international organization whose legitimacy derived solely from the member states – the Masters of the Treaties – to an organization in its own right. Increasingly, majority vote has replaced unanimity as a decision rule in several policy fields. Progressively the Union has obtained a resource basis of its own. It has become a polity which allocates and reallocates values throughout Europe. In fact, the EU, which is a creature of the member states, has contributed to transform them, either directly or by unleashing processes of mutual learning and adaptation.

These transformations are part of a process through which the European nation states transcend the Westphalian order. Integration in Europe, then, not only testifies to the Europeanization of the nation states but also to new forms of political governance emerging beyond the system of interstate relations. It constitutes a new type of political order that does not fit into the traditional dichotomy of intergovernmental versus nation-state regulation. What is the EU then? Integrated European cooperation has moved it beyond the status of a market regime, but does the EU simply represent transnational risk regulation and problem-solving, or is it reflective of a supranational move based on common values – a value-based community – and/or reflective of a development towards a rights-based post-national union, based on a full-fledged political citizenship?

In this book we explore the possibility of deliberation as an analytical category to explain integration beyond the nation state. Deliberation designates the rule of reasons, namely, that actors coordinate their actions by

giving and responding to reasons (Habermas 1981; Forst 2001). Deliberative theory based on communicative rationality constitutes the reflexive approach. The actors reflexively monitor the circumstances of their activities and base their interventions on intersubjectively accessible reasons. The usefulness of this approach to transnational and supranational systems of governance stems from the fact that such systems to a large degree lack forceful compliance mechanisms. The EU is a non-hierarchical system based on voluntary cooperation. The reflexive approach is seen as an alternative to the rational choice perspective underpinning 'liberal intergovernmentalism', which sees integration as driven by the interest maximisation of the contracting parties (Moravcsik 1998). It is also an alternative to neo-functionalism's perspective on 'unreflective' spillover processes from 'low' to 'high politics' (Haas 1961).

In this chapter I outline the reflexive approach to the European integration process with regard to the basic analytical categories, *deliberation* and *problem-solving*. First, I address some developments of the EU integration process and the dynamics that have pushed it in a supranational direction. Second, I point to deliberation as the medium of problem-solving, which, however, requires *trust* and *law* as complementary resources for collective action. In a third move I see polity-building as a problem-solving procedure based on experimental inquiry, but one that needs to be supplemented with mechanisms for *collective goal attainment* and *impartial conflict resolution*. After this I outline four analytical models of the EU which represent ideal-typical polity options. They are premised on different merits of deliberation – epistemic, transformative and moral.

A heterarchical order?

The EU is not a federation nor is it a confederation. While the latter depicts a union of states – with indirect and delegated powers – a federal system is *a union of citizens* based on an institutional arrangement like that of a sovereign state albeit more complex. The European polity has clear supranational elements such as the European Court of Justice (ECJ), which guarantees supremacy of EU law within its field of competence, and a directly elected Parliament which has obtained the power of co-decision with the intergovernmental Council in a wide range of policy fields. The term polity in the present use does not imply a full-fledged state, but a system in which a central polity coexists with local units. In Europe the member states and the EU have both shared and independent powers with neither having supreme authority over the other. The EU has got supranational political institutions, a Central Bank, a single currency and a material constitution. It is now also aspiring to be a polity with competencies on foreign and security policy. The EU has supranational dimensions but does not fit the customary concept of state, as it does not possess the required means, such as monopoly of violence and taxation, or a well-

developed collective identity necessary for majority vote, to enforce its will. It is not sovereign within a fixed, contiguous and clearly delimited territory.² There are no European jails, army or police force.

The EU is a polity without a nation and a state. The supranationality marking it is non-hierarchical and a consequence of its peculiar 'separation of powers', which is due to the role of the Commission and the Council, which combine representative and executive functions. This kind of supranationality ensures the member states a strong and consistent say in collective decision-making processes, in particular through the Council of the European Union. The institutional structure of the EU embodies a complex mixture of supranational, transnational and intergovernmental elements. There is disagreement among scholars with regard to how this order should be portrayed.

