

UNIVERSITY OF SOUTHAMPTON
FACULTY OF LAW, ARTS AND SOCIAL SCIENCES
School of Social Sciences

**The European Union as a Model of Transnational Democracy:
An Analysis of Three Policy Sectors**

by

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ABSTRACT

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**THE EUROPEAN UNION AS A MODEL OF TRANSNATIONAL DEMOCRACY:
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This thesis' principal concern is an analysis of the European Union's (EU's) experiment in transnational democracy. It contends that the distinct but related processes of globalisation and European integration, or Europeanisation, are restricting the autonomy and diffusing the sovereign authority of the state. Traditionally the legitimacy of sovereign states has been anchored to the popular sovereignty of their citizens but a dispersal of the sovereign authority of the state raises the issue of how democratic legitimacy can be rearticulated in order to sustain a correspondence between the demos and institutions of governance.

Using Fritz Scharpf's composite typology of input and output-oriented legitimacy the thesis considers the institutional and normative potential of the EU as a site of transnational democracy. Rather than treating the EU as a single entity it is viewed as constituting a series of regimes which regulate diverse policy problems incorporating a range of institutional and individual actors. The thesis analyses three different regimes: The European Central Bank; the EU gender rights regime; and the regulation of agro-food biotechnologies. The regimes are differentiated on the basis of their structural, institutional and ideational characteristics. It is argued that the various regimes call for different qualities of decision-making which reflect different configurations of input and output-oriented legitimacy.

Following the contention that the regimes call for different qualities of decision-making, three models of transnational democracy are developed which articulate different 'ideal' configurations of input and output legitimacy. Each of these models of transnational democracy is applied to a particular EU policy regime to explicate the democratic practices of the regime and to evaluate the normative purchase of the model. The European Central Bank regime is analysed through the model of democratic intergovernmentalism; the EU gender rights regime through the model of cosmopolitan democracy; and the agro-food biotechnologies regulatory regime through the model of deliberative democracy. The logic of mapping the models and regimes is guided by a *prima facie* resonance between the models' normative and institutional prescriptions and the structural, institutional and ideational characteristics displayed by the regimes.

The findings of the case studies provide the basis for a focused evaluation of the democratic qualities of the policy regimes and critique of all three models of transnational democracy. This analysis informs a broader evaluation of the democratic predicament and potential of the EU in a globalising world. In conclusion, some final remarks are offered in relation to the future of European transnational democracy with some suggestions for future research possibilities.

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Declaration of Authorship

I, **Robert Carl Frith**, declare that the thesis entitled **The European Union as a Model of Transnational Democracy: An analysis of Three Policy Sectors** and the work presented in it is my own.

I confirm that:

- this work was done wholly or mainly while in candidature for a research degree at this University;
- where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
- where I have consulted the published work of others, this is always clearly attributed;
- where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
- I have acknowledged all main sources of help;
- where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
- none of this work has been published before submission.

Signed: ... 

Date: ... *30 January 2004*

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Abbreviations and Acronyms.

ACRE	Advisory Committee on Releases to the Environment (UK)
AEBC	Agricultural and Environment Biotechnology Commission (UK)
BEPG	Broad Economic Policy Guidelines
CDEP	Centre of Decision for Economic Policy
CGB	Comité de Génie Biomoléculaire (France)
COREPER	Committee of Permanent Representatives
CDU	German Christian Democratic Party
DBF(s)	Dedicated Biotechnology Firm(s)
DG(s)	Directorate-General(s)
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECOFIN	Economic and Financial Committee of the Council of Ministers
ECSC	Economic Coal and Steel Community
EEC	European Economic Community
EDP	Excessive Deficit Procedure
EMAC	Economic and Monetary Affairs Committee (European Parliament)
EMI	European Monetary Institute
EMS	European Monetary System
EMU	Economic and Monetary Union
(E)NGO(s)	(Environmental) Non Governmental Organisation(s)
ENOW	European Network of Women
EOU	Equal Opportunities Unit (European Commission)
EP	European Parliament
EPD	Equal Pay Directive 1975
EPP/ED	European Peoples Party/European Democrats
ERA	Environmental Risk Assessment
ESCB	European System of Central Banks
ETD	Equal Treatment Directive 1976
ETUC	European Trades Union Congress
EU	European Union

EWL	European Women's Lobby
GDP	Gross Domestic Product
GM	Genetically Modified
GMM(s)	Genetically Modified Micro organism(s)
GMO(s)	Genetically Modified Organism(s)
HGC	Human Genetics Commission (UK)
HICP	Harmonised Index of Consumer Prices
ILO	International Labour Organisation
IMF	International Monetary Fund
MEP	Member of European Parliament
NAIRU	Non-accelerating inflation rate of unemployment
NAWO	National Alliance of Women's Organisations (UK)
NCB	National Central Bank
NICs	Newly Industrialising Countries
OCA	Optimal Currency Area
OECD	Organisation for Economic Cooperation and Development
QMV	Qualified Majority Voting
rDNA	recombinant DNA
SAP	Social Action Program
SCIMAC	Supply Chain Initiative for Modified Agricultural Crops
SEA	Single European Act
SED	Self Employed Directive 1986
SEM	Single European Market
SGP	Stability and Growth Pact
SPA	Social Policy Agreement
SPD	German Social Democratic Party
SPS	Sanitary and Phytosanitary
SSD	Social Security Directive 1978
TBT	Technical Barriers to Trade
TEU	Treaty on European Union 1993
TU(s)	Trade Union(s)
UN	United Nations
WRC	Women's Rights Committee (European Parliament)
WTO	World Trade Organisation

1. Introduction.

In his address to the European Constitutional Convention, in December 2002, the President of the European Commission, Romano Prodi, declared that the aspirations of the EU should be 'to consolidate a Union of peoples and of States that is the first true supranational democracy.'¹ In addition, he connected the successful realisation of this grand aspiration to the democratic and effective management of globalisation.²

Prodi's call to consolidate European transnational democracy reflects much recent academic scholarship on globalisation, which broadly, although not uncritically, advocates the development of democracy beyond the state, often identifying the European Union (EU) as a unique experiment in post-national democracy.³ However the optimism of this scholarship is challenged by a highly developed and extensive body of literature which is far more sceptical of transnational democracy in general and within the context of the EU in particular.⁴

This thesis critiques both of these bodies of work. Firstly it suggests that scholarship in relation to transnational democracy remains underspecified with regards to really existing institutions of governance. Secondly, it contends that the research in relation to the EU's democratic deficit remains constrained by its tendency to articulate national parliamentary models of democracy and to treat the EU as a single polity. It explicates and critiques the three most dominant normative models of transnational democracy found in the literature: the model of democratic intergovernmentalism; the model of cosmopolitan democracy; and the model of deliberative democracy and interrogates them in relation to three different policy regimes in the EU. In doing so it reviews both the democratic credentials of the EU and evaluates the usefulness of the normative models of transnational democracy. It does so by acknowledging that there are different models of democracy against which the democratic characteristics of the EU can be judged and by treating the EU as a series of overlapping regimes rather than a single polity. This allows comparison between the substantive policy areas in order to evaluate the democratic conditions and qualities pertaining to each.

1.1. Sovereignty and democracy, globalisation and Europeanisation.

The relevance and importance of scholarship on transnational democracy is contextualised in a careful consideration of the contemporary debates concerning the relationship between sovereignty and democracy, globalisation and Europeanisation (chapter 2). The relationship between sovereignty and democracy is central because modern conceptions of democracy and democratic practice have traditionally been territorially bounded and ‘the focus of modern democratic theory has been on the conditions which foster or hinder the democratic life of a nation.’⁵ Where theory and practice have assumed that the national state is the appropriate referent, and that its borders constitute the limits of democracy, ‘[t]he migration of political authority to supranational levels’ not only ‘has the potential to undermine long-standing democratic arrangements’,⁶ but also raises the critical question, ‘if the theory of democracy traditionally presupposes the type of state boundaries that globalization undermines, what could or should take their place?’⁷

It is argued that the EU, as a new configuration of authority, constituted within a globalising world, presents a challenge to democratic theory. Traditionally, this has assumed symmetry between a national citizenry and a national state constituted by, and constitutive of, the Westphalian manifestation of sovereignty.⁸ Indeed in the context of the EU, the blurring of the boundaries between the domestic and international spheres denotes a broader challenge to international relations, comparative policy analysis and democratic theory. Understanding this challenge is therefore of the utmost importance since normative solutions are likely to require contributions from these various disciplines.⁹

Globalisation is treated in this thesis as a complex of distinct but interrelated material and ideational processes across a range of domains of activity including the economic, political, military, cultural and environmental. Their modes of interaction are increasingly coordinated through transnational networks of power, which involves the reconfiguration of the authority and sovereign power of the territorial state. European integration, henceforward Europeanisation – the voluntary ‘pooling’ of sovereignty by EU member states – also has reconfigured the authority and power of the territorial state across a similar range of activities. Together globalisation and Europeanisation has created a complex enmeshment of supranational, national and regional institutions amongst which diffuse sovereign authority is coordinated. The conceptual relationships between sovereignty and democracy, under conditions of globalisation and Europeanisation are complex and contested, and require

careful mapping, before embarking on any evaluation of the democratic possibilities and predicament of the EU.

In order to set out this argument three alternative conceptions of globalisation and Europeanisation are outlined and their constitutive and causal relationships evaluated.¹⁰ The three understandings of globalisation critically evaluated are globalisation as *transference* which constitutes globalisation as an intensification of cross border exchanges from within; globalisation as *transformation* which constitutes globalisation as the erosion of the normative status of state borders from without; and globalisation as *transcendence* which constitutes globalisation as a structured process, in which the state and the global system are mutually constitutive.¹¹ Each of these understandings of globalisation raises particular causal or constitutive propositions. Viewing globalisation as an intensification of cross border exchanges requires that an explanation of globalisation is presented in causal terms in which globalisation is an outcome of the states' sovereign practices. Conversely, an understanding of globalisation as the erosion of the unit boundaries from without requires that an explanation of globalisation is framed in terms of systemic changes above the state. However an understanding of globalisation as a structured process in both the domestic and international spheres forecloses a simple causal explanation because neither state nor system is given precedence in the relationship. Instead globalisation is viewed as being constituted by an active state which generates globalisation, yet is simultaneously transformed within the process. State, system and globalisation are thus given meaning in terms of their relation to each other rather than as causally related independent and dependent variables.

This thesis adopts a broadly constructivist approach and suggests that sovereignty is a socially and historically mutable discourse or institution. Therefore whilst recognising that sovereignty denotes what are in effect the constitutive rules of the game, which actors may participate, and so forth, it also acknowledges that the constitutive rules are derived from the actors practices. Institution and practice are contended to be mutually constitutive and neither state nor sovereignty is fixed in perpetuity. In terms of a historical-constructivist approach the understandings of globalisation as *transference* and *transformation* are theoretically incoherent because they both operate to stabilise our ontological understandings of state and system and thus foreclose the possibility of theorising about the reconstitution of sovereignty and the conditions of democracy within a globalising EU. The alternative understanding of globalisation as *transcendence* is far more consistent with the constructivist perspective adopted by this thesis because it suggests that globalisation is a state authored process but one which changes the constitutive conditions within which sovereignty is

practiced and given meaning. As Bartelson notes; '[w]ithin this view, globalization not only affects the attributes of individual states or the identity of the state as a political institution, but it *subverts the conditions of its existence*.'

¹² Under contemporary conditions states continue to exercise sovereign authority, but the practices and meaning of sovereignty within this late-modern manifestation are very different to that constituted within the Westphalian order.

A similar set of constitutive theorisations are considered with respect to the relationship between Europeanisation and globalisation. Three similar understandings of Europeanisation are developed. The first suggests that Europeanisation is a state authored process, the purpose of which is to mediate the impacts of globalisation. The second conceives of Europeanisation as a process which overlaps with globalisation, and, reinforces the impact of globalisation in the erosion of the normative borders of the state. The third view of Europeanisation suggests that it both promotes, and mediates, the impact of globalisation; this is to say that it is constituted by, and constitutive of, globalisation.

These understandings of Europeanisation are broadly analogous to the understandings of globalisation in that they constitute state, Europeanisation and globalisation in different ways. Again we are required to consider whether one is normatively preferable above the others. For similar reasons, as above, the third understanding of Europeanisation is adopted as normatively preferable because it allows a nuanced appreciation of the changing constitutive relations between Europeanisation, globalisation and the national state and invites theoretical reflection in relation to alternative manifestations of sovereignty and democracy in the contemporary EU.

In the extended consideration of the relationship between sovereignty and democracy offered in chapter 2 it is argued that our modern state-bounded conception of democracy relies, in Connolly's terminology, upon the Westphalian assumptions of 'an essential symmetry among territory, action and membership'¹³, or, in Linklater's alternative phrasing, 'unity of sovereignty, territoriality, citizenship and nationality.'¹⁴ The central tenet of these contentions is that democratic theory commonly presumes the 'notion of a nation-state consisting of a more or less contained national society, a clearly demarcated territory and an administrative apparatus constituted to provide services for this society and territory.'¹⁵

The ways in which the modern manifestation of sovereignty has both established and perpetuated belief in relation to an essential symmetry between these various dimensions of community and political unit is highlighted by contrasting the very different ways in which territory, political authority and community were manifested in the medieval period. The

purpose of this exercise is twofold. Firstly it establishes the historically contingent nature of sovereignty and the notion of state bounded democratic legitimacy. In so doing it encourages us to challenge the analytical and normative claims asserted by the Westphalian model of sovereignty in light of the contemporary processes of globalisation and Europeanisation.

Secondly comparison with the medieval period provides us with a new set of intellectual tools with which to interrogate the contemporary manifestation of sovereignty. As Bull rightly notes '[i]t is not possible, by definition, to foresee political forms that are not foreseeable, and attempts to define non-historical political forms are found in fact to depend upon appeals to historical experience.'¹⁶ In keeping with this contention, this thesis articulates the 'neo-medieval' metaphor in order to help capture the increasingly complex ways in which political authority and political membership are constituted within the contemporary EU.¹⁷ The implications raised by this 'late-modern' or 'post-Westphalian' manifestation of sovereignty in relation to the proper location for democratic legitimacy are considerable, in view of the ambiguous relationship between authority and territory, and the emergence of multiple and competing political loyalties.¹⁸

It is argued that the processes of economic globalisation and Europeanisation have restricted the capacity of the state and led to the increasing diffusion of informal and formal political authority amongst a variety of actors below and above the state, thus, reconstituting contemporary sovereignty as an institution within which political authority is shared or coordinated between multiple heteronomous actors at local, national, regional and global levels. Where, the sovereign state has historically provided the necessary conditions for democracy to function, the unsettling of the 'Westphalian bond' in the EU poses a significant challenge to the normative theorising and the operation of democracy. It suggests that increasingly it is necessary to reformulate models of democratic legitimacy along transnational lines.

It is suggested that contemporary manifestations of sovereignty and democracy are very different to those constituted by and constitutive of the Westphalian paradigm. Whilst the processes of economic globalisation and Europeanisation are responsible for the disruption of the Westphalian bond between territory, authority and community they also constitute new sites of authority and loyalty. Whereas under the Westphalian paradigm these relations were essentially symmetrical, within globalising Europe they are constitutive of, and constituted by, variable geometry frames in which territory, authority and membership are fused together in multiple complex patterns.

The contemporary phenomena of globalisation and Europeanisation and their impact upon increasing complex relations between territory, authority and community clearly present formidable challenges to the Westphalian democratic bond. In this respect Anderson reflects that rather than celebrate the increasing complexity of the EU 'we might want to criticise its multiperspectival politics as directly involved in its 'democratic deficit' which is at least partly a result of the lack of 'singularity' in decision making, and especially in the weakness of its central parliament.'¹⁹ However an alternative view is that 'heterarchical complexity per se is not undemocratic' if it remains guided by '[d]istinctly democratic values, such as values of self determination, autonomy, respect for rights, equality and contestability.'²⁰ It is contended that the EU is the contemporary exemplar of heterarchical complexity and as such requires investigating with respect to whether it indeed does constitute a unique contemporary experiment in transnational democracy or whether such optimism should be replaced by more sober reflection with regards to the EU's institutional and normative democratic deficiencies: in effect, its democratic legitimacy.

1.2. Democratic legitimacy.

Fritz Scharpf, a prominent scholar of transnational democracy in relation to the EU, conceptualises democratic legitimacy as comprising 'input-oriented legitimation' and 'output-oriented legitimation'.²¹ Input-oriented legitimacy derives 'from the *authentic preferences* of citizens'. Output-oriented legitimacy on the other hand is obtained through '*effective fate control*'.²² Both dimensions, Scharpf suggests, are 'equally essential elements of democratic self-determination'.²³ Accordingly Scharpf contends that that the current debate on the European democratic deficit 'is deficient since it focuses exclusively on the weaknesses of the *input* structures at the level of the European Union.'²⁴ From such a perspective Prodi's call for both democratic and *effective* governance at the European level would seem promising by acknowledging the full importance of output-oriented legitimacy without which '[d]emocracy would be an empty ritual'.²⁵

Whilst in Scharpf's view there is no conceptual difficulty in obtaining output-oriented legitimacy at the European level he is far less optimistic about achieving input-oriented legitimacy in the EU.²⁶ Scharpf's distinction is based upon his assessment of their differing normative prerequisites. With respect to fulfilling the conditions of output-oriented

legitimacy Scharpf maintains that '[w]hat is required is no more than the perception of a range of *common interests*'. Input-oriented legitimacy on the other hand requires a much thicker organic sense of collective identity which although 'more or less taken for granted' within established nation states is far from being obtained at the EU level.²⁷ However in view that Scharpf himself contends that both dimensions are essential requirements to obtain democratic legitimacy, it is difficult not to concur with Frieze and Wagner that his emphasis on the EU's potential for output legitimation does not address the problem of the EU's democratic deficit but merely 'reason[s] it way.'²⁸

Zürn is more optimistic in his assessment concerning the democratic predicament and potential of the EU and consequently asserts that: [i]nternational institutions not only increase system effectiveness or output legitimacy, but are also a normatively sensible response to the problems for democracy that are caused by globalization.²⁹ Zürn's optimism is based on an alternative assessment of the normative and institutional requirements for establishing authentic democracy (input legitimacy). In this regard he considers two aspects in particular. Firstly Zürn highlights the deliberative dimension of democracy as well as its majoritarian aspect as emphasised by Scharpf.³⁰ Secondly, he argues that the 'practicability of democracy is not dependent on a fully cultivated *demos* from the outset';³¹ a claim which he substantiates with an extended analysis of the analytically separable components underpinning the notion of a *demos*.³²

Within the scholarly debate there is clearly an absence of consensus regarding the institutional and normative prerequisites for establishing authentic and effective democracy (input and output-oriented legitimacy) at the European level. These critiques require careful review; and accordingly they are considered at length in chapter 3. This is necessary in order to map out the contours of an already established debate and to move it forward. An important outcome of this review is the recognition that whatever the differences in the various critiques, '[v]ery rarely, if at all, is there more than cursory acknowledgement of the uneasy co-existence of competing visions and models of democracy, which, in turn, should inform both diagnosis, prognosis and possible remedy of democratic shortcomings.'³³ Indeed, on the whole 'one size fits all' solutions concerning the EU's democratic deficit are offered.³⁴ Frequently these solutions are 'constructed according to the concrete sociological features operating in a given national context ... thus neutralising alternative proposals which are not explicitly grounded on the empirical model of the national democratic state.'³⁵

One of the key claims, made by this thesis, is that, in large part the disparity between various assessments, concerning the potential for achieving input and output-oriented

legitimacy in the EU, hinges upon the model of democracy adopted. Within the literature on globalisation and normative democratic theory three models of transnational democracy are most often articulated,³⁶ where these [m]odels ‘can be thought of as ideal types or heuristic devices which order a field of inquiry.’³⁷ The three models are democratic intergovernmentalism; cosmopolitan democracy; and deliberative democracy. Democratic intergovernmentalism situates legitimacy in the indirect democratic authorisation of international institutions by national constituencies, whose principal legitimacy derives from their effectiveness in providing nationally determined public goods (output-oriented legitimacy). The state provides a transmission belt for the representation of national voices, thereby also providing input oriented legitimacy. Cosmopolitan democracy situates legitimacy in the realignment of various communities of fate and institutions of governance through the dispersal of authority below and above the state, guided by the principles of voice and effectiveness (input and output-oriented legitimacy). This is realised through the provision of bundles of enabling rights embedded within institutions across multiple sites of power. The model of deliberative democracy anchors legitimacy in the open contestation of discourses in the public sphere and the formal institutions of governance prior to decision-making. It therefore emphasises input-oriented modes of legitimacy. Nevertheless it is argued that the processes of deliberation can lead to more effective policy and thereby contribute towards output-oriented legitimacy.³⁸

This thesis interrogates these models of democracy in order to identify their institutional and normative requirements and to establish their respective relationships towards input and output dimensions of legitimacy. In doing so it is able to draw some conclusions regarding the strengths and weaknesses of the different models of transnational democracy, and, provide some comments in relation to the opportunities and restraints in realising input and output-oriented legitimacy beyond the state and in the EU in particular.

In addition this thesis takes seriously the arguments concerning whether the EU should be conceived of as a single polity or a series of regimes,³⁹ ‘from the perspective of governance and power – its exercise, control and accountability’.⁴⁰ Conceiving of the EU as a series of regimes, rather than as a single polity, permits analysis of the different democratic challenges faced by different policy sectors enmeshed in differentiated patterns of global, regional and national configurations of power. This differentiation of regimes in terms of their democratic challenges, thereby requiring different democratic solutions, underscores the need for different models of transnational democracy.

This thesis responds to these dual challenges – developing a better understanding of the distinct democratic challenges posed by divergent regimes, and thereby the need to consider competing solutions - by specifying three models of transnational democracy, and by mapping them onto three policy regimes.

1.3. The logic of the policy regimes.

Three different EU policy regimes are analysed in this thesis: the European Central Bank (ECB); gender rights in the workplace; and the regulation of agro-food biotechnologies. Each of these policy sectors, or regimes, is differentiated by a variety of factors: their relationship to the principal dimensions of the EU economy; enmeshment within the regional and global economic and regulatory spaces; principal discourse; mode of policy integration (negative versus positive); and technocratisation versus politicisation. These structural, institutional, and ideational factors constitute the divergent features of the various regimes, presenting the distinct challenges for developing transnational democracy. In particular it is contended that these factors are likely to constitute differing opportunities and constraints in relation to achieving input and output-oriented legitimacy. Thus, by choosing regimes which display divergent structural, institutional, and ideational characteristics, we are provided with an opportunity for comparative assessment of the possibilities for realising both input and output-oriented modes of legitimacy across the EU.

The EU is constituted by, and constitutive of, three principal aspects of economic activity – financial, production/trade, and social policy.⁴¹ The regimes chosen as case studies represent each of these dimensions of economic activity; the ECB – finance; the regulation of gender rights in the workplace – social policy; and the regulation of agro-food biotechnologies – production/trade. These aspects of economic activity have been present in the EU framework since the adoption of the Treaty of Rome, in 1957; however each of these policy areas have continued to evolve in the context of both the push of domestic influences, regional dynamics and the pull of globalised forces.⁴² The relationships between these forces are complex and indeterminate and enmesh the diverse regimes in differentiated patterns of global, regional and national configurations of power, which may be divergent, convergent or overlapping, ‘but never harmonious’.⁴³ Hence, the structure of each of these regimes is distinguished in terms of their various configurations of regionalisation and globalisation.

In this regard, the financial and monetary regime is characterised by both high levels of regionalisation and globalisation, in which highly integrated European markets are also embedded in wider global markets. The gender rights regime is characterised by high levels of Europeanisation, through the development of positive legal rights, but little in the way of global regulation. The agro-food biotechnologies regime, by contrast, is an increasingly Europeanised and globalised industry, which is highly regulated at the European level, and increasingly subject to indirect regulation through global institutions such as the World Trade Organisation (WTO) and Cartagena protocol.

The development of integrated European and global financial markets is related to the discourse of an institutionalised monetarist epistemic community – comprising the ECB and European and global market institutions - which have shaped both the mode of integration (negative versus positive) and the relative influence of politics and technocracy within the regime. Monetarism's emphasis on credibility, or market legitimacy, has led to both negative and positive modes of integration encompassing an independent and centralised ECB (positive integration) versus decentralised economic policy coordination between member states (negative integration). This institutional solution clearly distinguishes between the realm of politics in which policy goals are contested, and is attributed to the national members (principals), whilst the role of policy implementation is delegated to the ECB (agency), which provides the required technical expertise. The effective delimitation of voice and representation in relation to public policy goals is a reflection of the regime's emphasis on output-oriented legitimacy, specified in terms of achieving low inflation in the Euro Zone.

The development of an EU gender rights regime has been closely associated with the creation of a single European market. The principal discourse surrounding the market building exercises – including the provisions of equal rights in the workplace – has been dominated by neoliberal principles of flexibility, economic efficiency and competitiveness. The institutional solution adopted to forward the creation of a single market has been mutual recognition – the principle by which member states are required to accept goods which satisfy other member's domestic standards - which has promoted negative, rather than positive social policy integration. Nevertheless social policy has been incorporated into the Community acquis, and in the realm of gender rights, article 119 of the Founding Treaty, on equal pay between the sexes, has introduced gender equality and provided the foundation for a cluster of legally enforceable supranational provisions which have, in turn, generated competing discourses around social justice and positive modes of integration. The

development of this article was the outcome of a highly politicised and unified 'second wave' feminist movement in the 1970s, which has become more diversified in purpose in more recent years, and therefore less coherent.⁴⁴ In this context there is a detectable shift from high politicisation towards technocratisation, in which ECJ rulings adjudicate within the existing framework rather than press to extend it, and gender mainstreaming has brought about a bureaucratisation of the issue. Nevertheless, these supranational provisions, embedded within the various EU local, national and supranational institutions provide EU citizens with a set of individual enabling rights, providing both resources of voice and representation at multiple levels of governance, and which guarantee various aspects of gender equality. It is argued that these legal-institutional aspects of the EU gender rights regime contribute towards both input and output-oriented legitimacy.

The development of the EU agro-food biotechnologies regime has been driven by twin purposes: the protection of the environment and human health, and the promotion of a globally competitive European-wide biotechnology industry – the precautionary principle versus the competition state. These dual principles have been discursively contested both within the institutions of governance at the state and European levels and increasingly, in more recent years, within civil society, as the issues have been amplified by advocacy groups and particular events have received high levels of media coverage. The shift towards an interaction between civil society voices and the institutionalised discourses, alongside the increasingly vocal dispute between the EU and the USA in relation to EU regulatory standards for agro-food GMOs, has brought about an increasing politicisation of the regime, although technocratic modes of policy are highly resilient, institutionalised both within European and global institutions of governance. The EU regulatory provisions in relation to agro-food biotechnologies comprise both negative and positive modes of integration. Where, for instance, an application to market a genetically modified organism (GMO) is approved by a particular member-state, and no objections are raised by other EU members, then the application is simply approved on an EU-wide basis. Ostensibly, this amounts to a negative form of integration, based on principles of mutual recognition. However, if applications are contested – which all have been to date – then a complex settlement procedure is invoked, involving an EU regulatory committee which requires at least a qualified majority of member-states' approval. This institutional requirement constitutes the creation of a europeanised regulatory space, aiming at consensus building, rather than simply mutual recognition, and thus represents a form of positive integration. The need to build consensus within the institutions of governance, in conjunction with the institutionalisation of discursive

principles such as human health and economic competition, discourages simple bargaining and instead encourages argumentation or deliberation. Moreover the accepted terms of the institutionalised deliberation has been transformed through interaction with civil society voices, thus enlarging the ‘relevant community’ of opinions. The emphasis within both the institutionalised discourses and the interaction with civil society on issues of voice highlights the importance of achieving input, rather than output oriented legitimacy.

These divergent structural, institutional, and ideational characteristics, manifested in each of these three regimes, and their tendency towards either input or output-oriented legitimacy are summarised in table 1.1. below.

	ECB	Gender	Biotechnologies
Aspect of EU economy	Financial	Social	Production
Pattern of regional/global regulation	High/high	High/Low	High/Indirect
Discourse	Monetarist	Neoliberal vs. Social justice	Scientific vs. Social
Mode of policy integration	Negative	Legal rights – positive interpretation	Legal mixture
Technical or political regime	Technical	Political	Both
Configurations of input/output-oriented legitimacy	Output legitimacy	Input and output legitimacy	Input legitimacy

Table 1.1. Structural, institutional and ideational aspects of policy regimes.

1.4. Logic of mapping models over regimes.

The logic of the models is driven by this thesis’s claim that, the divergent assessments in relation to the EU’s democratic deficit, hinge upon the model of transnational democracy adopted. The three models adopted, which are most prevalent within the literature, democratic intergovernmentalism; cosmopolitan democracy, and deliberative democracy, emphasise different institutional and normative requirements to achieve input and output-oriented legitimacy. It is argued that the distinct democratic challenges posed by the three divergent regimes display a prima facie correspondence with the normative and institutional

prescriptions made by the different models of transnational democracy. This correspondence is indicated below, in table 1.2., by mapping the core principles of the models of transnational democracy alongside the institutional and normative principles of the policy regimes (outlined in sections 1.1. and 1.2.).

Democratic Intergovernmentalism	ECB
<p>International institutions improve policy effectiveness (output oriented legitimacy).</p> <p>Indirectly authorised by national constituencies who determine whether membership of the institution continues to effectively provide output oriented legitimacy.</p> <p>State provides a transmission belt for the representation of national voices, thereby also providing input oriented legitimacy.</p>	<p>Independent monetary authority improves monetary policy credibility, thereby lowering transaction costs and improving policy effectiveness (output oriented legitimacy).</p> <p>Member States of the Euro area (principals) delegated monetary authority to ECB (agency). The ECB expresses the interests of the national states.</p> <p>Asymmetric EMU (in which member states remain principal institutions in relation to macroeconomic policy) requires coordination between states and ECB. The ECB's legitimacy depends upon the support of the national states and their citizens, whose voices are represented in various intergovernmental institutions (ECOFIN, Eurogroup).</p>
Cosmopolitan Democracy	EU Gender Rights Regime
<p>Legitimacy achieved through the realignment of multiple communities of fate with institutions of governance through the dispersal of authority below and above the state.</p> <p>Choice of appropriate community of fate guided by the principles of voice and effectiveness (input and output-oriented legitimacy).</p> <p>Legitimacy given legal form through the provision of bundles of enabling rights embedded within institutions across multiple sites of power.</p>	<p>Multiple channels of voice and representation, and institutions of governance at the local, national and supranational level</p> <p>Appropriate level of governance guided by principles of subsidiarity and proportionality.</p> <p>Gender rights regime comprises a cluster of empowering gender rights, given legal form in EU supranational law, and may be invoked across multiple levels of governance.</p>

Table 1.2. Correspondence between normative models and policy regimes.

Deliberative Democracy	Biotechnologies
Legitimacy achieved primarily in the process of opinion formation (reflexive arguing), rather than the process of decision making itself, (aggregation of preferences), thereby emphasising input oriented legitimacy.	Institutional provisions of the regime (generalised principles and comitology) promote deliberation and search for consensus, rather than a simple aggregation of preferences.
Voices are articulated both through institutionalised deliberation and through the public spheres.	Regime characterised by both institutional deliberation, and after 1996 increasing involvement of civil society voices in relation to the appropriate regulatory approach.
The contestation of discourses impacts upon the (pre)existing balance, thereby transforming the terms of legitimacy for subsequent debate.	Agro-food biotechnology regime comprises competing economic and environmental principles (the precautionary principle versus the competition state).

Table 1.2. (cont.)

Three propositions, in relation to the modes of input and output-oriented legitimacy comprised in each of the policy regimes may be constructed through mapping the models of transnational democracy over the policy regimes (table 1.3.). These propositions provide an initial claim regarding the modes of input and output oriented legitimacy constituted in each of the policy regimes, which direct the enquires of the case studies. Whilst their purpose is not to be used as positively testable hypotheses, which are simply accepted or rejected – indeed a principal aim of the thesis is to obtain a better appreciation of the multiple approaches to achieving transnational democracy - it is accepted that the substantive content of the propositions may require qualification, or substantial reformulation as a consequence of the case study findings. Equally importantly, in the context of the purpose of this enquiry, the findings will also provide the opportunity to evaluate the regimes themselves, and provide normative prescription in relation to improving input and output-oriented legitimacy. On the basis of the findings the thesis aims to critique both the generalised optimism and pessimism for transnational democracy and the EU's democratic credentials, as well as reflect upon the advantages, and disadvantages of viewing the EU as a series of regimes rather than as a single polity.

Model of democracy	Policy Regime	Proposition
Democratic Intergovernmentalism	ECB	The bases of legitimacy in both input and output terms are primarily intergovernmental
Cosmopolitan Democracy	EU Gender Rights Regime	Input and output-oriented legitimacy is primarily provided by a cluster of enabling rights embedded across multiple levels of governance.
Deliberative Democracy	EU Agro-food biotechnology Regime	Democratic legitimacy is primarily provided by both institutionalised deliberation and civil society voices providing channels for preference articulation, reflection and modification (<i>input</i>) and the generation of superior policy (<i>output</i>) which is reflective of the preceding deliberation.

Table 1.3. Normative propositions.

1.5. Order of the study.

The remaining portion of the thesis is divided into 6 further chapters. The following chapter (chapter 2) explores the challenges posed in relation to territorially bounded conceptions of democracy under contemporary manifestations of sovereignty in a globalising EU. It is argued that the territorial state is enmeshed within complex and overlapping configurations of Europeanisation and globalisation which require mapping out in relation to particular policy sectors. The three policy sectors, and their divergent characteristics introduced earlier in this chapter (section 1.4) are considered in further detail in section 2.5. Chapter 3 reviews the principal existing institutional and normative debates in relation to the EU's democratic qualities (section 3.2). Following the arguments presented in chapter 2, concerning the divergent structural, institutional and ideational characteristics of the regimes and their differentiated impact on obtaining input and output-oriented legitimacy, the chapter outlines the argument for adopting a range of competing or complementary visions and models of transnational democracy in order to analyse and evaluate the EU's democratic potential (section 3.3.). The three principal models of transnational democracy are outlined: democratic intergovernmentalism; cosmopolitan democracy; and deliberative democracy;

which offer differing normative and institutional prescriptions for achieving input and output oriented democracy. In the following chapters (4-6) the veracity of these models' prescriptions is evaluated in relation to the three policy regimes, according to the logic outlined above (section 1.5.). Chapter 4 applies the model of democratic intergovernmentalism to the ECB; chapter 5 analyses the EU gender rights regime through the model of cosmopolitan democracy; and chapter 6 considers the democratic legitimacy of the EU regulation of agro-food biotechnologies using the model of deliberative democracy.

The opportunities and limits for transnational democracy in the EU are reviewed carefully in this thesis's conclusions (chapter 7). This final chapter investigates, in relation to each policy regime, whether aspects of the other models of democracy may also apply. In addition it returns to the issue concerning the relation between democracy within the policy regimes and the overall democratic legitimacy of the EU as a single entity.⁴⁵ The argument is brought to a close by shifting the focus of the argument from today's EU and offers a more speculative commentary regarding the future prospects for European transnational democracy.

Notes for Chapter 1. Introduction.

¹ Romano Prodi, President of the European Commission, 'Presenting the Commission Communication to the European Convention', European Convention, Brussels, Speech /02/617, 5 December 2002, p. 4.

² Ibid, pp. 3-4.

³ See for example: David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance, Cambridge, Polity, 1995; David Held, Models of Democracy, 2nd Ed., Cambridge, Polity Press, 1996; David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty', Legal Theory, 2002, vol. 9, no. 1, pp. 1-44. Michael Zürn, 'Democratic Governance Beyond the Nation-State: The EU and Other International Institutions', European Journal of International Relations, 2000, vol. 6, no. 2, pp. 183-221; Erik Oddvar Eriksen and John Erik Fossum, Democracy in the European Union: Integration through Deliberation?, London and New York, Routledge, 2000; Heidrun Friese and Peter Wagner, 'Survey Article: The Nascent Political Philosophy of the European Polity', The Journal of Political Philosophy, 2002, vol. 10, no. 3, pp. 242-364.

⁴ For a sceptical view of transnational democracy in general see: Robert Dahl, 'Can international organizations be democratic? A skeptic's view' in Ian Shapiro and Casiano Hacker-Cordón, Democracy's Edges, Cambridge, Cambridge University Press, 1999; Robert Dahl, 'A Democratic Dilemma: System Effectiveness versus Citizen Participation', Political Science Quarterly, 1994, vol. 109, no. 1, pp. 23-34. For an overview of the democratic deficit literature see Christopher Lord, 'Assessing Democracy in a Contested Polity', Journal of Common Market Studies, vol. 39, no. 4, pp. 341-61. The democratic deficit literature is extensively reviewed and evaluated in Chapter 3.

⁵ David Held, 1996, p. 335.

⁶ William D. Coleman and Tony Porter, 'International Institutions, Globalisation and Democracy: Assessing the Challenges', Global Society, 2000, vol. 14, no. 3, p. 377.

⁷ S. L. Hurley, 'Rationality, Democracy and Leaky Boundaries: Vertical vs. Horizontal Modularity', The Journal of Political Philosophy, 1999, vol. 7, no. 2, p. 128.

⁸ Richard Devetak and Richard Higgott, 'Justice unbound? Globalization, states and the transformation of the social bond', International Affairs, 1999, vol. 75, no. 3, p. 483-90.

⁹ See for example, Thomas Risse-Kappen, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union', Journal of Common Market Studies, 1996, vol. 34, no. 1, p. 53; Brian C. Schmidt, 'Together again: reuniting political theory and international relations theory', British Journal of Politics and International Relations, 2002, vol. 4, no. 1, pp. 115-140.

¹⁰ The distinction made between causation and constitution in the following section is guided by Wendt's treatment of the issue in Alexander Wendt, Social Theory of International Politics, Cambridge, Cambridge University Press, 1999, esp. pp. 77-91.

¹¹ Jens Bartelson, 'Three Concepts of Globalization', International Sociology, 2000, vol. 15, no. 2, pp. 184-190.

¹² Bartelson, 2000, p. 190.

¹³ William E. Connolly, 'Democracy and Territoriality', Millennium, 1991, vol. 20, no. 3, p. 464.

¹⁴ Andrew Linklater, The Transformation of Political Community, Cambridge, Polity Press, 1998, p. 190.

¹⁵ Zürn, 2000, p. 188.

¹⁶ Hedley Bull, The Anarchical Society: A Study of Order in World Politics, 2nd Ed., Basingstoke, Macmillan, 1995, p. 247.

¹⁷ Ibid, pp. 245-246; 254-266.

¹⁸ Stephen J. Kobrin, 'Back to the future: Neomedievalism and the postmodern digital world economy' in Aseem Prakash and Jeffrey A. Hart, Eds., Globalisation and Governance, London, Routledge, 2000, pp. 171-177. Amongst authors writing in relation to Neomedievalism it is commonplace for them to use the term 'postmodern' to encapsulate the variety of contemporary changes in the relations between territory, community and authority in the contemporary EU and in the globalising world more generally. See for example, James Anderson, 'The shifting stage of politics: New Medieval and postmodern territorialities?' Environment and Planning D-Society and Space, 1996, vol. 14, no. 2, pp. 133-153; John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', International Organization, 1993, vol. 47, no. 1, 139-174.; James A. Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?' Journal of Common Market Studies, 1996, vol. 34, no. 1, pp. 29-52. Whilst Kobrin adopts this terminology, he nonetheless displays an awareness of the controversy surrounding the use of the phrase postmodern to describe contemporary political and economic modes of organisation and its contested relation to the debates in relation to postmodernism as a mode of enquiry. Indeed in this respect he is at pains to emphasise that he uses 'the terms *modern* and *postmodern* in a very limited sense' and that his use of 'postmodern' refers specifically to the emerging mode of political-economic organization resulting from globalization.' (2000, p.

167). In order to avoid unintended associations raised by the postmodern lexicon this thesis adopts the less controversial term 'late-modern' to refer to the post-Westphalian manifestation of sovereignty and associated ambiguities in authority, membership and territory. This phrase is already established in the scholarship on modernity and globalisation in the work of Anthony Giddens, and William Connolly's work on the changing relations between state, authority and community in contemporary times. See Anthony Giddens, Modernity and Self-Identity: Self and Society in the Late Modern Age, Cambridge, Polity, 1991; The Consequences of Modernity, Cambridge, Polity, 1990; William Connolly, Identity/Difference: Democratic Negotiations of Political Paradox, New York, Cornell University Press, 1991.