Some analysts see the EU as a *system of multilevel and multi-centric governance*. Decision-making and implementation are diffused to networks, partnerships and private actors in transnational structures of governance. Common problems requiring common solutions are coordinated by joint problem-solving in agencies and committees.³ The exercise of political authority is no longer exclusively statal – the relationship between state and non-state actors is non-hierarchical. Such a regime is based on shared authority, and the major task is not 'redistribution', but 'regulation' of social and political risks. Hence the prevalence of *governance* and not political rule through responsible institutions such as parliament and bureaucracy – generally thought of as *government* based on one single (mono-cephalous) line of accountability anchored in the rights of the citizens. Governance represents innovative practices of networks and horizontal forms of interaction. It is based on a private-law framework where the production of norms is seen as the result of a spontaneous coordination process. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other on the basis of 'soft law'. In this view the EU comes close to a *heterarchy*: political authority is not centralized as in the hierarchical order of the state model nor is it decentralized as in an anarchical order. Rather the units of the system pool their sovereignties. There is:

a shift from a hierarchical substantive orientation, to be found in given rules and aims, to a horizontal heterarchical and procedural approach, operating with the localised and linked potential generated from private and public action and the linkages inherent to them.

(Ladeur 1999: 156)

Heterarchy is, however, deficient in empirical terms because a supranational structure endowed with a *dispute-resolution mechanism* is in place, namely, a court that bases its rulings on recognition of the primacy of

Union law and on the principle of rule of (hard) law. The integration process has moved the EU beyond an international organization as well as beyond a heterarchy. Due to this fact, democracy needs to be brought to bear on the EU. Its actions have consequences for the citizens' interests and values, for their freedom and welfare. The acts of the Union are thus not merely regulative as they allocate resources throughout Europe and affect EU citizens in most walks of life, even if only by means of impeding other levels' ability to act. Heterarchy is deficient with regard to democracy in that there is little chance of equal access and public accountability. Egalitarian structures of law-making are lacking. An order exercising power in the form of conflict resolution and resource allocation is in need of popular control according to the dictum that all legislative power stems from the people. 'Whatever a people cannot impose upon itself cannot be imposed upon it by the legislator either' (Kant 1797: 85). I return to the democratic problem of the Union in Chapter 11. The question now is how to explain the making of a supranational order.

The dynamics of integration

European cooperation started out as a pragmatic form of collaboration on coal and steel, underpinned by the peace motive. World Wars I and II profoundly affected the states and citizens all over Europe; and all depended on each other for a peaceful restoration of Europe after the war. Cooperation was initially problem-solving for the members due to their interdependence. Solving common problems led to more cooperation, the building of trust relationships and to the discovery of new areas of common concern. Increasingly, supranational polity formation took place with conflict-resolution and goal-attainment institutions of its own, which, however, spurred new questions about the legitimacy basis of such a polity.

In the beginning, [the European Union] was more of an economic and technical collaboration. [...] At long last, Europe is on its way to becoming one big family, without bloodshed, a real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead.

(European Council 2001b)

The reflexive approach sees cooperation as a response to societal problems, and institution formation as a response to the indirect consequences of such cooperation, which increasingly catches on and has polity consequences. Polity-building is the result of deepened integration driven by intelligent problem-solving, but problem-solving leads to juridification, to more legal regulation, which again triggers claims to democracy and *reflexive juridification*, as James Bohman puts it in the present volume. It is 'legal-

ization without democratic politics' (Brunkhorst 2004: 100). Hence the integration process is not a linear mono-causal process driven by unintended feedback loops as analytical functionalism suggests, neither by the federalist ideas of constitutionalists like Altiero Spinelli (1966) and Ernesto Rossi, nor by 'the hidden hand' of Jean Monnet who foresaw a federation as the necessary outcome of closer cooperation (Monnet 1978: 392f). Rather, the integration process is to a large degree driven by contestation and opposition as it came to be seen as a technocratic, elite-driven project conducted in isolation from the people. The obvious answer to such allegations comprised democratic reforms, which, however implied more integration and supranationalism.

Integration is a process where actors shift their loyalties and activities towards a new centre with the authoritative right to regulate interests and allocate resources (Schmitter 1969: 166). Integration thus entails solving the problem of collective action – the free-rider problem. In causal terms, we may conceive of integration beyond the nation state as a process where states and non-state actors cooperate in joint problem-solving sites across national borders in Europe, thereby creating a *transnational society*. As the activities increase, common standards, rules and dispute-resolution mechanisms – regulation and coordinating mechanisms – become necessary, which, in turn, trigger reflexive and self-reflexive processes conducive to the establishment of authoritative institutions that can control and command obedience in the name of all. Hence the European institutions develop into something more than agents of the member states (Stone Sweet 2004: 236). The EU becomes a polity in its own right.

The supranational character of the Union's legal structure started with the constitutionalization of the treaty system, which transformed the EC from an international regime into a quasi-federal legal system based on the precepts of higher-law constitutionalism. All legal persons and not just states, have judicially enforceable rights. Furthermore, Article 177 of the Treaty of Rome (EEC) states that, whenever Community law is needed for the resolution of a dispute before a national court, the presiding judge may (sometimes must) request the ECJ for an adequate and authoritative interpretation. Due to case law, the *Doctrine of Supremacy* (1964) states that, in cases of disputes between a national norm and an EC legal norm, the national norm must give way; and the *Doctrine of Direct Effect* (1962, 1974) says that, under certain conditions, EC norms – Treaty law and secondary legislation – grant the citizens rights that must be protected in national courts. In the Treaty establishing a Constitution for Europe, recognition of the primacy of Union law is now stated (European Council 2004c: Articles I-6 and I-12). Further, the progressive strengthening of the doctrines of supremacy and direct effect is 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 net upshot is that:

The constitutionalization of the Treaty of Rome constitutes an ‘unintended consequence’ of monumental proportions. The member states, after all, had designed an enforcement system that one can characterize as ‘international law plus’, being (a) the compulsory nature of the Court’s jurisdiction, and (b) the obligatory participation of the Commission in various proceedings.

(Stone Sweet 2003: 27)⁴

The present state of affairs is due to a protracted process of integration since its inception with the Paris Treaty. The basis for cooperation deepened and broadened: from the Paris (1951) and Rome (1957) Treaties, through the Single European Act (1986), Maastricht (1992), Amsterdam (1997), Nice (2000), to the Laeken Declaration (2001) and the present-day work on forging a constitution. The EU is clearly something less than a federation but more than a club, a ‘Zweckbundnis’ (Verband), regime or a confederation. The latter cannot be democratic as it is the states not the citizens that are the masters; states are the sole sources of legitimacy and they act internationally on indirect and delegated powers on governance functions. The member states are the contracting parties in an intergovernmental organization. However, at least from the early 1990s, the EU has proclaimed its commitment to democracy, and to the principle of *direct legitimacy*: the power-wielding institutions should be authorized by the people and be accountable to the affected parties. The Charter of Fundamental Rights (2000) included now as part II of the Constitutional Treaty is the most explicit commitment as yet to a full-blown political union founded on democracy and human rights – a rights-based citizens’ Union (Eriksen *et al.* 2003a).

In order to understand the dynamics of such a development, we need to explore the concept of problem-solving which is at the heart of the European integration project. It is a vital issue in explaining the integration process but what does its coordinative power consist of?

Problem-solving, voting and bargaining

In political science *problem-solving* is a mode of decision-making distinguished from *bargaining* and *confrontation*. Confrontation denotes the appeal to the will (volition) or preference of a dominant actor (or coalition of actors) who has the means to compel compliance if necessary. In formalized political systems majority *vote* is the basic mechanism of sanction in the confrontational mode. It is those who control the most votes that win. Bargaining may be depicted as the strategic employment of threats and warnings in order to achieve given ends.⁵ Control over vital resources outside the negotiation site – such as the threats of exit, strike and lockout – is the action-coordinating mechanism of bargaining. In bargaining sites it is the resources not the votes that decide (Rokkan 1966).

In both cases external-sanction mechanisms are employed – the number of votes and the resources at disposal – in order to reach a decision. Voting and bargaining both sanction action and terminate the decision-making process solely on the basis of quantitative vectors. When it comes to problem-solving there need not be such external sanction mechanism in play to ensure compliance with a plan of action. Rather its coordinative power may stem from the cooperation process itself, or so I shall argue.

Fritz Scharpf (1988: 258) contends that problem-solving is premised on the ‘appeal to common (“solidaristic”) values’ and ‘resort to ostracism and exclusion as the ultimate collective sanction’. The capacity to coordinate action is in this case dependent upon the prevailing habits, customs, conventions and then on the ultimate threat of exclusion of non-compliers. However, problem-solving also takes place when such preconditions do not exist. The coordinative force of problem-solving – its ability to harmonize action – should therefore be sought for in the process itself, in the process of finding efficient or right solutions.⁶ Scharpf’s conception of problem-solving seems to: 1) overestimate the pool of collective values required; and 2) underestimate the force of reasons in the coordination of actions.

- 1 Agreement on values, on the common good, may be more or less present, may be diffuse and may even be non-existent as a resource for joint problem-solving. Further, given the social and cultural complexity of modern societies, such a ‘collectivistic substrate’ can not merely be taken for granted. The presence of a *value consensus* based on common virtues and a collective we-feeling may not be counted on in a pluralistic context. On the other hand, a common value base required for collective action can be created through enduring social interaction and communicative practices. It can result from intensified cooperation.
- 2 Problem-solving refers to the use of knowledge in a given situation. It has a cognitive dimension and is thus accessible for rational appraisal. Critical interlocutors may query whether the knowledge base is adequate for the choice of action. Is sufficient information collected for cogent decision-making? Problem-solving has to do with the finding of answers to posed questions and with solutions that may or may not be rational, namely, well grounded. It is a cooperative effort in order to overcome exigencies and obstacles in a manner that can be deemed successful or not successful, good or bad, right or wrong.