¹⁹ Anderson, 1996, p. 149.

²⁰ Hurley, 1999, p. 127.

²¹ Fritz Scharpf, Governing in Europe: Effective and Democratic?, Oxford, Oxford University Press, 1999, pp. 6-13.

²² Fritz Scharpf, 'Economic integration, democracy and the welfare state', European Journal of Public Policy, 1997, vol. 4, no. 1, p. 19.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Scharpf, 1999, pp. 9-11.

²⁷ Ibid, p. 9.

²⁸ Heidrun Friese, and Peter Wagner, 'Survey Article: The Nascent Political Philosophy of the European Polity', The Journal of Political Philosophy, 2002, vol. 10, no. 2, p. 349.

²⁹ Zürn, 2000, p. 184.

³⁰ Scharpf, 1999, p. 7-9; Zürn, 2000, pp. 191-95.

³¹ Zürn, 2000, p. 201.

³² Ibid, pp. 195-99.

³³ J. H. H. Weiler, Ulrich, R. Haltern, and Franz, C. Mayer, 'European Democracy and its Critique', West European Politics, 1995, vol. 18, no. 3, p. 5.

³⁴ Ibid.

³⁵ Carlos Closa, 'European Union citizenship and supranational democracy', in Albert Weale and Michael Nentwich, Eds., Political Theory and the European Union: Legitimacy, constitutional choice and citizenship, London and New York, Routledge, 1998, p. 177.

³⁶ Although as Weiler quite rightly notes this depends to a 'large measure on the literature you choose to study.' (p. 271). Hence, although he sketches out a similar methodology: 'exploring possible 'fits between various democratic models and Union modes of governance', his choice of the 'the most well known' ideal types differs to my own (p. 279). Instead he adopts a consociational model, a pluralist model, and a neo-corporatist model. (pp. 279-285). See J. H. H. Weiler, The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other essays on European Integration, Cambridge, Cambridge University Press, 1999. Along similar lines John Coultrap contrasts parliamentary and pluralist models of democracy to evaluate the EU's democratic deficit. See John Coultrap, 'From Parliamentarism to Pluralism: Models of Democracy and the European Union's 'Democratic Deficit'', Journal of Theoretical Politics, 1999, vol. 11, no. 1, pp. 107-135. Despite critiquing the inadequacy of statal models of democracy, (Weiler 1999, 268 Coultrap, p. 109), these examples remain principally attempts to translate statal models of democracy to the transnational level. In contrast, the ideal types employed in this thesis are properly developed models of transnational democracy.

³⁷ Held, 2002, p. 1.

³⁸ Unlike the other two models, democratic intergovernmentalism is not a label which is found in the literature on transnational democracy. Instead the model is derived from a synthesis of approaches which emphasise the primacy of the intergovernmental aspects of authority and legitimacy. Key intergovernmental contributions include: Will Kymlicka, 'Citizenship in an era of globalization: commentary on Held', in Ian Shapiro and Casiano Hacker-Cordón, Democracy's Edges, Cambridge, Cambridge University Press, 1999; Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, International Organization, 1997, vol. 51, no. 4, pp. 513-553; Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', Journal of Common Market Studies, 1993, vol. 31, no. 4, pp. 473-524; Robert O. Keohane, 'Governance in a Partially Globalized World: Presidential Address, American Political Science Association, 2000', American Political Science Review, 2001, vol. 95, no. 1, pp. 1-13; 'International Institutions: Can Interdependence Work', Foreign Policy, 1998, Spring, pp. 82-96. Examples of influential work on cosmopolitan democracy include David Held, 2002, 1996, 1995, Daniel Archibugi, David Held and Martin Köhler, Re-imagining Political Community: Studies in Cosmopolitan Democracy, Cambridge, Polity, 1998, Thomas Pogge, 'How to create supra-national institutions democratically. Some reflections on the European Unions "democratic deficit"', in A. Føllesdal and P. Kosowski, Eds., Democracy and the European

Union, Berlin, Springer Verlag, 1998; 'Cosmopolitanism and Sovereignty', *Ethics*, 1992, vol. 103, no. 1, pp. 48-75. Cosmopolitan Democracy, For recent contributions towards the literature on transnational deliberative democracy see: Eriksen and Fossum, 2000, John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford, Oxford University Press, 2000; 'Transnational Democracy', *The Journal of Political Philosophy*, 1999, vol. 7, no. 1, pp. 30-51; Dennis F. Thompson, 'Democratic Theory and Global Society' *The Journal of Political Philosophy*, 1999, vol. 7, no. 1, pp. 111-125; H. Brunkhorst, 'Globalising democracy without a state: weak public, strong public, global environmentalism', *Millennium*, 2002, vol. 31, no. 3, pp. 675-90. Recent critiques of the various models include: David Chandler, 'New Rights for old? Cosmopolitan citizenship and the critique of state sovereignty', *Political Studies*, 2003, vol. 51, no. 2, pp. 332-349 (Cosmopolitan Democracy); Molly Cochran, 'A Democratic Critique of Cosmopolitan Democracy: Pragmatism from the Bottom-Up', *European Journal of International Relations*, 2002, vol. 8, no. 4, pp. 517-548, (Cosmopolitan Democracy and Deliberative Democracy); Gillian Brock, 'Cosmopolitan Democracy and Justice: Held Versus Kymlicka', *Studies in East European Thought*, 2002, vol. 54, pp. 325-347 (Cosmopolitan Democracy and Democratic Intergovernmentalism).

³⁸ David Held, 1996, p. 335.

³⁹ The now classic definition of regimes is provided by Stephen Krasner who states that '[r]egimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.' Stephen D. Krasner, 'Structural causes and regime consequences: regimes as intervening variables', *International Organization*, 1982, vol. 36, no. 2, p. 186. Generally when writing on the subject of regimes authors usually relate them to institutions. In this respect Keohane notes that in the 1970s 'political scientists began to redefine the study of international institutions, broadening it to encompass what they called 'international regimes – structures of rules and norms that could be more or less informal.' Robert O. Keohane, 'International Institutions: Can Interdependence Work?' *Foreign Policy*, Spring, 1998, p. 85. In accordance with Keohane's definition, Coleman and Porter regard regimes as 'relatively decentralised, often informal, issue area-specific institutions.' Coleman and Porter, 2000, p. 386. Again, emphasising their issue-specificity, Young states that regimes govern 'well-defined activities, resources, or geographical areas of only some actors.' Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment*, Ithaca, New York, Cornell University Press, 1989, p. 13. In this regard each of the policy areas studied by this thesis can rightly be regarded as regimes. Each of the policy areas are area specific (management of monetary policy; gender equality; regulation of agro food biotechnologies). Moreover each of these policy areas is constituted by different principles, norms rules and decision-making procedures around which actors expectations converge. Clearly the central role of the European Central Bank (ECB) within the Euro regime means that it is more highly institutionalised than the other regimes considered. However this does not undermine the understanding of regime employed by this thesis which accepts that regimes can be more or less informal. Moreover it is argued that in order to fully understand the practices of the Euro regime it is necessary to appreciate the ways in which the ECB institutions are embedded within the wider EMU regime (See chapter 3). Reflecting the multiple-regime approach adopted by this thesis my usage of the term regime differs from other scholars who have used it in relation to the EU as a singular regime. (See for instance Robert E. Breckinridge, 'Reassessing Regimes: The International Regime Aspect of the European Union', *Journal of Common Market Studies*, 1997, vol. 35, no. 2, pp. 173-187.

⁴⁰ J. H. H. Weiler, Ulrich R. Haltern and Franz C. Mayer, 'European Democracy and Its Critique' *West European Politics*, 1995, vol. 18, no.3, p. 5.

⁴¹ Article 2 (ex Article 2), Consolidated Version of the Treaty Establishing the European Community, as amended by the Treaty of Amsterdam, subsequently referred to simply as the EC Treaty.

⁴² Part I, Article 2 (purposes of the Community), Part II, Title I, (Free movement of Goods); Title III, (Free Movement of persons, services and capital); Part III, Title II, (Economic Policy), Title III, (Social Provisions), Treaty Establishing the European Community, 1957, subsequently referred to as the Founding Treaty.

⁴³ Arie M. Kacowicz, 'Regionalization, Globalization, and Nationalism: Convergent, Divergent, or Overlapping?', *Alternatives*, 1999, 24, no. 4, p. 527.

⁴⁴ Catherine Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union*, Verso, London, 1996.

⁴⁵ Cf. Hurley's comments in relation to evaluating the internal democratic credentials of 'horizontal layers' and the democratic legitimacy of the overall system in its tendencies. (p. 143).

2. Sovereignty and democracy, globalisation and Europeanisation.

2.1. Introduction.

The principal concern of this thesis is an examination of the EU as an experiment in transnational democracy. The purpose of this chapter is to set out the theoretical claims which support European transnational democracy as an important and relevant area of study. Modern conceptions of democracy and democratic practices have historically been contained within the national state. The relationship between the state and democracy has been mutually reinforcing. The state has provided the necessary resources to realise a variety of public goods for its citizens, and in turn democracy provides the basis for the state's legitimacy. State bounded democracy has provided both effective policy capacity and the channels for democratic policy input - what Scharpf refers to as input-oriented and output-oriented democratic legitimacy.¹

This simple formula for democratic legitimacy assumes a particular state form - the modern sovereign state - which seeks to assert exclusive and supreme authority over the citizenry within its territory and which co-exists alongside other territorially discrete states that recognise no superior authority beyond their borders within the sovereign states system. Democratic legitimacy thus conceived involves an essential symmetry among territory, political authority and community.² Accordingly a disruption in this symmetry could be held to unsettle the formula for democratic legitimacy. It is contended in this thesis that just such a disruption of the clear lines of 'Westphalian cartography' is being brought about by the distinct but overlapping processes of globalisation and Europeanisation.³ Simply put, it is suggested that these contemporary processes have created novel modes of interactions and sites of power which transcend the territorial manifestations of authority and democracy of the modern state system.

Whilst, as was noted in the introduction (section 1.1.), globalisation and Europeanisation processes have impacted across a range of domains, this thesis focuses on the economic domain in particular. The decision to adopt an economic emphasis is justified on two grounds. Firstly, even within multi-dimensional accounts of globalisation the economic dimension remains central. Secondly, one of the key aims of the thesis is to

investigate the relationship between globalisation and Europeanisation, the latter being primarily an economic process to date. With regards to the processes of economic globalisation and Europeanisation it is argued that they have increasingly restricted national state capacity and reconfigured sovereign authority amongst a variety of actors. A number of aspects of globalisation are considered including the impact of increasingly globally mobile capital, trade liberalisation, the growth of global production networks and the hegemonic status of neoliberal ideas. A similar range of factors are considered with respect to Europeanisation. However, the narrative concerning the relationship between globalisation, Europeanisation and the state is not simply one of transcending the state. The state remains an important site of power and authority. It will be argued that whilst Europeanisation may well reinforce certain aspects of globalisation, it does, in certain respects, also provide European states an effective means of mediating the impact of globalisation. In particular it is suggested that in a variety of ways the 'political economies of scale' of the EU are more commensurate with governance than the national state in a globalising world which lends it greater effective capacity and hence output-oriented legitimacy.⁴ Moreover, it is suggested that the EU offers a unique experiment in transnational democracy which offers channels of voice and representation between the European citizenry and European institutions of governance thus providing input-oriented legitimacy. In (re)-constituting effective capacity and democracy – input-oriented and output-oriented democracy - at the regional level the EU presents an interesting experiment in post-national forms of democratic legitimacy in a globalising world.

The next section of this chapter (section 2.2.) considers the nationally constituted formula for democratic legitimacy and makes the case that it rests on a modern (Westphalian) conception of state sovereignty. This line of argument is developed by contrasting the organisation of political authority in the modern period with the organisation of political authority in the medieval period. The purpose of this exercise is not to provide an explanation for the reconfiguration of political authority between the medieval to modern periods or to suggest that such a movement was natural or inevitable. The immediate purpose is to demonstrate that our modern territorially bounded conception of democracy is intimately associated with the modern manifestation and meaning of sovereignty. A further reason is to highlight the historically contingent nature of the modern manifestation of sovereignty in order to move away from naturalised and eternalised conceptualisations and thereby encourage us to imagine alternative meanings of sovereignty and locate their practices in a regionalising and globalising Europe.

The following section (section 2.3.) outlines how processes of economic globalisation have restricted the governance capacity of the state and led to the increasing diffusion of informal and formal political authority amongst a variety of actors, thus prompting a debate concerning the contemporary status and meaning of sovereignty and by association the condition of modern territorially bounded democracy. These qualitative changes in sovereignty and democracy are explored through the metaphor of 'neo-medievalism' which highlights five constitutive principles of the late-modern manifestation of sovereignty. These are (1) the coordination of sovereign responsibilities; (2) the representative inequality of states; (3) functional and territorial cleavages; (4) reciprocal intervention in the domestic affairs of other EU member states; (5) multilevel sovereignty games within variable geometry frames (section 2.3.2.).

This thesis does not argue that processes of globalisation and Europeanisation are bringing the demise of sovereignty. Instead it contends that the usage and meaning of the term and the ascribed practices of sovereignty are changing. In the context of Europe it is argued that sovereignty refers to the diffuse exercise of authority among a variety of sub-state, state and supra-state actors; along territorial, transterritorial and functional lines, rather than 'connoting the exercise of supremacy within a given territory.'⁵

Building on these understandings of globalisation and Europeanisation the third section, (section 2.4.), proceeds to consider how they are related to each other. In order to explore the possible relationships three proposals are evaluated: (1) Europeanisation promotes globalisation; (2) Europeanisation is a response to, and mediates the impacts of, globalisation; and (3) the more ambiguous relationship, that Europeanisation both promotes and mediates the impacts of globalisation. It is contended that the third proposition emphasising the complexity, indeterminacy and differentiated aspects of the relationship is most convincing. Accordingly it is further specified, in the following section, (section 2.5.), in relation to the three principle dimensions of EU economic policy - economic and financial integration, social policy, and trade. Each of these, sectors or regimes, are differentiated not only by their relation to these distinct aspects of economic policy, but also according to: their enmeshment in Europeanisation and globalisation; principal discourse; mode of integration (negative versus positive); emphasis of technocratisation versus politicisation; and articulations of input and output-oriented legitimacy. It is concluded that the new meanings and practices of European sovereignty and democracy cannot be satisfactorily understood within territorially bounded concepts and that democracy needs rethinking beyond the 'box',

where the EU experiment is re-coordinating action, authority and democracy at multiple levels below and beyond the state as well as at the state level.⁶

2.2. Westphalian sovereignty and democracy.

Historically, democratic theory has assumed that democracy is ostensibly state-bounded.⁷ Echoing Scharpf's typology of input-oriented and output-oriented legitimacy Coleman and Underhill note that:

political leaders are assumed to have the capacity to implement policies they deem necessary to ensure their political legitimacy in a democratic context [output]. Citizens can hold these leaders to account for these decisions. Through political parties or interest groups, citizens can also participate individually in attempting to influence the actions of political leaders [input].⁸

This 'internally generated' formula for state-bounded democracy is summarised in figure 1 below.

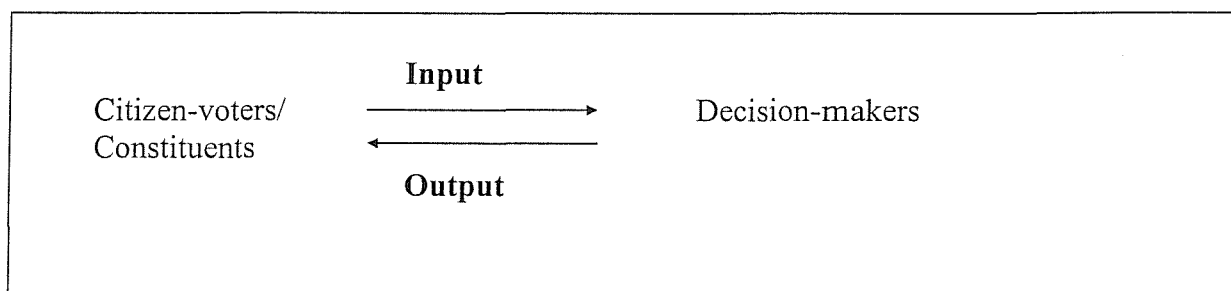


Figure 2.1. State-bounded democracy.

This model of democracy is based on a particular manifestation of sovereignty which I refer to as modern or Westphalian and involves an essential symmetry between territory, authority and community. The congruence of these three features is essential for the state-bounded democratic formula to hold, and accordingly any disruption of this symmetry undermines the orthodox model of democratic legitimacy. In order to explicate this point further we may compare and contrast the modern manifestation of sovereignty with the medieval constitution of authority across the three dimensions highlighted above: territory, authority and community. The style of historical comparison resonates with what Bartelson would call an 'episodical' approach in that '[i]t does not aim to describe or explain past ages or past world-views in their entirety, but focuses only on those episodes of the past which are crucial to our understanding of what was singled out as problematic in the present.'⁹

Within medieval Europe the King was not the exclusive ruler within his Kingdom. Instead monarchs shared authority with a wide variety of other institutions. Whilst the structure of rule was (in part) territorial, it was 'nonexclusive territorial rule' characterised by a 'patchwork of overlapping and incomplete rights of government.'¹⁰ Building on this picture, Anderson notes:

[p]olitical sovereignty was *shared* between a wide variety of secular and religious institutions and different levels of authority - feudal knights and barons, kings and princes, guilds and cities, bishops, abbots, the papacy - rather than being based on territory per se as in modern times.¹¹

The relations between these various institutions were organised principally through 'nested hierarchies', in which smaller units were embedded or 'nested' in larger entities, and through which people were members of the larger units 'not directly but only by virtue of their membership of lower level bodies.'¹² In this respect, 'Kings and other rulers were the subjects of higher authorities and laws.'¹³ The higher authorities were the twin heads of Latin Christendom, the Pope and the Holy Roman Emperor, whilst the higher laws were natural law or divine law. Within Christendom therefore the ultimate sovereign was God 'whose commands were generally acknowledged by Christians as demanding obedience.'¹⁴

The absence of the norm of exclusive territoriality meant that within medieval Europe, the principle of non-intervention was virtually meaningless. As noted above, multiple heteronomous – that is functionally differentiated authorities within any given territory - was the norm. Moreover, the functional differentiation of authority within a territory was not entirely clear-cut, and often subject to contestation between rival parties:

[i]n theory the feudal order was characterized by heteronomous institutions with different functional tasks that supposedly would promote peace and harmony among all elements in the society. In practice violence was endemic among the nobility and between the nobles, the monarchs, and the church. Actual practices hardly conformed with Christian ideals. Vassalage, which rewarded loyal servants with land, provided subordinates with resources that they could and did use to challenge their nominal superiors.'¹⁵

Thus territories were not pacified spaces of symbiotic multiple authorities but rather the sites of contested authority. Furthermore, [i]t was unusual for a king's realm to be concentrated and consolidated at one place.'¹⁶ In this respect their territory 'would often resemble an archipelago: peripheral parts were scattered like islands among the territory of

others rulers; core parts were perforated and interrupted by the intervening jurisdictions of other authorities,' and their claims of authority would differ between territorial locations.¹⁷

The configuration of multiple authorities within a territorial location; the functional contestation between these authorities; the physical fragmentation of territorial rule and the differentiated bases of rulers authority between territories means that it would be anachronistic to distinguish between domestic and international spheres: '[t]he distinction between domestic and international politics was not simply blurred, it had little or no conceptual meaning.'¹⁸ At best we may, perhaps, speak of 'fluid frontier zones',¹⁹ or 'large zones of transition.'²⁰ The absence of a distinction between domestic and international spheres of authority was mirrored by the absence of a distinction between private and public authority. Accordingly, '[g]overnment authority was not clearly public; in most places a king's (public) realm was also his or her (private) estate',²¹ and thus 'public territories formed a continuum with private estates.'²²

The movement from the medieval state, characterised by diffused and overlapping patterns of authority, to the unified modern state, involved the reconfiguration of exclusive authority around a central institution - the territorial state.²³ The unified character of the state and its claim to a monopoly on legitimate authority are obverse sides of the same coin - one makes little sense without the other. However for analytical purposes we can consider each issue separately, beginning with the latter. If we say that the modern state claims a monopoly of, or exclusive legitimate authority within the state, by this we mean that it does not share sovereignty with any other institution - its sovereignty is supreme. In that 'no external actor enjoys authority within the borders of the state' we can say that the modern state is sovereign.²⁴ This condition of sovereignty is formally institutionalised in international law - therefore the state is constitutionally independent.²⁵ Exclusive authority within a given territory, formally institutionalised through constitutional independence, is according to Sørensen:

an absolute condition; it is either present or absent ... a state does either have sovereignty in the sense of constitutional independence or it does not have it. There is no half-way house, no legal in-between.²⁶

If we assert that modern sovereignty is an absolute condition, the corollary is that it must be a unitary condition - that is to say that the state 'must be of one piece'. It is nonsensical to speak of a fractured or diffused absolute condition. It must be unitary - all authority must lead back to a central point - a single public realm.²⁷

The absolute condition of sovereignty where a state is or is not sovereign may be expressed in binary terms as being a condition of either 1 or 0: 1 indicating that a state is sovereign; 0 indicating that it is not. In the same way that the constitutional condition of sovereignty cannot be said to be partial, neither can we say that a state is more sovereign or less sovereign than another. Our binary parameters do not allow such a statement. A sovereign state has the condition 1, and only 1, regardless of its material, or normative resources. Therefore, even under conditions of considerable disparity in *de facto* capacity, two sovereign states are legally bestowed an equal status - a binary condition of 1 respectively. The legal equality of states is a fundamental condition of sovereignty, and is enshrined in Article 2 of the UN.²⁸ As was noted above, the medieval state was territorial, but the configuration of authority was non-exclusive - sovereignty was shared within its borders. The modern state, by contrast, is exclusively territorial.²⁹ Authority is not configured along any other axes. In this sense we can talk of the 'bundling of sovereignty', whereby authority over all aspects of social life is configured within the state's boundary.³⁰

The corollary of configuring exclusive authority within a territorially bounded unit is the principle of non-intervention: the idea of *legitimate* intervention by an outside authority within a sovereign state where sovereignty denotes the principle of non-intervention is illogical. Despite this Krasner points out that intervention practices in the affairs of modern states *have* occurred with regularity, compromising their territorial integrity.³¹ Accordingly he refers to sovereignty as a principle of 'organised hypocrisy' reflecting the notion that state's may or may not transgress it depending on their interest calculations.³² However sovereignty should not merely be conceived of solely as an objective condition, exogenous to actors' interests and subject to their instrumental manipulation. Rather, reflecting broadly constructivist approaches, a more useful approach is to view it as an institution through which identities and interests are mediated. The following comments by Murphy summarise these sentiments admirably:

[t]o conclude that sovereignty does not matter, or that it is simply a concept that has been employed when it is politically expedient ... is to ignore the extraordinary power of the dissemination and widespread acceptance of sovereignty as a political-territorial ideal. In a more philosophical vein, ignoring the significance of sovereignty assumes that ideas and beliefs are simply the outcome of circumstance, not also shapers of circumstance.³³

Exclusive territoriality and the corollary of non-intervention are central principles of the modern state form, shaping the configuration of the sovereignty discourse through which

political authority is organised. This claim is valid, despite numerous instances of 'compromising Westphalia'.³⁴ In fact, the very occurrence of intervention practices signifies the existence and power of the discourse: '[i]ntervention practices participate in stabilizing the meaning of sovereignty. This is so because discussions of intervention invariably imply questions of sovereignty.'³⁵ The idea of 'compromising Westphalia' has meaning only in the context of an intersubjective knowledge structure through which the meaning of intervention can be interpreted. Whilst the phrase 'compromising Westphalia' retains meaning, so the discourse of modern sovereignty and its constitutive principles of territoriality and non-intervention retain their resonance.

These principles of exclusive territoriality and non-intervention, signified through instances of intervention practices - transgressions of the state's borders - rely upon the discursive construction of a neat delineation between the domestic and international spheres - what Clark refers to as the 'Great Divide'.³⁶ Sovereignty thus has two faces: the domestic and the international. The domestic face of sovereignty is 'the idea that there is a final and absolute political authority in the political community ... *and no final and absolute authority exists elsewhere* ...'³⁷ The external face of sovereignty 'has involved no more than the assertion or the justification of the independence of the state.'³⁸ Accordingly, we can say that:

the Great Divide encapsulates a profound series of assumptions about the radically differing empirical and normative provenances of the international and the domestic.³⁹

A variety of bi-polar relations between these two respective spheres can be constructed: hierarchy/anarchy; order/disorder; cooperation/contestation, and so forth. These contrasting milieux offer differing normative potential. The domestic arena offers an environment suitable for the pursuit of 'the good life'; whilst the conditions of the international arena, restrict state actions to the far narrower pursuit of self-interested power politics, underpinned by a 'theory of survival'.⁴⁰

The configurations of territory, authority and membership in the medieval and modern episodes are profoundly different. Within the medieval period the non-exclusive character of territorial rule meant that subjects were simultaneously answerable and bound to multiple rulers whose bases of authority claims and de-facto capacities could, and frequently did vary between fragmented territories. It is only with the 'bundling' of these dimensions that it became possible to imagine a territorially delimited state which had exclusive authority over

a geographically coterminous population and which was co-constituted by the principle of non-intervention within a system of formally similar states. Moreover the emergence of democracy depended upon the Westphalian configuration of sovereignty in which territorially delimited state authority and citizen membership were congruous and free from external intervention. These are the conditions and terms of its modern democratic legitimacy. Only under these conditions is it meaningful to hold that the state can internally generate its legitimacy by providing *its* citizens with a range of public goods and conversely that the citizens can influence *their* state's policy programme through a variety of democratic institutions and practices.

The immediate purpose of contrasting and comparing the medieval and modern periods is to demonstrate how state-bounded democracy requires the congruence of territory authority and membership and how this in turn is articulated through the discourse of modern sovereignty. However a second purpose is to draw attention to the historically contingent nature of modern sovereignty of which the meaning, objects and subjects of incorporation and terms of legitimacy have changed over time. Such a task is important because to problematise the modern manifestation of sovereignty - as this thesis does with reference to the processes of economic globalisation and Europeanisation - requires re-imagining the meaning and practices of sovereignty alongside the feasibility and desirability of alternatives or alterations to territorial models of democratic legitimacy.

A broadly constructivist approach is adopted by this thesis to reanimate sovereignty, suggesting that instead of being a fixed concept sovereignty is instead a socially and historically mutable discourse or institution. An initial definition of an institution may read: a 'persistent and connected set of rules: formal and informal, that prescribe behavioural roles, constrain activity, and shape expectations.'⁴¹ Although this definition requires further explication, it clearly establishes an important point: that in defining sovereignty as an institution - as a set of rules - it clearly distinguishes the concept from notions which consider it as an actual condition of effective control. Whether or not a state has the ability to independently enact economic policy is a matter of economic autonomy, not economic sovereignty.⁴² Similarly, a state's 'control over and access to the production and diffusion of information and knowledge' is not a matter of 'epistemic sovereignty',⁴³ rather it is an issue of epistemic autonomy. This conceptual distinction between institutional rules and conditions of actual autonomy does not mean that they are unrelated, '[i]t is merely to point out that the relation is a contingent relation and not a conceptual relation.'⁴⁴ As this thesis argues, the contingent relationship is of key importance, in that changes in the conditions of

autonomy and capacity such as are generated by the processes of economic globalisation and Europeanisation creates pressures for the reconfiguration of the institutional rules – i.e. sovereignty (section 2.3.). For the moment though, it is important to further explicate the institutional characteristics of sovereignty.

My opening remark, asserting that an institution, is a ‘persistent and connected sets of rules: formal and informal, that prescribe behavioural roles ...’, contains three core propositions which require further consideration: (1) institutions are persistent; (2) institutions constitute rules, and; (3) institutions constrain/shape behaviour. Let us consider the issue of *rules* first. In effect the rules are constitutive rules which means they are ‘foundational, they define the core features of what sovereignty is.’⁴⁵ These rules define the game being played, by which actors, and so forth. These rules are inherently long-standing - for instance the Westphalian sovereignty regime has evolved over three centuries. However, whilst these sets of rules are long-standing, or *persistent*, this is not to say that their meaning is fixed in perpetuity. This approach roots the construction of the institution of sovereignty within the sovereignty practices of the actors themselves.⁴⁶ It is asserted that the reconfiguration of institutions of political authority - from medieval through modern (and late-modern) - has occurred as a consequence of the changing practices of the key actors, who themselves are defined by reference to the prevailing institutions. This type of argument allows Biersteker and Weber to assert that ‘[s]tates can be defined in terms of their claims to sovereignty, while sovereignty can be defined in terms of the interactions and practices of states ...’, on the basis of which ‘... neither state nor sovereignty should be assumed or taken as given, fixed, or immutable.’⁴⁷ However, we should not consider sovereignty to be an institution constantly in flux. For the most part sovereignty configurations - its rules and practices - are naturalised and therefore become habitual. What then, brings about a reconfiguration of the institution of sovereignty? Changes in the institution are brought about by new political, economic, environmental or social pressures which challenge the efficacy of a particular sovereignty configuration: it ‘should be understood as an institution which is periodically renovated to respond to new historical circumstances.’⁴⁸

Finally, let us consider the *behavioural* component of the initial definition of an institution whereby constitutive rules ‘prescribe behavioural roles, constrain activity, and shape expectations.’ The behavioural emphasis contends that institutions ‘change behaviour but not identities and interests.’⁴⁹ This is an insufficient conception of institutions for the purposes of this thesis, which contends that institutions are ‘considerably more than low risk, functional vehicles for the exchange of state preferences.’⁵⁰ Like Keohane, Wendt recognises

that institutions are often 'codified in 'formal rules and norms' but he also asserts that these rules 'have motivational force only in virtue of actors' socialization to and participation in collective knowledge.'⁵¹ These processes of actor socialisation within intersubjective frameworks (which are a reflection of actors' practices) change the *identities* and not merely the interests of the actors concerned. The impact of institutions is therefore much more profound than shaping behaviour; they are 'fundamentally cognitive entities.'⁵²

In view of the above discussion let us re-evaluate the institutional aspects of sovereignty. I contend that it is a set of rules which are collectively constituted by (sovereign) actors' practices. In turn, these rules are constitutive of actors' identities and interests. Actor (agent/identity) and institution (discourse) are mutually constitutive. Both the meaning of sovereignty and the identities and interests of the sovereign actors are socially constructed, and consequently both derive their meaning from collective recognition. The institution of sovereignty exists to the extent that actors recognise it, and their practices reinforce it, and the actors are sovereign to the extent that their claims to sovereignty are recognised. In view that both agent and discourse are socially constructed, and mutually constitutive, changes in practices or shared beliefs are likely to reconfigure both elements, through an iterative process:

the meaning of sovereignty is negotiated out of interactions within intersubjectively identifiable communities; and the variety of ways in which practices construct, reproduce, reconstruct, and deconstruct both state and sovereignty.⁵³

Whilst the modern sovereign state and the modern sovereign state system have come to dominate our conceptions of sovereignty, an appreciation of the social construction of sovereignty and its historical contingency opens up the possibility that the contemporary processes of economic globalisation and Europeanisation are giving rise to new sovereignty practices.

2.3. Globalisation, late-modern sovereignty and democracy.

Having argued that sovereignty's meanings and its associated practices are socially constructed and historically contingent in order to problematise ahistorical and fixed

interpretations of sovereignty, the following section considers the proposition that contemporary processes of economic globalisation and Europeanisation are destabilising the congruent (Westphalian) relationship between territory, authority and political community. The implications of this proposition raise serious questions concerning: the (re)location of legitimate authority; the creation of new centres of power; and contexts of citizen participation which transcend the territorial bases of state authority, power and representation; striking right at the heart of the notion of an effective national democratic state. A variety of intellectual positions exist concerning the veracity of this proposition and are given due consideration. Broadly defined these positions fall into three camps: that we are witnessing the end of the sovereign state; that the processes of globalisation and Europeanisation are peripheral or irrelevant to the sovereign institutions and practices of the state; and that these processes are destabilising and reconstituting the meaning of sovereignty and its associated practices – that is we are experiencing the creation of new sovereignty meanings and practices in which sovereignty is viewed as shared or coordinated between multiple heteronomous actors. This thesis adopts the latter position: a belief in the continued relevance of the state in the constitution of sovereignty, but rejecting the position that nothing has changed.

The following discussion considers what is meant by economic globalisation and Europeanisation. These processes are considered in themselves and, more importantly for the purpose of the current argument, concerning their implications for sovereignty and democracy. Broadly speaking it is suggested that both processes have constrained the autonomy of the European states, which generates modifications in (states') sovereignty practices and the institution of sovereignty. It is argued that whilst Europeanisation may well reinforce certain aspects of globalisation, it does, in certain respects, also provide European states an effective means of mediating the impact of globalisation. In particular it is suggested that in a variety of ways the 'political economies of scale' of the EU are more commensurate with governance in a globalising world than the national state which lends it greater effective governance capacity (output-oriented legitimacy).⁵⁴

Globalisation can be defined as a complex of distinct but interrelated material and ideational processes across a range of domains of activity including the economic, political, military, cultural and environmental. Their modes of interaction are increasingly coordinated through transnational networks of power, which involves the reconfiguration of the authority and sovereign power of the territorial state. Similarly Europeanisation has reconfigured the authority and power of the territorial state across a similar range of activities. Together they

have created a complex of subnational, national, and supranational institutions amongst which diffuse sovereign authority is coordinated.

Having recognised globalisation as a multidimensional process this study self-consciously focuses on its economic dimensions. This focus is justified on two grounds. Firstly, arguments concerning globalisation's impact on state sovereignty and autonomy consistently stress its economic aspects – in particular the development of a globalised capitalist economy - even if other aspects are noted. In this respect Hay and Rosamond note that '[g]lobalization is invariably presented and analysed as a set of principally economic ... processes and practices, serving to effect a more or less epochal transformation of contemporary capitalism.'⁵⁵ This tends to be the case even where scholars hold highly different views regarding the veracity of the argument. This may be illustrated with a few examples from the literature which engages with the issue of globalisation and the state: '...no account of globalization and the state is adequate without extended attention to capitalism ...'; '[g]lobalisation is first and foremost embodied in the exponential growth in the international financial markets ...'; '[c]entral to this perception [of globalisation] is the notion of a rapid and recent process of economic globalization'; 'Globalisation is a multi-faceted process ... Arguably, however, it has been *economic changes* and technological innovations ... that have conjured up visions of a 'global' world'.⁵⁶ Secondly, European integration has, in the move towards a single European market (SEM), been primarily an economic process to date, and a key aspect of the study is an investigation of the relationship between globalisation and Europeanisation.

2.3.1. Globalisation.

Three main understandings of globalisation are offered in the globalisation literature.⁵⁷ The first of these suggests that globalisation may be identified as an intensification of exchange across existing unit (state) boundaries – that is an increase in *cross*-border relations. The second understanding views globalisation as a systemic level process which through an increase in open border relations is creating a single borderless world. The third understanding regards globalization as the transcendence of unit and system through the increase of *trans*-border relations. Each of these perspectives has differing implications for the meaning and status of the sovereign state and sovereign state system and by corollary the meaning and status of state-bounded democratic legitimacy. An understanding of economic

globalisation as an increase in *cross-border* relations is according to Scholte 'synonymous with internationalization.'⁵⁸ This conception of globalisation poses little threat to a modern understanding of the sovereign state and modern sovereign state system as it 'still presupposes that this system as well as the units remains identical with themselves throughout the globalizing process.'⁵⁹ If contemporary globalisation is simply heightened internationalisation it can be rightly argued that we are witnessing nothing new. Indeed Hirst and Thompson marshal a variety of indicators of economic internationalisation to illustrate that the levels of internationalisation displayed by the contemporary industrialised economies is very similar to their late nineteenth century counterparts.⁶⁰ Moreover, the primacy accorded to the unit level within such a conception signifies a great deal of continuity with the precepts of the 'embedded liberalism compromise' of the post-war order.⁶¹

Under conditions of embedded liberalism, markets were indeed internationalised - that is to say they engaged in integrated international trade. However, the emphasis is placed on the nature of the economic relations having an inter-national rather than intra-global quality. This careful use of language is used to emphasise the 'correlation of the economy with the state's boundaries.'⁶² The boundaries of the state were not impermeable; rather '[w]hat mattered was that transactions across them were under the *potential* control of national governments'.⁶³ In order to provide domestic stability, under conditions of increasing internationalisation, the state was increasingly interventionist. The height of the 'interventionist state' was from the middle 1950s to the late 1960s under High Fordism,⁶⁴ in which the state employed 'Keynesian policies of much broader fiscal controls, socio-economic plans regulation, and health, education, and welfare.'⁶⁵ In doing so it 'enhanced inclusion of marginalized people, raised the social wage substantially, and, in the social democracies, sharply increased labour participation.'⁶⁶ Under these conditions of High Fordism, territory, authority and political community were congruent, and moreover, '[t]he economy served the community of the state in which it was *embedded*.'⁶⁷ Accordingly, globalisation as internationalisation does not disrupt the sovereign institutions and practices of the modern state. Rather it signifies a continuation of the stability of sovereign meanings and practices and emphasises the role of states' as the agents of globalisation.⁶⁸

The second meaning given to globalisation denotes the 'creation of a single borderless world'⁶⁹, or 'of the world being, intelligible as *a single place* that comprises the totality of all human relationships.'⁷⁰ According to Bartelson this understanding of globalisation retains the distinction made by the first interpretation between unit and system but turns the relationship of causation '*outside-in*' rather than '*inside-out*' linking the fate of states with

global systemic changes.⁷¹ The implications of this conception of globalisation for the meaning and status of the modern sovereign state and sovereign state system are considerable. With respect to the economic dimensions of globalisation it argued that an increasingly globalised world economy is impacting on the capacity and autonomy of the state as a result of the increasing mismatch in their 'political economies of scale':

... the more that the scale of goods and assets produced, exchanged, and/or used in a particular economic sector or activity diverges from the structural scale of the national state – both from above (the global scale) and from below (the local scale) – and the more that those divergences feed back into each other in complex ways, then the more that the authority, legitimacy, policymaking capacity, and policy-implementing effectiveness of states will be challenged from both without and within.⁷²

Cerny argues that in a globalising world, distinguished by a growing divergence between the institutional capacity of the state and the structural characteristics of the global economy, the state has difficulty in supplying various types of regulatory, productive/distributive and redistributive public goods.⁷³ The thrust of this argument is ostensibly output-oriented as Cerny makes explicit elsewhere: 'democratic states are losing the policy autonomy and capacity for transforming what the people want into concrete *outputs*.'⁷⁴

A number of interconnected features of contemporary economic globalisation are associated with the loss of state capacity and restrictions upon its autonomy; in particular the development of globalised post-Fordist production networks; growth of globalised financial markets; national liberalisation of capital controls; and an associated neoliberal discourse. Each of these dimensions of economic globalisation has contributed towards moving the economy beyond the effective management of the state.