The logic underpinning problem-solving thus differs from that of the other two modes of decision-making – bargaining and voting – in that it does not contain a clear-cut external sanction mechanism, but is dependent on the *process*. That is, on the manner in which the participants define problems and suggest solutions and on the nature and quality of the

process in which they assess and justify proposals and solutions. This means that the resource base and the potential for effective sanctioning are not at the same level of formalization as that of the former two, making calculation and prediction of the results of the interaction process more difficult. Problem-solving is inherently linked to reflection, reason-giving and reaching common understanding. The medium for this is *deliberation* as it compels actors to verbalize and justify their plans of action in case of conflict. This may change someone's attitudes or beliefs, which is necessary in order for actors to harmonize action plans voluntarily.

Deliberation and will formation

When identities and values are involved, when actors do not know who they are or what they want, they cannot bargain or vote; when opinions differ and consensus on a common metric is missing, actors must argue. In this way deliberation reaches deeper than bargaining and voting. One cannot hold a vote or bargain unless alternatives are clarified and conflicts resolved so that a common understanding, at least as to what one disagrees about, is established. One must also *argue for* choosing the bargaining and voting procedures. The deliberative process of arguing and counter-arguing is a process 'that shapes *the identity and interests* of citizens in ways that contribute to the formation of a public conception of the public good' (Cohen 1989: 19). Deliberation designates the process of reaching agreement through reason-giving. Such a process may end in consensus with regard to a particular decision, or in conflict. In the latter case, deliberation needs to be succeeded by bargaining and/or voting.

In theoretical terms, deliberation is an action-coordinating mechanism suited to explaining the level of agreement and consensus reached in committees, conventions and networks. Its explanatory power is based on the motivational *force of reasons*, namely, that the insights into good reasons have behavioural consequences. Deliberation denotes an actor's attempt to come to an *agreement* about the definition of a situation, i.e. to reach a common *understanding* of how a given situation should be described. The ability to reach consensus on empirical and normative questions is due to the obligation to provide reasons, which is forced upon every participant in real discourses. In a well-performed deliberative process the participants will find out which reasons are good enough. Deliberation increases legitimacy as it includes affected parties and gives them a chance to argue their case. It also makes for qualitatively good and fair decisions as far as the members put forward arguments and respond to counter-arguments in a rational manner. Rational deliberation has a number of merits, including:

- 1 Deliberation leads to improvements in information and judgment: it is a cognitive process for the assessment of reasons in order to reach

just decisions and establish conceptions of the common good. This *epistemic value* of deliberation by implication also increases the likelihood that losers comply with majoritarian decisions.

- 2 Deliberation has the capacity of shaping preferences and transforming opinions conducive to collective will formation, namely, the *transformative value* of deliberation. This is due to the 'world-disclosing effect' of deliberation changing empirical and normative outlooks as well as collective self-interpretations.
- 3 It also has *moral value* as it is a constraint upon political power-holders. Only by justifying collective decisions towards the ones affected can one know whether or not they are right. Deliberation is a principle that sets the conditions for how to reach correct decisions, hence the concept of deliberative democracy.

Thus, deliberation does not merely constitute the medium of rational problem-solving and a coordinative mechanism, it also provides a democratic standard. One should, however, keep in mind that the epistemic dimension is vital to all theories of deliberation as far as they are premised on the acquisition and employment of knowledge and hence the force of reasons.

Reflexive polity-building

In this perspective deliberative politics is seen as a *reflexively organized learning process* – as a problem-solving procedure that brings in knowledge and relevant normative perspectives and qualifies (or validates) them in order to establish mutual understanding and agreement. 'Politics has the function of coordinating the learning process of the whole society' (Deutsch and Markovits 1980: 38). Deliberative politics, when institutionalized correctly, contributes to resolve conflicts impartially and achieve common aims legitimately. Consequently, we may conceive of societies as problem-solving entities in which success can be measured according to *collective rationality* – that is, according to standards of justice and the common good (Peters 1991: 204ff; Habermas 1996: 319).