The contemporary structure of globalised production is often associated with 'a transition from Fordism to post-Fordism'.⁷⁵ The development of post-Fordist production patterns is explained as both a response to increasing levels of global competition from the earlier development of flexible, high technology economies like Japan and other Asian newly industrialising countries (NICs)⁷⁶ and as the cause of increasing globalised production and competition.⁷⁷ Whereas Fordist production structures were characterised by integrated production processes closely association with national political structures, post-Fordist production structures involve increasing levels of 'differentiation – both of distinct stages of the production process and of increasingly complex and variable production-line tasks

themselves.’⁷⁸ These increasing levels of differentiation between and within the stages of the production process involve changes in the ‘hard’ production processes’⁷⁹ such as the use of advanced reprogrammable automation; variable geometry and indirect management techniques based around subcontracting networks and just in time supply-chains; and the flexible and differentiated labour systems.⁸⁰ These changes in the patterns of production and the configuration of the factors of production are structured on increasingly globalised lines: global sourcing (the globalisation of supply chains and subcontractors); global production relocation (based on differentiated markets); and global factories (whereby the differentiated stages of a single production process are located in different countries) allow production operations to be tailored according to ‘wherever labour costs, taxation rates, regulatory frameworks and other variables are most favourable to them.’⁸¹ Accordingly it is meaningful to speak of the development of an increasingly globalised economy – that is ‘an economic space transcending all country borders’ alongside an already existing internationalised economy ‘based on transactions across country borders.’⁸² Under these conditions of globalised production it is argued that constraints are placed on the autonomy of the state and its capacity to provide public goods contested. In particular it is suggested that increasingly the ‘competition state’ is required to tailor its provision of public goods to those that ‘promote a relatively favourable investment climate for transnational capital.’⁸³

Whilst the aforementioned discussion focused on the globalisation of economic production (including services) – what is often referred to as the ‘real’ economy, an even more significant development is the globalisation of the financial or ‘virtual’ economy. In this respect Cerny suggests that the globalisation of the financial markets is leading to their ‘increasing structural hegemony in wider economic and political structures and processes.’⁸⁴ Reflecting this perception of the increased hegemony of the globalised financial markets Castells reverses the ‘real’ and ‘virtual’ labels suggesting that ‘in the age of networked capitalism the fundamental reality, where money is made and lost, invested or saved, is in the financial sphere.’⁸⁵ The structural power of the globalised financial markets is attributed to a variety of characteristics: the increasing volume of financial transactions as a proportion of total economic activity; the instantaneity of transactions; and the dematerialised and disembedded character of the markets.⁸⁶

Compelling data can be marshalled detailing the growth of the financial markets historically and compared against the growth in the real economy. For instance foreign exchange market turnover has grown from US\$60 billion in the early 1980s to an estimated US\$1.2 trillion in 2001.⁸⁷ Over the same period the difference in the volume of financial and

real transactions has grown exponentially. In 1983 foreign exchange transactions were ten times as large as world trade. By 1999 they were seventy times larger.⁸⁸ The growth of the financial markets means that increasingly the state cannot effectively manage a range of economic public goods such as control of the money supply, exchange rates and interest rates.⁸⁹ The ineffective attempt in 1992 by the Bank of England to stop the run on Sterling and its subsequent forced withdrawal from the European Monetary Fund (EMS) is an exemplary illustration of the globalised markets financial power.⁹⁰ However volume alone is not a complete explanation of why the global financial markets are able to increasingly restrict the autonomy and elude the control of national governments. In this respect Sassen notes that '[c]onceivably a global capital market could just be a vast pool of money for investors to shop in without conferring power over governments.'⁹¹ The explanation also lies in the other characteristics of contemporary globalising financial markets - most notably the instantaneity of the market transactions and the dematerialised and disembedded character of the markets.

The instantaneity of market transactions is intimately connected to the rapid advances in information-communication technologies. Indeed, it may be said that '[f]inancial globalization has been virtually synonymous with the rapid development of electronic computer and communications technology.'⁹² Sassen notes in respect of the foreign currency markets - which for her are an exemplar of a globalised market - that the speed-up of transactions has 'left the central banks incapable of exercising the influence on exchange rates that they are expected to have'⁹³. An important characteristic of these financial transactions is their 'virtualisation',⁹⁴ or 'dematerialisation',⁹⁵ where increasingly only electronic records of transactions are kept which elude the surveillance capacity of the state's institutions of financial governance.⁹⁶ Closely connected with these process of virtualisation or dematerialisation is that of disembedding - the detachment of money from territorial space into global space - whereby financial transactions operate in relative detachment of national jurisdictions.⁹⁷ This trend towards 'lengthen[ing] the distance between the financial instrument and actual underlying asset'⁹⁸ may be associated with the contemporary phase of financial innovation broadly labelled 'securitization', which has led to the development of a range of complex financial instruments in bonds, equities and, in particular derivatives, traded by highly specialised investment institutions - such as pensions funds and insurance companies - with speculative investment strategies.⁹⁹

Under these conditions of contemporary financial globalisation, characterised by highly globalised markets trading sophisticated 'securitized' financial instruments, states are

increasingly structurally constrained by the power of financial markets. The high levels of speculative investment, combined with the speed of the transactions and hence the ability of the investors to relocate their portfolios means that states are increasingly required to tailor their public policies to the requirements of the financial investors. This exposure to the structural power of the markets is amplified where national governments increasingly fund their public debt through globalised financial markets.¹⁰⁰

Alongside the material constraints on contemporary states under conditions of economic globalisation we may also note an associated discursive structure, which reinforces the material constraints imposed on the state's policy autonomy. In this respect Sassen claims that the operation of the globalised financial markets generates norms concerning 'the criteria for 'proper economic policy alongside' the deployment of 'raw power'.¹⁰¹ The dual deployment of structural power alongside the generation of a normative discourse leads Sassen to allege that it is meaningful to speak of a new form of economic citizenship that is constituted by global economic actors – especially the globalised financial markets – in which they and not national citizens hold states' accountable.¹⁰² A similar argument is presented by Gill under the auspice of what he calls 'new constitutionalism' which 'confers privileged rights of citizenship and representation on corporate capital.'¹⁰³ Whilst suggesting that 'the accountability of governments to 'markets' is mainly to material forces',¹⁰⁴ he also acknowledges the normative function of the discourse of globalising neoliberalism that 'stresses the efficiency, welfare and freedom of the market and self-actualisation through the processes of consumption.'¹⁰⁵

In conceptualising globalisation as a process of transformation at the global level, a number of arguments are presented which identify challenges to the capacity and autonomy of the national state. The territorial organisation of state authority and power is increasingly ineffective in regulating, managing and governing economic activity which is organised at a global scale. It is contended that the growing ineffectiveness of national state scale control is attributable to the growth of globalising flexible post-Fordist production networks; globalised financial markets characterised by instantaneous, dematerialised and disembedded transactions; and an associated neoliberal discourse legitimising the projection of externally formulated neoliberal economic values onto democratic societies. Concerning these global transformations Bonanno concludes that 'the State's capacity to mediate between market and society has been weakened. The State is increasingly unable to control the flow of economic resources according to the rules established through democratic processes.'¹⁰⁶ Framing these propositions in terms of Scharpf's composite typology the implications are specifically that

the state suffers a loss of output oriented legitimacy as it is increasingly constrained in its autonomy and policy capacity.

The first and second conceptualisations of globalisation employ arguments which are an inverse of the other. Whilst arguments concerning globalisation as transference are ostensibly inside-out, those in respect of globalisation as transformation are primarily outside-in. What the other includes the other leaves out. Accordingly to Clark neither of these formulations is 'adequate or convincing.'¹⁰⁷ Conceptualising globalisation as 'transference' reduces globalisation to a unit level phenomenon which overstates the role of voluntarism on the part of the state, whilst the latter implies the structural determination of the state.¹⁰⁸ In this vein Clark warns us 'we must equally avoid the danger of sliding from the view of the state as an agent of globalization to that of the state as the passive formation of global systems'.¹⁰⁹ In response to the inadequacies of these first two conceptualisations of globalisation a third is offered which views globalisation as the 'transcendence' of any distinctions between unit and system – [g]lobalisation is neither inside out nor outside in but rather a process that *dissolves* the divide between inside and outside.¹¹⁰ In order to make sense of globalisation as processes which dissolves the distinction between the inside and outside Clark avers that we need to appreciate the simultaneous location of the state both within the internal and external spheres. Accordingly the state no longer produces the system, or the system wholly the state. Instead they are mutually constituted and mediated by the state itself. By recognising the mutuality of the two spheres and transcending the 'Great Divide' Clark is able to move away from zero-sum formulations which announce the end of the state or that nothing has changed. Adopting a structurationist approach Clark argues that the state is both an active participant generating globalisation yet is simultaneously being transformed by the process.¹¹¹ With respect to the issue of globalisation and state capacity we need to acknowledge that '[s]tate capacity cannot be viewed simply as the (negative) function of globalization since globalization, in turn, is what states have made of it.'¹¹² However this in turn involves a transformation in the state itself: '[s]tate transformation in conditions of globalization entails a necessary change of state *identity* and is a *precondition*, or at the very least a *concomitant*, of wider systemic change, not something that occurs as an incidental by-product of it.'¹¹³ The implications raised by this conceptualisation of globalisation for state sovereignty and state bounded democracy are more complex than in the previous two scenarios, which suggest respectively that sovereignty and democracy either remain largely intact or that the implications of globalisation are mainly output.

In the third conceptualisation of globalisation the state is clearly implicated as an author of the processes of contemporary globalisation. However to note this is very different from concluding that state sovereignty and democracy remain intact. Barber's observation that globalised capitalism has escaped the box – albeit that the box was opened by the state itself – reflects the sense in which key aspects of control now seem beyond the control of the state. However Barber's metaphor relies on a framework which returns us to a separation of the inside and outside and fails to recognise the processes of re-territorialisation that accompany contemporary process of economic globalisation.

Contra Barber's suggestions globalised economic activity has not been '[r]ipped free from the juridical and legislative box of regulative institutions' and been launched into global 'hyperspace'.¹¹⁴ Rather, '[t]o a large extent, global processes materialize in national territories.'¹¹⁵ This applies to the globalised financial markets which function 'within a grid of very material, strategic places: that is cities [which] belong to national territories'¹¹⁶ and to globalised economic processes more broadly defined in view of 'the fact that national legal systems remain as the major, or crucial, instantiation through which guarantees of contract and property rights are enforced.'¹¹⁷ However, although globalised economic processes may be generated from within, directed by institutions which are located within national states and which to that extent benefit from the regulative public provisions of the state in question, this re-territorialisation of economic activity does not necessarily reinforce, in Westphalian terms, any sense of symmetry between territory, authority and political community. Rather these processes destabilise and transform them in fundamental ways.

Sassen employs the phrase 'global cities' to describe the locations in which globally-orientated enterprises establish themselves in order to access the 'corporate services complex' necessary to coordinate global economic systems.¹¹⁸ These cities are global in that they form a network of global strategic economic sites. Exemplars of global cities are London, New York, Paris, and Amsterdam.¹¹⁹ The strategic functions provided by the corporate services complex are articulated specifically with respect to the functioning of the global cities network and not with respect to the functioning of the overall national corporate economy, as could be associated with the public economic functions of Fordist manufacturing.¹²⁰ Global cities are an instance of territorial de-nationalising in that their functions are tied to the globally-oriented purposes of a distinct corporate sub-sector. In doing so the processes of de-territorialisation and re-territorialisation partially reconfigure the relationship between territory, authority and political community, destabilising the simple

symmetry of state centred sovereignty and democracy where territory, authority and community were mutually reinforcing dimensions.

The rise of an interlinked network of global cities is an instance of a broader set of transformations which are associated with the ‘unbundling’ of territoriality, whereby the exclusive authority of a state over all aspects of activity within a discrete or individuated territory is being supplemented and supplanted by other forms of authority.¹²¹ According to Ruggie the growth of ‘transnationalized economic links’ – what I have referred to as economic globalisation – ‘have created a nonterritorial “region” in the world economy – a decentered yet integrated space-of-flows, operating in real time, which exists alongside the spaces-of-places that we call national economies.’¹²² The problem with Ruggie’s framework is that despite his intentions to transcend the individuation of the modern sovereign state it once again invokes the duality of inside and outside as discrete realms. Anderson detects this weakness in Ruggie’s formulation and reworks the notion of unbundling to convey the idea that it involves the interpenetration of the space of flows and space of places.¹²³ This interaction between, and unsettling of, the spaces of flows and spaces of place is precisely what is involved in the re-territorialisation of financial flows occurring in Sassen’s global cities. The complex articulation of these interpenetrating territorial, functional, and transterritorial regimes is captured by Panitch when he asks [i]s it really to international finance [transterritorial regimes] that governments in London or Ottawa [territorial regimes] are accountable when they prepare their budgets? Or are they accountable to international finance because they are accountable to the City of London or to Bay Street [functional regimes]?¹²⁴

Unbundling is a partial and differentiated process.¹²⁵ Pronouncements on the death of the state or to the effect that nothing has changed are equally misleading. Instead the territorial state remains highly relevant but its claims to authority are increasingly coordinated alongside a variety of other functional and transterritorial modes of authority and governance. Does this dispersal of authority equate to a rearticulation of sovereignty, or does it simply mean, as Wæver suggests that these aspects of activity are no longer a part of sovereignty?¹²⁶ To adopt Wæver’s position would seem to miss the crucial transformations of sovereignty in the contemporary world. It has been maintained throughout this chapter that the meaning of sovereignty is not fixed but rather that it is ‘negotiated out of the interactions within intersubjectively identifiable communities; and the variety of ways in which practices construct, reproduce, reconstruct, and deconstruct both state and sovereignty.’¹²⁷ The interactions between territorial states and globalised economic actors

have given rise to various economic practices establishing modes of authority which do not merely instantiate transgressions of exclusive territoriality thereby reproducing it as the organising principle defining sovereignty but rather have generated new sovereignty meanings which legitimate the coordination of various modes of territorial and non-territorial forms of authority both within and across national territories. State sponsored policies of economic liberalisation underpinned by a justifying neoliberal discourse have actively promoted the development of post-Fordist production networks and the growth of the globalised financial markets associated with contemporary economic globalisation. These processes have not spontaneously developed somewhere 'out there', nor continue to operate in some externalised transterritorial environment. Instead these non-territorial processes are instantiated within the national territories of states, whereby the territorial, non-territorial and transterritorial spheres interpenetrate each other. These practices do not occur beyond the institution of sovereignty nor are they subsumed within it. Rather the interactions of these contemporary practices are transforming the institution of sovereignty thereby giving rise to new sovereignty meanings based on the principles of non-exclusive territoriality, in which multiple heteronomous actors operate in a series of overlapping regimes, thus helping to define a transformed intersubjective community. A number of authors, following Bull have employed the analogy of 'neo-medievalism' in order to capture key insights of the new meanings and practices of sovereignty in its late-modern manifestation.¹²⁸

2.3.2. Late-modern sovereignty and democracy.

The coordination of diffuse authority between actors starkly contrasts with the meaning and practice of sovereignty as it is specified within the Westphalian paradigm. A series of constitutive breaks may be emphasised which indicate the new meanings and practices of sovereignty within the EU under conditions of Europeanisation and globalisation. The key principles which are constitutive of, and constituted by, this post-Westphalian or late-modern sovereignty form are: (1) the coordination of sovereign responsibilities; (2) the representative inequality of states; (3) territorial and nonterritorial functional spaces; (4) reciprocal intervention in the domestic affairs of other EU member states; (5) multilevel sovereignty games within variable geometry frames.

(1) It has been contended in this chapter that the Westphalian notion of sovereignty is constituted by, and constitutive of, the principle of exclusive territoriality whereby authority over all aspects of social life is configured within the state boundary. This is captured by Ruggie's notion of the 'bundling of sovereignty.'¹²⁹ The configuration of authority within the EU does not easily fit with notions of exclusive territoriality, however. The EU member states exercise their authority and power, 'within an institutional context involving the pooling and sharing of sovereignty', with the supranational institutions of the EU such as the Commission; European Court of Justice (ECJ); European Parliament (EP); and European Central Bank (ECB).¹³⁰ Accordingly, 'it is difficult to identify 'the sovereign institution' in the European Community'.¹³¹ In similar, although not identical, terms Jackson suggests that '[t]here is not so much a sharing of sovereignty as a mutual acknowledgement of co-ordinate jurisdiction between the EU and its member states in certain policy areas in which the states used to enjoy exclusive jurisdiction.'¹³² The image of coordinated sovereign responsibilities is preferable to that of sharing or pooling in that it retains the essence of sovereignty as an institution which confers a status rather than as a resource which can be instrumentally bargained away.¹³³

(2) Whilst within the context of Westphalian sovereignty, states are constituted as legal equals, within the context of EU Europe the legal equality of states has been partially displaced by the 'differential representation and weighted voting in a significant number of areas.'¹³⁴ Reflecting this new principle of representative inequality larger states are allocated two Commissioners whilst in the Council, an increasing number of policy areas are subject to Qualified Majority Voting (QMV) as opposed to unanimity.¹³⁵

(3) The partial 'unbundling' of sovereignty signifies a qualification of territoriality as the principle attribute of sovereignty. Territory remains important in the late-modern manifestation of sovereignty, however. The EU is itself still territorial 'and in many respects traditional conceptions of sovereignty remain dominant, whether exercised by member states or by the EU as a whole.'¹³⁶ Nevertheless territoriality as the principal mode of configuring authority is increasingly accompanied, or more accurately interpenetrated, by 'nonterritorial functional space'.¹³⁷ Functional regimes have always existed, according to Ruggie to 'attenuate the paradox of absolute individuation.'¹³⁸ In this respect nonterritorial functional spaces are not wholly new, although we may argue they are increasingly salient as the mode of configuring authority across the 'decentred space of flows.'¹³⁹ Ruggie's notion of a decentred space of flows echoes other metaphors such as networks, in which the exercise of

authority in a particular policy area requires compromise, cooperation, contestation and negotiation within complex interactions at multiple levels of governance.¹⁴⁰

(4) The constitution of sovereignty as a diffuse institution through which multiple heteronomous actors coordinate and contest authority claims within transterritorial and functional regimes sharply contrasts with Westphalian sovereignty principles of exclusive territoriality and the corollary of non-intervention. This is not merely an instance of ‘compromising Westphalia’.¹⁴¹ As I have argued above, (section 2.2.), the idea of ‘compromising Westphalia’ has meaning only in the context of an intersubjective knowledge structure through which the meaning of intervention can be interpreted. Whilst the phrase ‘compromising Westphalia’ retains meaning, so the discourse of modern sovereignty and its constitutive principles of territoriality and non-intervention retain their resonance. Within the EU the principle of ‘non-intervention has been seriously modified, in that an opening has been created for legitimate outside intervention by member states in national affairs.’¹⁴² Within the constitution of transterritorial juridical regimes any notion of non-intervention needs to be reinterpreted through abstract functional spaces, rather than through territorial spaces.¹⁴³ As I have already stressed, coordination should not be equated with harmony, but rather, a process of contested coordination subject, to both political and legal wrangling, between the various actors. However, the contestation and coordination of sovereignty claims amongst a variety of actors in relation to the same territorial location represents not a compromising of Westphalia, but rather, the exercise of legitimate sovereign practices; within a late-modern sovereignty discourse which is constitutive of, and constituted by, new sovereignty meanings.

(5) In viewing it as a post-Westphalian sovereignty regime suggests that the EU polity is more than an international organisation but less than a federation; instead it is ‘something quite different from both, an ‘intermediate’ form’.¹⁴⁴ This assertion that EU sovereignty is something qualitatively different from Westphalian sovereignty reflects the contention that the partial unbundling of sovereignty is more than transitional,¹⁴⁵ and encourages us to avoid falling into the ‘Gulliver fallacy’, whereby change is viewed purely quantitatively and associated merely with a change in the geographical scale of authority.¹⁴⁶

In order to facilitate qualitative, rather than merely quantitative, shifts in thinking requires new concepts which allow us to think beyond the terms of reference provided by the modern state form. It is in this respect that reflection on the medieval configurations of sovereignty can prove useful - in order to stimulate our ‘social episteme’, - the ‘mental equipment’ that we draw upon in ‘imagining and symbolizing forms of political community’.

¹⁴⁷ The benefits of drawing on the neo-medieval metaphor are not to be found in attempts to draw comparisons between the contemporary EU and the medieval period, in which all authority 'was thought to derive ultimately from God and the political system was basically Theocratic.'¹⁴⁸ Instead 'the medieval metaphor is primarily to free our minds from the confines of the modern state system, whose assumptions prejudice us to the degree that they obscure new developments.'¹⁴⁹

The aspect of the metaphor which perhaps helps us think most constructively about the constitution of sovereignty in the EU is the notion of the multiperspectivity of spatial organisation.¹⁵⁰ If the modern state was constitutive of, and constituted by, fixed point perspective thinking whereby authority was 'collapsed into just one all important level',¹⁵¹ then by invoking the neo-medieval metaphor suggests that the EU, 'may constitute the first 'multiperspectival polity' to emerge since the advent of the modern era.'¹⁵² Ruggie's use of the metaphor reflects a constructivist emphasis on the cognitive power of institutions, whereby institutions do not merely alter behaviour but also identity. With respect to actors interactions in the context of the EU he comments: 'the constitutive processes whereby each of the twelve defines its own identity - and identities are logically prior to preferences - increasingly endogenize the existence of the other eleven.'¹⁵³ Thus as Wæver contends, 'discussions about France's self-interest cannot be seen as separate from the E.U. issues; the 'self' already incorporates the E.U.'¹⁵⁴ In this respect we may say that EU European sovereignty is constitutive of and constituted by variable geometry frames in which territory action and membership are fused in multiple complex patterns which unsettle the bond fixed by Westphalian cartography.

In that globalisation conceptualised as transcendence significantly destabilises the institution of sovereignty as meaning the exclusive authority of the territorial state it also has important implications for state bounded democracy. Globalised economic activity may be instantiated in territorial locations; however the regimes constructed do not reinforce a sense of symmetry between national territory, national authority and national community. Both territory and authority are increasingly destabilised by globalised economic activity which is instantiated simultaneously within and across territorial and non-territorial functional spaces whilst political membership remains largely associated with national territory:

globalization leads to a growing disjunction between the democratic, constitutional, and social aspirations of people – which continue to be shaped and understood through the framework of the territorial state and the increasingly problematic potential for collective action through state political

processes. Certain possibilities for collective action through multilateral regimes may increase, but these operate at least one remove from democratic accountability.¹⁵⁵

With regards to the diminution of the output capacity of the national state, the argument is made that, the transterritorial scope of the EU makes it more commensurate with the governance of transnational processes under conditions of contemporary economic globalisation. However, despite possible improvements in terms of output-oriented legitimacy, unless individuals and groups are provided voice and given the opportunities to participate in opinion formation, the institutions of governance remain democratically weak. Simply put democracy requires input authenticity alongside output effectiveness.

This reading of the requirements for input-oriented legitimacy raises tensions in the EU in which sovereignty is coordinated amongst a variety of actors within and between multiple levels of governance whilst, democratic authenticity remains territorially bounded within the national state. Thus the questions posed are: 'are we perhaps getting the 'worst of both worlds' of democracy'¹⁵⁶, or; do '[i]nternational institutions not only increase system effectiveness or output legitimacy, but also [provide] a normatively sensible response to the problems for democracy that are caused by globalization.'¹⁵⁷

2.4. Globalisation and Europeanisation.

These questions, concerning input and output-oriented-legitimacy in a globalising EU, are explored in the following section (2.4.1.) via three propositions concerning the relationship between globalisation and Europeanisation, which reflect the three different conceptions of globalisation – as transference, transformation and transcendence – analysed earlier in the chapter (section 2.3.1.). The most convincing relationship - that Europeanisation both promotes and mediates the impacts of globalisation: constraining the autonomy and capacity of the national state in some policy areas whilst increasing its policy effectiveness in others through co-ordinated multilateral action - is specified in the following sections in relation to the three principle dimensions of EU economic policy - economic and financial integration (section 2.5.1.), social policy (section 2.5.2.), and trade (section 2.5.3.).

The EU is a highly visible example of a multilateral regime which is arguably better suited to managing transnational economic processes in view of its transterritorial

characteristics. Furthermore it offers a unique arena for a critical study of transnational democracy in that exceptionally it offers both direct and indirect channels for democratic participation and accountability beyond the state.

However it is unsatisfactory to simply accept the assertion that the political-economies of scale of the EU are better suited to managing globalised economic activity, or that it effectively constitutes transnational democracy. In order to better understand the effectiveness of the EU in mediating the impact of economic globalisation requires that we consider the complex of relationships constituted by Europeanisation, globalisation and the national state. The following section outlines a series of possible relationships: (1) That Europeanisation promotes globalisation and reinforces the constraints on the autonomy and policy capacity of the national state; (2) that Europeanisation is a response to, and mediates the impacts of, globalisation on the national state; and (3) that the relationship is more ambiguous and that Europeanisation both promotes and mediates the impacts of globalisation. It is argued that the third position best reflects the contemporary relationship between Europeanisation and globalisation. This position is refined by suggesting that the relationship between these phenomena varies between different policy sectors: constraining the autonomy and capacity of the national state in some policy areas whilst increasing its policy effectiveness in others through co-ordinated multilateral action. In this respect Wallace comments upon the 'variation in the way in which European governance interacts with domestic politics, on the one hand, and the broader global context on the other.'¹⁵⁸ In order to investigate the various relationships between globalisation and Europeanisation this thesis analyses three policy sectors, or regimes, which are distinguished on the basis of: their relation to the major aspects of the EU economy (financial, social and trade/production); enmeshment in national, regional and global configurations of power; discourse; mode of integration (negative versus positive); and the technical and political ideas deployed within the regime to interpret and justify the type of exposure/integration. It is contended that these factors shape the possibilities for articulating input and output-oriented legitimacy. These arguments are elaborated on with respect to the following three regimes: economic and monetary policy (ECB); social policy (gender rights); and agro-industrial policy (regulation of agro-biotechnologies), which were selected on the basis of their differing articulation of these dimensions.

(1) The proposition that Europeanisation reinforces the impact of globalisation by placing constraints on the autonomy and policy capacity of the national state, contends that the 'general constraints on national policy choices that have resulted from economic

'globalization' are intensified and tightened' by the processes of Europeanisation.¹⁵⁹ Indeed it is suggested that Europeanisation processes may even 'surpass the ideals of globalization for the progressive opening of capital and product markets.'¹⁶⁰ Despite the complementarity of these processes it is not sufficient to conceptualise Europeanisation as a regional variant of globalisation.¹⁶¹ Instead it is more useful to think of them as distinct but overlapping processes. The implication of this move is important in that it suggests that Europeanisation is not simply the result of globalisation but that it has its own historical dynamics.

Principally the origins of European integration can be fixed to a political commitment by the continental states to avoid another European war: in particular by France's aim to achieve more permanent control over Germany than after WWI and by Germany's desire for inclusion within the post-war construction of Europe.¹⁶² As Dinan notes:

[c]oal and steel lay at the core of both countries' economic systems and war-making potential. By establishing a supranational entity to manage the coal and steel sectors, the ECSC's [Economic Coal and Steel Community's] six member states (France, Germany, Italy, Belgium, the Netherlands, and Luxembourg) came so closely intertwined that a future war between them soon appeared unthinkable and impossible.¹⁶³

Early European integration was not only associated with 'security *in* Europe but also *for* Europe'¹⁶⁴ as post-war Western European construction became enmeshed with the development of a new set of geo-strategic security concerns directed towards Eastern Europe in the context of the Cold War confrontation between the USA and the USSR.¹⁶⁵ Accordingly whilst early European integration proceeded within a globalised context the motivations underpinning the process cannot, nor should they, be linked with any contemporary notions of economic globalisation.

Ross argues that the impetus for further European integration in the 1980s should not be interpreted as a European response to globalisation; especially in view that 'renewing European integration to confront some kind of abstract globalization was rarely considered at all.'¹⁶⁶ Instead he suggests that the processes of Europeanisation beginning in the mid 1980s and continuing into the 1990s are more accurately associated with a number of European dynamics including: Mitterrand's strategy to 'exogenize' French domestic policy problems along with its geo-political concerns in relation to a unified Germany following the end of the cold war; British desires for an increasingly deregulated European free trade zone; and links made between further integration, democratisation and economic restructuring by the

Mediterranean European states. He also points to the path dependent nature of the decisions for further integration in the context of European elite's historical experiences and familiarity with processes of Europeanisation.¹⁶⁷

Rather than view globalisation as shaping Europeanisation, Ross suggests we consider the obverse argument – that Europeanisation has reinforced the impact of globalisation or has even promoted it – commenting that '[r]enewed European integration made decisive contributions to its [globalisation's] elaboration, which occurred in specific policy decisions by particular actors.'¹⁶⁸ Ross's argument points towards the complementarity of Europeanisation and globalisation processes in their tendencies to remove decision making capacities away from the national state. The main gist of this argument suggests that the processes of both globalisation and Europeanisation are largely based upon negative modes of integration in contrast to the relative weakness of positive modes of integration.¹⁶⁹ The term '*negative integration* refers to the removal of tariffs, quantitative restrictions, and other barriers to trade or obstacles to free and undistorted competition. *Positive integration*, by contrast, refers to the reconstruction of a system of economic regulation at the level of the larger economic unit.'¹⁷⁰ Where European integration has largely taken the form of negative integration, with only a limited amount of corresponding positive integration, a situation is arising in Europe in which the political capacity for effective intervention 'is being reduced below the level that was available in the nation state during the post-war decades.'¹⁷¹

(2) Contra the preceding perspective, the view that Europeanisation is a response to, and mediates the impacts of, globalisation on the national state suggests that it can be meaningfully understood as a response to globalisation. Wallace argues that European integration may have led to a reduction in 'European vulnerability to the broader phenomenon of globalization'.¹⁷² Countering Ross's assertion that 'renewing European integration to confront some kind of abstract globalization was rarely considered at all',¹⁷³ Schmidt notes that globalisation:

seems to have been so much part of background assumptions about the necessity and appropriateness of economic openness and market-driven policies of budgetary restraint in the process of European integration that the term itself has appeared comparatively infrequently in the discourse of the EU Commission.¹⁷⁴

This is unsurprising because, as Rosamond notes, the usage of globalisation as a signifier for changing external events dates from the early 1990s, reflecting its popular

adoption in the academic literature from the late 1980s.¹⁷⁵ In this sense whilst it is quite wrong to suggest that the origins of Europeanisation were a response to globalisation or even that the revival of integration in the mid-1980s was justified with reference to globalisation, (although regional economic competition was an element of the official discourse),¹⁷⁶ it appears that globalisation has been increasingly used in EU policy documents and speeches since the 1990s to justify the logic of European integration.¹⁷⁷ However, a central element of Rosamond's argument is that a variety of discourses of globalisation are employed in constituting the relationship between globalisation and Europeanisation which (re) introduces an ambiguity in the relation between globalisation and Europeanisation. This leads us onto a third, and arguably more convincing proposition.

(3) The third proposition contends that Europeanisation both promotes and mediates the impacts of globalisation: constraining the autonomy and capacity of the national state in some policy areas whilst increasing its policy effectiveness in others through co-ordinated multilateral action. This argument is voiced by Schmidt, who notes the simultaneous pressures of increased international competition and the protection of market and monetary integration.¹⁷⁸ Similarly, Wallace notes 'variation in the way in which European governance interacts with domestic politics, on the one hand, and the broader global context on the other.'¹⁷⁹ Schmidt refines her argument by applying it to monetary, industrial and social policy – considering the specific ways in which Europeanisation acts as a conduit and shield for globalisation in these particular policy sectors. Adopting this methodological approach provides insights to the different patterns of enmeshment between global, regional and national systems within different areas of economic activity. Instead of envisaging a simple linear relationship between Europeanisation and globalisation, a 'picture of indeterminacy and complexity, of uneven globalization and regional differentiation' is suggested.¹⁸⁰ In this regard Rosamond contends that 'the metaphor of 'multi-level governance ... should be used to explore the EU as a highly fluid system of governance characterized by the complex interpenetration of the national, subnational and supranational'.¹⁸¹ However differentiation in configurations of enmeshment is not simply systemic or material – it is ideational too. It is in this context - of differentiated, complex and indeterminate enmeshment - that we should read Rosamond's observation concerning a plurality of globalisation discourses within the EU and his suggestion that 'different communities of actors may be playing very distinct sorts of games vis-à-vis globalization.'¹⁸²

2.5 Differentiated Globalisation and Europeanisation: Three Policy Regimes.

In order to consider these insights further they are articulated with respect to the three regimes studied by this thesis: economic and monetary policy (ECB); social policy (EU gender rights); and agro-industrial policy (EU regulation of agro-biotechnologies). The structure of European and global integration is outlined in relation to: levels of regionalisation and globalisation; the principal discourse(s); mode of integration (positive versus negative); technocratisation versus politicisation. These divergent features are then related to the input and output-oriented modes of legitimacy articulated within the regimes.

2.5.1. Economic and monetary policy (ECB).

It is contended that a key dimension of economic globalisation is the integration of global financial markets (section 2.3.1). These financial markets are characterised by vast, instantaneous, dematerialised and disembedded transactions which arguably exceed the regulatory capacity of the national state. This characterisation is refined by noting that these dematerialised flows also re-materialise within locales embedded within national territories which Sassen refers to as global cities. However the patterning of re-materialisation does not necessarily reinforce any sense of symmetry between national territory, authority and community in that, whilst these nodes are situated in national territories, they may be increasingly detached from the wider interests of the national state and community; forming an instance of territorial de-nationalising whereby functions are tied to the global oriented purposes of a distinct corporate sub-sector.

Tracing these trends with respect to European economic integration a number of observations concerning the key European financial markets (capital markets, foreign exchange markets and euro financed trading markets) can be made regarding (1) European financial cross-border connections with the wider global economy and (2) with respect to intra-regional integration and the creation of a meaningful European economic space.

(1). With respect to the capital markets the euro share of the entire global debt securities market (both domestic and international issues) was 24 percent in 2002 compared

to the US dollar share of 46 percent and Japanese yen share of 19 percent.¹⁸³ However looking specifically at the stock of international issues as a proportion of the overall stock of issues of a particular currency the euro share was 33 percent compared to the US dollar share of 20 percent and Japanese yen share of 6 percent.¹⁸⁴ Thus, whilst as a share of the entire global stock of debt securities the euro ranked second to the US dollar, 'in relative terms, international debt markets are the most important for the euro.'¹⁸⁵ Turning to the euro's foreign exchange position, as with international securities, it stands second only to the US dollar, however, its turnover of 43 percent remains significantly behind the US dollar of 84 percent.¹⁸⁶ With respect to external trade for the euro area, figures indicate that about half is financed using the euro.¹⁸⁷

(2). Whilst these indicators suggest the importance of the euro as an international currency a number of important characteristics concerning the euro's international role need to be compared with the US dollar's role which emphasise the formers regional rather than a global status.¹⁸⁸ With respect to the provision of new euro denominated debt securities evidence suggests most demand originates in the euro area whilst demand for US dollar denominated debt securities 'is more evenly spread within and outside the United States, attracting world wide investors from Asia, Latin America and Europe.'¹⁸⁹ Similarly where the US dollar is characterised as the main international currency – underwriting its global importance - attention is drawn to the euro's inherited status from the Deutsche Mark as a regional vehicle currency. This regional focus is affirmed with respect to differences between the use of the US dollar and euro as official reserve currencies which show the US dollar 'has a global reach as an anchor, reserve and intervention currency' compared to the more geographically limited use of the euro by countries neighbouring the euro area.¹⁹⁰

This mixture of globalisation and Europeanisation is reflected in the developments in the European equities markets whereby the third stage of EMU seems to have stimulated a 'shift from a domestic orientation to a more international sectoral orientation, favouring, in particular, pan-European investments.'¹⁹¹ The Europeanisation of the equities market seems, in turn, to have stimulated a net outflow of equities from the euro area to the US markets.¹⁹² The increasing demands for pan-European investments are associated with movements towards a pan-European stock-market. Markets have been restructured on an increasingly European basis - an example of which is the merger of the Paris, Amsterdam and Brussels exchanges under Euronext in September 2000.¹⁹³ The merging of exchanges has been facilitated by the harmonisation of legal structures and the adoption of electronic trading platforms and associated moves towards the European dematerialisation of trades.¹⁹⁴

Moreover these informal movements towards an integrated European financial market are intimately linked to the creation of the euro-zone itself and its formal institutional Authority - the European Central Bank (ECB).

The contemporary structural characteristics of European Monetary integration therefore demonstrate elements of both Europeanisation and globalisation whereby markets are increasingly inter-coordinated and integrated on a pan-European basis and at the same time deeply enmeshed in global financial flows and connections beyond the proximity of Europe – particularly with the US markets.¹⁹⁵

The key actors involved in the overlapping processes of monetary Europeanisation and globalisation can be broadly distinguished as either economic or political actors. The preceding discussion, focussing on the financial institutions, highlights the informal but influential role of the financial market in generating and institutionalising Europeanised and globalised financial flows and connections. However the discussion also directs attention to the association between the positions taken by the market actors and the infrastructural and regulatory structures developed and implemented by the political institutions.¹⁹⁶ The most salient infrastructural change has been the development of a single currency area in the final stage of EMU establishing the ECB as the central institution of governance in the euro area with exclusive authority over euro monetary policy. However other key European institutions remain influential - including the EU Commission and the Economic and Financial Committee of the Council of Ministers (ECOFIN) - in particular with respect to coordinating macro-economic policy which remains within the competence of the member states.

Within these institutions a discursive battle has been fought out, the outcome of which has been the salience of the monetarist paradigm. This discourse links economic prosperity with the maintenance of price stability. Combined with time inconsistency literature, which supports the separation of political and technical institutions, monetarist ideas have deeply shaped the ECB institutional structure, especially with respect to the centralisation of monetary policy, whilst retaining macro-economic policy at the national level. The monetarist discourse is perpetuated by a monetarist epistemic community constituted by the political institutions such as the ECB and ECOFIN and the economic and financial institutions who are enmeshed in a complex of Europeanised and globalised relations. (See section (4.4.). Thus, EMU is given meaning and justified by recourse to a complex of overlapping and enmeshed Europeanised and globalised discourses. These discourses interpret the differentiated configurations of systemic and material enmeshment and ‘write’

EMU as both a generator of and response to globalisation.¹⁹⁷ This is illustrated by a recent statement made by Professor Otmar Issing, member of the ECB Executive Board.¹⁹⁸

To begin with Issing explicitly links Europeanisation with generating further globalisation stating that '[i]n short progress on regional integration can support rather than impede the globalisation process, to the advantage of all concerned'.¹⁹⁹ However he proceeds to assert the internal priorities of monetary policy through the maintenance of price stability for the promotion of European well-being²⁰⁰ and rejects an explicitly active international role for Europe as 'an international growth engine'.²⁰¹ In doing so he attempts to adopt a 'neutral stance' in which the 'Eurosystème is neither promoting nor hindering the internationalisation of the Euro'.²⁰² There remains a tension though in Issing's attempt to locate EMU as both a mediator and promoter of globalisation which is resolved by his assertion that 'future developments in this field will first and foremost be the outcome of a market-driven process'.²⁰³ Whilst the deployed discourse attempts to write EMU as both a promoter and mediator of globalisation, Issing's explicit reference to the market directs attention to the primarily market building character of EMU based on positive (monetary) integration and the negative (economic) integration. Indeed Issing draws attention to the requirement for deeper negative integration through further liberalisation of goods, labour, and financial markets.²⁰⁴

Within EMU monetary and economic governance is institutionally coordinated across the supranational and national levels; where monetary policy is centralised within a single supranational authority – the ECB - whilst macroeconomic policy remains the responsibility of the national states. However this neat, formal institutional division of competences between the supranational and the national is subject to contestation as a result of the intimate co-dependency of the economic and monetary spheres. This contestation within EMU is exemplified in the wrangling between the Commission and the Council with respect to the operation of the Stability and Growth Pact. These Europeanised dimensions of governance interface with globalised aspects of governance – in particular the 'informal' or 'private' authority of the globalised markets, whereby policy orientations are inextricably linked towards the interests of the globalised financial actors captured by Gill's notion of 'new constitutionalism' or Sassen's concept of 'economic citizenship'. These globalised economic actors are not beyond the national state or European regulatory space but rather are themselves located within these delineated economic and legal spaces. Their globally oriented actions create globalised economic spaces (global cities) such as London, Frankfurt and Paris which cut across the national and European economic spaces. This statal orientation towards financial and economic institutions 'throws into bold relief the tensions

between 'political legitimacy and market legitimacy'; where the former is associated with democracy and the latter primarily with credibility.²⁰⁵

This discourse raises serious challenges with respect to notions of democratic legitimacy, prioritising as it does the promotion of economic efficiency above democratic legitimacy. Indeed in this respect McNamara contends that the discourse situates effectiveness and democracy in an adversarial relationship whose ideational resolution 'privileges price stability as an absolute good.'²⁰⁶ This is, in turn, reflected in the institutional solution of an independent central bank, which insulates policy making from 'the hypothesised shortcomings of democracy.'²⁰⁷ The asymmetric design of EMU – the centralisation of monetary policy, alongside decentralised economic policy at the national level is premised upon the territorial state remaining the proper location for democracy and policy effectiveness ultimately benefiting the national community.²⁰⁸ In view of the apparent democratic weaknesses of an ECB disembedded from the democratic territorial state, the case study (chapter 4) assesses the different ways in which input and output-oriented legitimacy is instituted within the regime and evaluates the proposal that the mechanisms of representation and effectiveness remain primarily intergovernmental.