The democratic procedure is a special variant of the idea of societal problem-solving as it represents the institutionalization of communicative processes for the selection of problems and solutions for a community. Reflexivity is here taken to depict the actor's rational monitoring of the circumstances of their activities. Deliberation is, then, not solely an instrument for reaching better decisions but also for learning through the testing of arguments. That agents can provide self-reflexive interpretations of, as well as provide intelligible, intersubjective reasons for, their behaviour is procedurally entrenched. The democratic procedure makes voice possible, challenges arguments and compels actors to justify their claims by institutionalizing critical opposition and choice opportunities. It spurs

reflection over the process. Hence, we may speak of *institutional reflexivity*, which Giddens (1991: 20) defines as '[t]he regularized use of knowledge about circumstances of social life as a constitutive element in its organization and transformation'. Such *procedural self-reference* entails communication over communication and reflection over the selection of selections, to talk with Niklas Luhmann.⁷ Of course, selections may be perverse and communication may fail,⁸ but can, due to the epistemic value of public deliberation, be corrected. This value then not only increases the probability for compliance but also grounds the assumption of collective rationality as the outcome of well-conducted deliberative processes.

Such a perspective sits very well with the pragmatist theory of John Dewey (1927), to whom successful problem-solving depends on the degree to which actors manage to collaborate and engage in deliberation on a free and equal basis. Voluntary cooperation on practical questions, based on the free access to information and mutual deliberation, constitutes an 'intelligent' problem-solving method. The more free the participants are to suggest proposals and to assess information and assumptions, the more rational the problem-solving. It is this model of societal cooperation that Dewey applies to democracy, as he sees it as the political form of organization based on conscious deliberation and experimentation in which human intelligence can be fully realized. The growth of democratic communication is a requirement for *experimental inquiry* – for problem-solving within most fields of action in modern societies (Putnam 1991).

Dewey reconstructs polity-building stemming from simple forms of cooperation on solving common problems, namely, the collective inquiry of the citizens. There is no postulation of a collective identity or common interest at the outset – the society is not conceived of as an ethical society – but commonality is established during the process of attending to and solving the problems facing the actors:

Recognition of evil consequences brought about a common interest which required for its maintenance certain measures and rules, together with the selection of certain persons as their guardians, interpreters, and, if need be, their executors.

(Dewey 1927: 17)

The combined, unintended consequences of problem-solving lead to the formation of public spheres because it is in the affected parties' interest to control such consequences but also because there is an obligation to provide reasons to the ones affected.⁹ A public sphere and subsequently a polity come about and become organized as far as the indirect consequences are discovered and the affected ones succeed in establishing regulative schemes of action by 'internalizing the externalities'.

Those indirectly and seriously affected for good or for evil form a

group distinctive enough to require recognition and a name. The name selected is the Public. This public is organized and made effective by means of representatives who as guardians of custom, as legislators, as executives, judges, etc., care for its especial interest by methods intended to regulate the conjoint actions of individuals and groups. Then, and in so far association adds to itself political organization, and something which may be government comes into being: the public is a political state.

(Dewey 1927: 35)

However, in this theory of polity-building there is a true danger of scientism and technocracy.¹⁰ Consequentialism bears the burden of justification. The rights that protect the integrity and autonomy of the individual, independent of their interests and problems, are missing. The principle of democratic justification in a deontological sense can hardly be compensated for by the inquiry of the citizens coming together to solve common problems. We are faced with the risk of forfeiting the individual for the collective good. The Deweyan perspective has to be supplemented because practical problem-solving according to the standards of efficiency and the collective good, involves burden-sharing and the allocation of costs, hence bringing about questions of rights and justice. There is a hierarchical dimension to the idea of reflexive self-constitutionalization, according to Schmalz-Bruns (Chapter 3), as reflexivity entails the public use of reason that establishes the *moral point of view* according to which moral reasons can appear as what they are – hierarchically superior. Democracy conceived of as self-government constituted by the unintended consequences of action must be supplemented with a rights-based perspective. Moreover, we should distinguish between the case when actors face the same challenge in a situation and wish to overcome it cooperatively, and when they run into a conflict which they want to solve consensually (Habermas 1989b). The former refers to what goals or what ‘good society’ we would like to realize – *goal attainment*, the latter to the rules for *conflict resolution*. The general problem of political integration on democratic terms, which has to do with the relationship between deliberation, law and trust, can be reconstructed in three steps.

Law, trust and deliberation

First, as integration has to do with shifting the bounds of loyalty and with the solving of the free-rider problem, it requires surrender or delegation of sovereignty. For integration to come about there is a need to overcome the problem of collective action, which arises as soon as a common good cannot be restricted for the ones bringing it about. For such, moral, deontic norms that tell what is obligatory, right and just are required to stabilize social relations. Interests and pragmatic concerns shift according