2.5.3. Social policy (gender rights).

EU social policy has historically been intertwined with the creation of a European common economic space and continues to remain so today. Moreover since the negotiation of the Treaty of Rome in 1957 the 'proper' nature of their relationship has been highly contested. However it is generally accepted that social policy has remained 'a 'lame duck' or ascribed only 'Cinderella' status when compared to the real business of economic integration.'²⁰⁹ Viewed through the EU's 'economic prism' social policy has been justified largely through recourse to market building requirements.²¹⁰ In this respect Streeck comments that '[t]he sole purpose envisaged in the Treaty of Rome for social policy was to make a Europeanwide labour market.'²¹¹ Whilst initially at the outset of the Treaty negotiations it was assumed that some degree of harmonisation of social provisions between the participating states would be necessary to achieve building an internal market these sentiments dissipated over the duration of the negotiations.²¹²

The impact of this shift in attitude is evident in the Treaty's social provisions which, in Hoskyns terms, resulted in a whiff of society-creating measures ... a gesture towards harmonisation ... and a strong element of functional social policy ...²¹³ Streeck suggests that the push for further market integration in the 1980s was 'bound up with a European deregulation project' underpinned by business friendly principles of flexibility and market forces.²¹⁴ Realising integration based on these principles was achieved largely by the utilisation of the instrument of mutual recognition rather than harmonisation thereby facilitating the construction of an internal market without the requisite supranational regulation or institution building. As such Streeck comments that it 'represents a sophisticated version of 'negative integration''²¹⁵ Amidst this pervasive 'neoliberal *Zeitgeist*'²¹⁶ informing the market reforms, led primarily by business interests, Streeck argues that redistributive and market correcting social policy cannot be successful.²¹⁷

As exceptions to his argument Streeck acknowledges that in the areas of labour market equality between men and women and health and safety in the work place: '[c]ommunity intervention did result in upward harmonization and in supranational jurisdiction', but with the caveat that these successes were for 'highly specific reasons.'²¹⁸ Streeck's observations are not without justification. The incorporation of a reference to gender equality in the Treaty of Rome was motivated ostensibly by France's insistence; reflecting its need to obtain concessions to appease French industrial interests.²¹⁹ Equal pay for men and women was an issue for French industrialists because equal pay legislation had already been adopted in France giving rise to fears of social dumping.²²⁰ The provision therefore was principally aimed at market building rather than any commitment to positive integration. Duncan argues that '[t]his theme has remained constant right through out the history of the EU.'²²¹

From this perspective, EU gender policy has little to do with gender equality but instead is intimately connected to fixing the single market – the primary aim of the EU – an assertion which is borne out by the EU preponderance with workplace directed provisions.²²² Indeed Article 119 – concerning equal pay between men and women – was initially a component of a deleted title of the Treaty which dealt with distortions to competition but was transferred to the social title of the Treaty at a late stage in the negotiations. As Hoskyns notes '[t]his transfer goes some way to explaining the unexpected force of Article 119 by comparison with the other social policy articles: it was drafted for a different section of the Treaty and was therefore expected to create stronger obligations.'²²³

Despite the contingencies that influenced the adoption of Article 119 as a social measure 'it has become the entering wedge for gender-related EU social policy.'²²⁴ In this

vein Walby suggests that a far more optimistic interpretation of the impact of EU social policy can be developed if we are prepared to be more imaginative in our conception of what it is deemed to encapsulate. In particular, she maintains that we need to extend our definition of social policy beyond traditional conceptions of wealth redistribution, incorporate and emphasise forms of social inequality other than class – especially that of gender – and re-evaluate the impact of EU law as an instrument of social policy.²²⁵ By adopting this perspective EU social policy, in general, and EU gender policy, in particular, may be interpreted as more than as a sophisticated form of negative integration ultimately tied to market building. Instead, whilst accepting that this may have been a major factor in its initial adoption, there is also a strong argument that it represents a form of positive integration, in particular through the impact of the supranational legal dimension, which addresses social exclusion and ameliorates the impact of a deregulatory economic project.²²⁶

The nature of the relationship between EU economic and monetary policy and social policy is complicated further by contemporary trends towards increased interconnectedness with the wider global economy. As Walby asks '[i]s the European Union able to establish a distinctive set of social powers ... in a globalizing economy?'²²⁷ Arguably the pressures for flexibility and the pre-eminence of market forces associated with the 1980s drive for further integration are ever greater under conditions of globalised economic competition. The salience of this argument is reflected in a recent speech given by the British Chancellor of the Exchequer, Gordon Brown:

we must embrace open markets and thus free trade. Efforts to improve the flexibility of product and capital markets should not stop at the EU's borders. Greater openness to global trade and investment creates new opportunities for European producers and consumers, and strengthens the incentives for reform. A more flexible and dynamic Europe would, in turn, play a leading role in breaking down barriers to trade and investment in the rest of the world – a virtuous circle of reform and openness, leading to a stronger and more resilient economy from which the EU, and the global economy would benefit.²²⁸

Brown proceeds to link the globalisation of the product and financial markets with the liberalisation of labour markets; increasing the levels of flexibility in terms of labour mobility, functional flexibility and employment flexibility.²²⁹ The emphasis on labour flexibility raises important issues with respect to gender equality. As Perrons highlights, whilst EU discourse has tended to highlight the advantages of flexibility linking it with economic efficiency and competitiveness and thus greater welfare for all – (as per Brown's

speech) - it omits the adverse implications of flexibility for equal opportunities between men and women.²³⁰ In doing so she highlights the potentially differentiated impact of different modes of flexibility, contrasting the 'progressive connotations' of adaptive (functional) flexibility which 'implies a varied working life with continuous retraining and life-long learning' with the 'more ambiguous connotations' of numerical (employment flexibility) – incorporating a variety of working patterns including part-time, flexi-time, temporary contracts and so forth, which is 'associated with the increasing feminization and precariousness in the labour markets of the EU.'²³¹ In this respect it is telling that Brown links employment flexibility with 'empower[ing] mothers in particular to secure the benefits of more flexible working arrangements.'²³² In doing so he reasserts the traditional gender contracts with respect to the proper male and female roles.²³³

The formulation and application of a supranational EU gender policy has been contested at all levels. Member states have actively resisted the extension of the EU's competence in gender matters – in particular through their incorporation of the principle of subsidiarity in the Treaty on European Union which prioritises the state as the appropriate level of governance in respect of joint EU and state competence.²³⁴ In addition the extensive use of directives requiring interpretation within national legal codes and application by state institutions divides the competence for policy between the supranational and national levels. At the supra-state level within the Commission the various DGs have demonstrated varying commitments towards adopting gender perspectives as evidenced in their mixed uptake of gender-mainstreaming.²³⁵ As Pollack and Hafner-Burton argue, the willingness of various DG's to address gender issues reflect their own policy frames, which are based on a perceived tension between the goals of economic efficiency and competition and social justice.²³⁶ In particular they note the resistance of the DG for Competition – describing it as 'among the most strongly neo-liberal DGs within the Commission.'²³⁷ From this perspective the resistance to a positively integrated EU gender policy can be linked to the arguments deployed by national finance ministers and global economic and finance market actors concerning the need for market flexibility under conditions of economic globalisation. However this is balanced by broad support from the EP and ECJ for the development of a supranational gender rights regime. In addition whilst certain grass-roots actors have developed links with supranational actors other have focused ostensibly on the national realm whilst others still have remained localised in their networks, reflecting increasing tendencies towards differentiation within women's movements compared with the (temporary) solidarity

of the second wave feminists in the 1970s. These tendencies have, in turn, contributed towards the varying technocratisation versus politicisation of the regime at any point in time.

EU social policy, including gender policy - which is the specific focus of this thesis - has been intimately tied to the creation of an internal European market. However EU gender policy has not remained limited to merely market-making provisions. Instead there is a real sense in which employment related gender equality provisions do change labour market power structures and provide a basis of recourse for EU women to fight exclusion and marginalisation. The hegemonic discourse adopted reflects the economic foundations of the EU – thus provoking Duncan’s reference to the EU’s ‘economic prism.’ The dominance of this framework does filter the type of arguments which are acceptable. This is amply demonstrated by the requirement of the Equal Opportunities Unit (EOU) to couch their arguments for gender mainstreaming not in the language of social justice or equality but rather in terms of efficiency gains.²³⁸ Nonetheless the gender equality provisions adopted within the *acquis communautaire*²³⁹ have provided for the development of a supranational gender rights space which is constituted by, and constitutive of, gender equality conversations between and within civil society activists and EU supranational institutions – in particular focused around the Commission EOU and EP Committee on Women’s Rights.²⁴⁰

The provision of enabling rights forms a core element of a cosmopolitan model of democracy, especially in Held’s version. Indeed according to Cochran, ‘Held’s conception of democracy will accept no form of individual autonomy other than that protected by a set of rights embedded in democratic public law and its necessary institutions.’²⁴¹ These enabling rights are attributed with both facilitating the opportunity to participate in democratic politics and the bases for effective control, thus contributing towards both input and output oriented legitimacy. The contribution of EU gender rights are assessed, in chapter 5, in terms of their contribution towards both empowering women’s voices and providing effective fate control for the gendered constituency. In doing so the chapter evaluates the proposal that input and output-oriented legitimacy is primarily provided by a cluster of overlapping enabling rights embedded in the EU legal framework which may be claimed by individuals and applied at the subnational, national and supranational levels.

2.5.2. Agro-food biotechnologies.

Whilst the discussion in section 2.5.1 considers the relationship between European monetary and economic integration (EMU) and financial globalisation, and thus focuses on the 'virtual economy', this section turns to the 'real economy' and considers the impact of Europeanisation in promoting and mediating globalised production and trade with specific reference to Agro-food biotechnologies.

As outlined earlier, post-Fordist production is characterised by the denationalisation of production alongside its (re)configuration on increasingly globalised lines, incorporating: globalised networks (the globalisation of supply chains and subcontractors); globalised markets (based on markets differentiation); transnational intrafirm production (whereby the differentiated stages of a single production process are located in different countries); and the application of advanced technologies both within the various stages of the production process and in their overall coordination.

Biotechnology 'cannot be considered as an industrial sector, but rather a set of technologies' which are applied across a variety of different industry, service and agricultural sectors.²⁴² The sectors within which biotechnology is utilised account for 9 percent of the Community's gross value-added production and 8 percent of its employment.²⁴³ Moreover estimates suggest that the European biotechnology market could be worth €100 billion by 2005.²⁴⁴

Biotechnologies are viewed as a key aspect of creating a highly advanced knowledge economy: '[a]s probably the most promising of the frontier technologies, life sciences and biotechnology can provide a major contribution to achieving the European Community's Lisbon Summit's objective of becoming a leading knowledge based economy.'²⁴⁵ The biotechnologies markets are characterised by 'an explosion of the pace of innovative opportunities, [such] that no individual company, irrespective of its size, can even think to be able to successfully originate and control all the relevant knowledge.'²⁴⁶ The diffuse and fragmented knowledge structure promotes a 'division of innovative labour' in which biotechnology firms form collaborative networks which are crucial for economic success.²⁴⁷ The corporate actors include both large multinational corporations and smaller transnational firms which adopt global marketing strategies for their 'niche products'.²⁴⁸ A central feature of the industry structure is the division of innovative labour, between the small Dedicated Biotechnology Firms (DBFs) and the larger downstream firms; where the DBFs provide highly specialised cutting-edge research knowledge and expertise and the large downstream

corporations provide a fundamental source of demand for the DBFs intermediate products and services, along with the necessary financial and managerial recourses to fund product research, development and marketing.²⁴⁹

The collaborations between the market actors are (partly) structured on the basis of geographical proximity leading to the development of regional clustering of biotechnology activities.²⁵⁰ The benefits of clustering are associated with effective and efficient knowledge transmission between actors, access to relevant laboratory and research expertise in centres of excellence such as major universities and the development of other supporting institutions like venture capital and patent lawyers.²⁵¹ These clusters are not only based on 'dense internal or local relations but also by the ability to establish strong and varied external ties with other clusters.'²⁵² The development of outward oriented ties appears to be an increasing trend. The increasing number of 'delocalised' collaborations is associated with 'the need to get access to state-of-the art knowledge, wherever it might be located.'²⁵³

The ability to develop delocalised collaborations is facilitated by the ease with which intellectual property can cross borders, providing the opportunity for corporations in the US and Europe to form trans-Atlantic partnerships.²⁵⁴ Indeed in this respect it is noted that 'research in biotechnology appears to be internationalised, with its knowledge foundations being developed on a 'global' basis.'²⁵⁵ Data suggests that the internationalisation of research activity is uneven, however. The pattern of cross-location between EU Europe and the US is comparable across a variety of chemical sub-sectors with the exception of biotechnologies where EU activity in the US remains similar but US research located in the EU is considerably lower.²⁵⁶

The limited levels of US investment in the EU market seem to stem from a perception that the European markets are less competitive than those located in the US. The low levels of EU competitiveness are linked with a number of coincident factors, centred on: the fragmentation, rigidity and hierarchical structure of the European scientific and industrial base; the weakness in organisational structures linking science to industry; inadequate development of venture capital markets and the historical absence of a strong European commitment to intellectual property rights.²⁵⁷ As a result not only does it appear that US investment in EU markets is discouraged but it is also possible that EU firms are encouraged to collaborate with upstream US DBFs.²⁵⁸

This overview of the structure of the biotechnology industry reveals a number of salient characteristics which reflect the general propositions articulated by the post-Fordist production model. Biotechnologies incorporate the application of very advanced technology

throughout the production process. Indeed the centrality of knowledge promotes its tendencies towards globalisation in view of the ease with which information can be transferred across borders 'at a click of a mouse'.²⁵⁹ Furthermore, the organisation of production into clusters based around centres of excellence and other support institutions, which in turn have developed internationalised links, is clearly analogous to Sassen's notion of denationalised economic activity based on the interests of a particular corporate sub-sector within global cities. The sector is characterised by an increasingly complex pattern of inter-firm links – vertical, horizontal, national and transnational – extending 'to fundamental research and development in an information age.'²⁶⁰ Moreover intrafirm activity has become increasingly salient following the trend towards corporate concentration. These investment decisions are based on market actors' evaluations of differentiated globalised market conditions (in which US markets are currently more highly favoured than those located in Europe).

The latter point directs our attention towards the asymmetric exposure of European biotechnology markets in which EU investments in international markets considerably exceed investment in EU markets. The preceding overview provides insights that this may be linked with a variety of factors. A number of these – in particular the development of a European Research area and securing intellectual property rights at the European level – are directly connected with creating a meaningful European economic space, and the related development of a meaningful European regulatory space. In respect of genetically modified organisms in particular this has proved particularly contentious leading to a moratorium on new authorisations since October 1998. The uncertainty surrounding the regime has led to research and development investments being redirected towards non-plant related areas.²⁶¹ The difficulty in developing a common regulatory space for biotechnologies is partly a reflection of the cross-sectoral application of biotechnologies, which enables 'linkages between sectors that were previously discreet.'²⁶² This cross-sectoral characteristic of agro-food biotechnology has been reflected in the EU regulatory environment by the involvement of a number of Commission Directorates, whose perspectives and policy approaches reflect conflicting 'prevailing ideologies' and competition for policy leadership.²⁶³

Substantial emphasis is placed upon the issues of international competition, the development of a knowledge economy and the promotion of a business environment that rewards innovation and entrepreneurship. In terms of this discourse the regulatory emphasis is placed on market building or negative integration, largely in accordance with neoliberal economic principles. However, alongside consideration of the likely economic benefits, the

ethical implications of the technology;²⁶⁴ issues of environmental protection and human safety;²⁶⁵ concerns for good governance; democracy; accountability; and public participation,²⁶⁶ are also considered. These various themes broadly promote a conception of positive integration which goes beyond market building and highlight competing technical and political propositions in relation to the role of the regulatory activity.

The EU regulatory structure carefully negotiates a path between national, European and global claims over regulatory competence. For instance key EU directives concerning the regulation of agro-food biotechnologies – Directives 90/219 and 90/220 - accord member states central roles in the authorisation procedure.²⁶⁷ Moreover provisions contained in Directive 90/220 allow member states to deviate from EU authorisations on grounds of national concerns for public health and the environment. However national states are required to coordinate their competences and justify their interpretations with supranational actors – in particular the Commission which is accorded considerable adjudicatory authority in relation to member states’ – especially under circumstances of Council indecision and inaction. Moreover the EU regulatory framework is enmeshed with global institutions, including membership of the WTO and the adoption of the Cartagena Protocol which bestow various rights and obligations upon the EU and its member states.

Any attempt to regulate the production, release and marketing of agro-food biotechnologies within the EU requires the interpretation and negotiation of these multiple levels of governance – an issue which Thompson identifies as ‘the problem of many majorities.’²⁶⁸ The complex enmeshment of institutions has given rise both to the coordination and contestation of authority claims within, between and across the various levels of governance, as the actors attempt to resolve multiple commitments made at any particular level (for instance EU commitments to both trade liberalisation and social protection) and determine the appropriate level of governance. The dangers to democracy of multiperspectivity are clear: the absence of singularity in decision-making creates problems for attributing responsibility and hence for accountability.²⁶⁹ However, it is within just such a ‘highly decentralised system ... [requiring] substantial amounts of co-operation, conflict resolution, and joint problem-solving ... that the more positive prospects for democracy – and in particular - discursive democracy can be pursued.’²⁷⁰ The principal advantage of a discursive conception of democracy is that it is not confined to territorially delimited communities - it ‘can cope with fluid boundaries and the production of outcomes across boundaries.’²⁷¹ In view of the diffuseness of authority in relation to the EU regulation of agro-food biotechnologies and the complex configuration of authority at the various levels of

governance – national, European and global, and the implications it raises with respect to both voice and effective governance the case study (chapter 5) assesses the different ways in which input and output-oriented legitimacy is instituted through discursive practices. In doing so it evaluates the proposal that democratic legitimacy is primarily provided by both non-institutionalised and institutionalised discursive practices providing channels for preference articulation, reflection and modification (*input*) and the generation of superior policy (*output*) which is reflective of the preceding deliberation.

2.6. Conclusion.

This chapter has outlined how processes of globalisation and Europeanisation have destabilised Westphalian sovereignty in the EU. It is suggested that this is important because it has crucial implications for the authenticity and efficacy of territorially bounded democracy. The argument is made that sovereignty is a socially constructed institution and that sovereignty practices themselves are constitutive of the institution of sovereignty. Accordingly the institution of sovereignty is accorded a constitutive status distinguishing it from instrumental conceptualisations which simply treat it as a resource to be exchanged and bartered, respected and ignored. By emphasising sovereignty's constitutive role it is possible to conceive of changes in sovereignty practices not merely 'compromising Westphalia' but more fundamentally bringing about a shift in its constitutive rules and principles.

Adopting these terms we can view globalisation and Europeanisation as more than exercises of, or transgressions of, sovereignty but rather as processes which actively destabilise the Westphalian sovereignty meanings and give rise to the partial incorporation of new principles and practices within the institution of sovereignty thereby transforming its generative grammar. The reconfigured institution of sovereignty legitimises alternative institutions of governance alongside state actors and establishes a new set of principles underpinning the exercise of sovereignty. This late-modern manifestation of sovereignty is examined through the metaphor of neo-medievalism – not to draw direct comparisons which would be highly misleading - but rather to escape the 'tyranny of existing concepts and practices' articulated by Westphalian sovereignty.²⁷²

These new conditions do not necessarily mean the worst of both worlds for the practice of democracy in the EU because the EU polity institutionalises effective capacity and

channels of voice and representation in new and complex ways which potentially redress the incongruence between social and political spaces created by contemporary processes of denationalisation. The partiality of the unbundling process suggests that different policy areas will be constituted by and constitutive of ‘a complex mixture of old, new, and hybrid forms – ‘territorial’, transterritorial’, and ‘functional’ forms of association and authority coexisting and interacting.’²⁷³

The differentiated aspects of ‘unbundling’ are considered in relation to the three principal dimensions of EU economic policy – economic and financial integration, trade and social policy. Each of these policy sectors, or regimes, is constituted by, and constitutive of, differentiated configurations of Europeanisation and globalisation; principal discourse; modes of integration (negative versus positive); technocracy and politicisation; and input and output oriented-legitimacy. These differentiated aspects are summarised below (table 2.1.).

	ECB	Gender	Biotechnologies
Aspect of EU economy	Financial	Social	Production
Pattern of regional/global regulation	High/high: highly integrated markets – regionalisation and regionalism.	High/Low: Legal provisions only for EU citizens.	High/Indirect: EU regulations and WTO/Cartagena provisions.
Discourse	Monetarist: low inflation absolute goal for economic prosperity.	Neoliberal vs. Social justice: mutual recognition vs. harmonisation.	Scientific vs. Social: Expert vs. lay opinion – democratisation of science?
Mode of policy integration	Mixed: Single monetary authority vs. state coordinated macro-economic policy.	Legal rights: positive interpretation of article 119 and related directives.	Legal mixture: negative market integration vs. high environmental and health standards.
Technical or political regime	Technical: Institutionalised epistemic community	Political/Technical Influenced by role of civil society and ECJ interpretations	Technical/Political: Influenced by scientific versus social discourses
Configurations of input/output-oriented legitimacy	Output legitimacy: Reduced costs to achieve price stability	Input and output legitimacy: voice and legally enforceable rights	Input legitimacy: institutional deliberation and civil society voices

Table 2.1. Differentiated regimes.

It is suggested that no single model of transnational democracy can adequately reflect the characteristics and qualities of such highly differentiated ‘unbundling’. Instead it is

argued we need to deploy a range of models. Accordingly, in the next chapter, following an overview of the current institutional and normative arguments concerning the democratic characteristics of the EU, three ideal-typical models of transnational democracy are analysed: democratic intergovernmentalism, deliberative democracy and cosmopolitan democracy. In each case it is proposed that their specific normative and institutional prescriptions mean that they provide useful insights in relation to a particular policy regime.

Notes for Chapter 2. Sovereignty and democracy, globalisation and Europeanisation.

- ¹ Fritz Scharpf, Governing in Europe: Effective and Democratic?, New York, Oxford University Press, 1999, pp. 6-13; Fritz Scharpf, 'Economic integration, democracy and the welfare state', Journal of European Public Policy, 1997, vol. 4, no. 1, pp. 18-36.
- ² William E. Connolly, 'Democracy and Territoriality', Millennium, 1991, vol. 20, no. 3, p. 464; Andrew Linklater, The Transformation of Political Community, Cambridge, Polity Press, 1998, p. 190.
- ³ Richard Devetak and Richard Higgott, 'Justice unbound? Globalization, states and the transformation of the social bond', International Affairs, 1999, vol. 75, no. 3, p. 483.
- ⁴ Phillip Cerny, 'Globalization and the changing logic of collective action', International Organization, 1995, vol. 49, no. 4, p. 598.
- ⁵ Robert O. Keohane, 'Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society', in Hans-Henrik Holm and Georg Sørensen, Whose World Order? Uneven Globalization and the End of the Cold War, Boulder and Oxford, Westview Press, 1995, p. 177.
- ⁶ Benjamin R. Barber, 'Can Democracy Survive Globalization?' Government and Opposition, 2000, vol. 35, no. 3, pp. 275-6.
- ⁷ William D. Coleman and Geoffrey R. D. Underhill, 'Introduction: Domestic politics, regional economic co-operation and global economic integration', in William D. Coleman and Geoffrey R. D. Underhill, Regionalism and global economic integration, Europe, Asia and the Americas, London and New York, Routledge, 1998, p. 7.
- ⁸ Ibid.
- ⁹ Jens Bartelson, A Genealogy of Sovereignty, Cambridge, Cambridge University Press, 1995, p. 8.
- ¹⁰ John Gerard Ruggie, 'Territoriality and beyond; problematising modernity in international relations' International Organization, 1993, vol. 47, no. 1, p. 149.
- ¹¹ James Anderson, 'The shifting stage of politics: new medieval and postmodern territorialities?', Environment and Planning D: Society and Space, 1996, vol. 14, p. 141. *Emphasis added.*
- ¹² Ibid.
- ¹³ Robert Jackson, 'Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape', Political Studies, Special Issue, 1999, vol. 47, no. 3, p. 435.
- ¹⁴ Ibid, p. 436. Whilst Krasner, concurs with this view that '[a]ll European thinkers accepted the concept of Christendom, a unified society that was governed by divine law', he also points out that the application of the idea was a contested issue, in which the various constitutive actors 'did vigorously debate the specific prerogatives of the parts', Stephen Krasner Westphalia and All That', in Judith Goldstein and Robert O. Keohane, eds., Ideas and Foreign Policy: Beliefs, Institutions and Political Change, Ithaca and London, Cornell University Press, 1993, pp. 255- 256.
- ¹⁵ Krasner, 1993, p. 252.
- ¹⁶ Jackson, 1999 p. 436.
- ¹⁷ Ibid. See also Anthony Giddens, The Nation-State and Violence, Cambridge, Polity Press, 1985, pp. 88-9.
- ¹⁸ Krasner, 1993, p. 252.
- ¹⁹ Anderson, 1996, 141.
- ²⁰ Ruggie, 1993, p. 150. Although it is worth noting that the external borders of Christendom marked a clear line between the Christian and non-Christian worlds. (Jackson, 1999, p. 437).
- ²¹ Jackson, 1999, p. 435.
- ²² Ruggie, 1993, p. 150.
- ²³ Ruggie, 1993, p. 59, associates the centralised configuration of authority with the invention of single-point perspective in Renaissance art: 'What was true in the visual arts was equally true in politics: political space came to be defined as it appeared from a single fixed viewpoint.' *Original emphasis.* See also Anderson, 1996, pp. 142-143 for consideration of the impact of the invention of the single point perspective.
- ²⁴ Stephen D. Krasner, 'Compromising Westphalia', International Security, 1995-6, vol. 20, no. 3, p. 116. Krasner uses the phrase autonomy and not sovereignty, but does so to signify constitutional authority, i.e. sovereignty as per this thesis's definition.
- ²⁵ Georg Sørensen, 'Sovereignty: Change and Continuity in a Fundamental Institution: Political Studies, Special Issue, 1999, vol. 47, no. 3, p. 592.
- ²⁶ Ibid, p. 593. In order to reinforce his assertion with respect to constitutional independence as an absolute condition, he draws analogies with other juridical categories which he asserts also share the same logic. One of these juridical categories is citizenship, of which he says 'A person is either a citizen of a particular country or not, there is no legal status of being 75% Dane.' (p. 593). Whilst this statement is correct, the analogy can be extended to provide an interesting metaphor for thinking beyond a single point perspective. Whilst a person

cannot have a legal status of partial citizenship, it is quite feasible that they enjoy dual citizenship: they may hold both Danish and UK passports. However this does not make them two persons, they are the same person but with multiple (in this case 2) legal identities. The issue of multiperspectivity and its implications for late-modern manifestations of sovereignty are considered in section 2.3.2 through the neo-medieval analogy.

²⁷ Ruggie, 1993, p.151. Krasner, 1993, p. 258, notes that the colonial history of many European states is consistent with the principle of modern sovereignty in that: 'all of the activities and people within a defined geographic area were governed by the same authority structures, although those structures might be located several thousand miles away. The British Empire, for instance, was treated as a single state in international law'.

²⁸ 'The organization is based on the principle of the sovereign equality of all its Members', Charter of the United Nations, Article 2(1). Sørensen, 1999, p. 593, asserts that the attribution to each member of the UN General Assembly one vote 'is a concrete expression of this legal equality.' However it is also worth noting that issues of international peace and security - at the heart of modern sovereignty - fall under the jurisdiction of the Security Council and not the General Assembly. The voting procedure set out under Article 27(3) bestows on the permanent members of the Security Council an effective veto. Clearly the voting procedure in this instance is unequal and rather than reflecting the legal equality of the members, reflects the (historically) substantive or de-facto differences in state sovereignty.

²⁹ The principle of exclusive territoriality has created problems of social interaction. As Ruggie, 1993, pp. 164-65, points out, paradoxically, the legitimacy of absolute individuation allows no common space within which state actors can meet. This paradox has been resolved with the development of the principle of extraterritoriality.

³⁰ Ruggie, 1993.

³¹ See Stephen Krasner, Sovereignty: Organized Hypocrisy, Princeton, Princeton University Press, 1999; Krasner, 1995-96 and Krasner, 1993.

³² Krasner, 1999.

³³ Alexander B. Murphy, 'The sovereign state system as political-territorial ideal: historical and contemporary considerations', in Thomas J. Biersteker and Cynthia Weber, Eds., State Sovereignty as Social Construct, Cambridge, Cambridge University Press, 1996, p. 87.

³⁴ Krasner, 1995.

³⁵ Cynthia Weber, Simulating Sovereignty: Intervention, the State and Symbolic Exchange, Cambridge, Cambridge University Press, 1995, p. 4.

³⁶ Ian Clark, Globalization and International Relations Theory, Oxford, Oxford University Press, 1999.

³⁷ F. H. Hinsley, Sovereignty, 2nd Ed., Cambridge, Cambridge University Press, 1986, p. 26. *Original emphasis*.

³⁸ Ibid, 225.

³⁹ Clark, 1999, p. 15.

⁴⁰ Martin Wight, 'Why is there no international theory?' Herbert Butterfield and Martin Wight, Eds., Diplomatic Investigations: Essays in the Theory of International Politics, London, George Allen and Unwin, 1966, p. 33.

⁴¹ R. O. Keohane, Multilateralism: an important agenda for research', International Journal, 1990, vol. 45, p. 732, quoted Sørensen, 1999, p. 591.

⁴² Jackson, 1999, p. 432.

⁴³ Karen T. Litfin, 'The Status of the Statistical State: Satellites and the Diffusion of Epistemic Sovereignty', Global Society, 1999, vol. 13, no. 1, p. 96.

⁴⁴ Jackson, 1999, p. 432.

⁴⁵ Sørensen, 1999, p. 592. My use of the term differs from Sørensen's, in that he asserts the constitutive rules of sovereignty have remained unchanged. Instead he locates the changes in 'sovereignty game' to changes in the regulatory rules of sovereignty - that is the rules which determine how the game is played. However it is my assertion that the medieval, Westphalian, and late-modern manifestations of sovereignty are constitutively distinct - that is to say they are actually different games.

⁴⁶ See Thomas J. Biersteker and Cynthia Weber, 'The social construction of state sovereignty' in Biersteker and Weber, 1996, for a discussion of the social construction of sovereignty, and its mutually constitutive character, and Weber, 1995, for an extended (and more postmodernist) argument concerning the construction, deconstruction and reconstruction of sovereignty meanings through states' intervention practices.

⁴⁷ Biersteker and Weber, 1995, p. 11.

⁴⁸ Jackson, 1999, p. 433.

⁴⁹ Alexander Wendt, 'Anarchy is what states make of it: the social construction of power politics', International Organization, 1992, vol. 46, no. 2, p. 392.

⁵⁰ Ben Rosamond, 'Constructing Globalization' in Karin Fierke and Knud Erik Jorgensen, Eds., Constructing International Relations: The Next Generation, New York, M. E. Sharpe, 2001, p. 202.

- ⁵¹ Wendt, 1992, p. 399.
- ⁵² Ibid.
- ⁵³ Biersteker and Weber, 1996, p. 11.
- ⁵⁴ Cerny, 1995, p. 598.
- ⁵⁵ Colin Hay and Ben Rosamond, 'Globalization, European integration and the discursive construction of economic imperatives', Journal of European Public Policy, 2002, vol. 9, no. 2, p. 147.
- ⁵⁶ Jan Aart Scholte, 'Global capitalism and the state', International Affairs, 1997, vol. 73, no. 3, p. 429; Vivien A. Schmidt, The Futures of European Capitalism, New York, Oxford, 2002, p. 17; Paul Hirst and Grahame Thompson, Globalization in Question: The International Economy and the Possibilities of Governance, 2nd Ed., Cambridge, Polity, 1999 p. 1; Roland Axtmann, 'Globalization, Europe and the State: Introductory Reflections', in Roland Axtmann, Ed., Globalization and Europe: Theoretical and Empirical Investigations, London and Washington, Pinter, 1998, p. 2. *Emphasis added.*
- ⁵⁷ Scholte, 1997, pp. 430-31; Jens Bartelson, 'Three Concepts of Globalization', International Sociology, 2000, vol. 15, no. 2, pp. 184-190.
- ⁵⁸ Scholte, 1997, p. 430; Bartelson, 2000, p. 184.
- ⁵⁹ Bartelson, 2000, p. 184.
- ⁶⁰ Hirst and Thompson, 1999; Paul Hirst and Grahame Thompson, 'Globalization in one country? The peculiarities of the British', Economy and Society, 2000, vol. 29, no. 3, pp. 335-356; Paul Hirst and Grahame Thompson, 'Globalization and the future of the nation state', Economy and Society, 1995, vol. 24, no. 3, pp. 408-442; Paul Hirst, 1997, 'The Global Economy - Myths and Realities', International Affairs, Vol. 73, no. 2, pp. 409-425.
- ⁶¹ John Gerard Ruggie, 'At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy', Millennium, 1994, vol. 24, no. 3, p. 508.
- ⁶² Devetak and Higgott, 1999, p. 486.
- ⁶³ Scharpf, 1999, p. 36.
- ⁶⁴ Alessandro Bonanno, 'The crisis of representation; the limits of liberal democracy in the global era', Journal of Rural Studies, 2000, vol. 16, no. 3, p. 312.
- ⁶⁵ Ibid, p. 311.
- ⁶⁶ Ibid.
- ⁶⁷ Devetak and Higgott, 1999, p. 486. *Emphasis added.*
- ⁶⁸ Bartelson, 2000, p. 184.
- ⁶⁹ Scholte, 1997, p. 431.
- ⁷⁰ Bartelson, 2000, p. 184.
- ⁷¹ Ibid, pp.186-88.
- ⁷² Cerny, 1995, p. 597.
- ⁷³ Ibid, pp. 608-9.
- ⁷⁴ Philip G. Cerny, 'Globalization and the erosion of democracy', European Journal of Political Research, 1999, vol. 36, no. 1, p. 2. *Emphasis added.*
- ⁷⁵ Robert Cox, 'Democracy in hard times: economic globalization and the limits to liberal democracy', in Anthony McGrew, Ed., The Transformation of Democracy?, Cambridge, Polity, 1997, p. 57.
- ⁷⁶ Cerny, 1995, p. 613.
- ⁷⁷ Ibid, p. 614; Cerny 1999, p. 11.
- ⁷⁸ Cerny, 1995, p. 613.
- ⁷⁹ Cerny, 1999, p. 11.
- ⁸⁰ Ibid; Cerny 1995, p. 613; Cox, 1997, pp. 57-8.
- ⁸¹ Scholte, 1997, p. 434.
- ⁸² Robert W. Cox, 'Structural Issues of Global Governance: Implications for Europe', in Stephen Gill, Ed., Gramsci, Historical Materialism and International Relations, Cambridge, Cambridge University Press, 1993, p. 260.
- ⁸³ Cerny, 1995, p. 611
- ⁸⁴ Ibid, p. 617.
- ⁸⁵ Manuel Castells, The Rise of the Network Society, vol. 1: The Information Age: Economy, Society and Culture, Oxford and New Malden, Mass., Blackwell Publishers, 1996, p. 472.
- ⁸⁶ Cerny 1995, pp. 616-7; Saskia Sassen, Losing Control? Sovereignty in an Age of Globalization, New York, Columbia University Press, 1996, pp. 43-46; Saskia Sassen, 'Territory and Territoriality in the Global Economy', International Sociology, 2000, vol. 15, no. 2, p. 383; Saskia Sassen, 'Digital Networks and the State: Some Governance Questions', Theory, Culture and Society, 2000a, vol. 17, no. 4, pp. 25-27; Scholte, 1997, pp. 439-40.

- ⁸⁷ Bank for International Settlements, Triennial Central Bank Survey: Foreign exchange and derivatives market activity in 2001, Basel, March 2002, p. 1. This represents a 19 percent decrease in activity since 1998 at current rates.
- ⁸⁸ Sassen, 2000a, p. 26.
- ⁸⁹ Scholte, 1997, p. 27.
- ⁹⁰ Sassen, 1996, pp. 51-2; Kathleen R., McNamara, The Currency of Ideas: Monetary Politics in the European Union, Cornell University Press, Ithaca and London, 1998, pp. 167-8.
- ⁹¹ Sassen, 1996, p. 44; Sassen, 2000a, p. 26.
- ⁹² Cerny, 1995, p. 617.
- ⁹³ Sassen, 2000, p. 383.
- ⁹⁴ Ibid.
- ⁹⁵ Cerny, 1995, p. 617.
- ⁹⁶ Ibid; Sassen, 2000, p. 383. Indeed Sassen speculates that the implications also raise questions concerning the effectiveness of non-state-centred systems of coordination.
- ⁹⁷ Scholte, 1997, p. 439.
- ⁹⁸ Sassen, 2001, p. 76.
- ⁹⁹ Sassen, 1996, pp. 46-7; Saskia Sassen, The Global City: New York, London, Tokyo, 2nd Ed., Princeton and Oxford, Princeton University Press, 2001, pp. 65-84.
- ¹⁰⁰ Sassen, 1996, pp. 49-50.
- ¹⁰¹ Sassen, 2000a, p. 26.
- ¹⁰² Sassen, 1996, p. 41.
- ¹⁰³ Stephen Gill, 'Globalisation, Market Civilisation, and Disciplinary Neoliberalism', Millennium, 1995, vol. 24, no. 3, p. 413.
- ¹⁰⁴ Ibid, p. 412.
- ¹⁰⁵ Ibid, p. 399.
- ¹⁰⁶ Bonanno, 2000, p. 314.
- ¹⁰⁷ Clark, 1999, p. 54.
- ¹⁰⁸ Ibid, pp. 54-56.
- ¹⁰⁹ Ibid., p. 93
- ¹¹⁰ Bartelson, 2000, p. 189.
- ¹¹¹ Clark, 1999, pp. 52-69.
- ¹¹² Ibid., p. 63.
- ¹¹³ Ibid, p. 103.
- ¹¹⁴ Barber, 2000, p. 275.
- ¹¹⁵ Sassen, 1996, p. xii.
- ¹¹⁶ Ibid, p. 13.
- ¹¹⁷ Ibid, p. 27.
- ¹¹⁸ Ibid, p. 12.
- ¹¹⁹ Sassen, 1996, p. 12; Sassen, 2000, pp. 378-9.
- ¹²⁰ Sassen, 1996, p. 108, n. 18; Sassen, 2000, p. 387, n. 7.
- ¹²¹ Ruggie, 1993; Anderson, 1996.
- ¹²² Ruggie, 1993, p. 172.
- ¹²³ Anderson, 1996, p. 145.
- ¹²⁴ Leo Panitch, 'Globalisation and the State', The Socialist Register, 1994, p. 74.
- ¹²⁵ Anderson, 1996, p. 148
- ¹²⁶ Ole Wæver, 'Identity, Integration and Security: Solving the Sovereignty Puzzle in E.U. Studies', Journal of International Affairs, 1995, vol. 48, no. 2, pp. 417-8.
- ¹²⁷ Biersteker and Weber, 1996, p. 11.
- ¹²⁸ Hedley Bull, The Anarchical Society: A Study of Order in World Politics, 2nd Ed., Basingstoke, Macmillan Press, 1995, pp. 254; 255-6.
- ¹²⁹ Ruggie, 1993.
- ¹³⁰ Keohane, 1995, p. 175.
- ¹³¹ Ibid.
- ¹³² Jackson, 1999, p. 451.
- ¹³³ Ibid.
- ¹³⁴ William Wallace, 'The sharing of Sovereignty: the European Paradox', Political Studies, 1999, vol. 47, no 3, pp. 504-5.
- ¹³⁵ Ibid, p. 505, n. 7.
- ¹³⁶ Anderson, 1996, p. 133.

- ¹³⁷ Ruggie, 1993, p. 165; Anderson, 1996, p. 145.
- ¹³⁸ Ruggie, 1993, p. 165.
- ¹³⁹ Ibid, p. 172
- ¹⁴⁰ Caporaso, 1996, pp. 46-47.
- ¹⁴¹ Krasner, 1995.
- ¹⁴² Sørensen, 1999, p. 603.
- ¹⁴³ Ruggie, 1993, p. 165. Anderson, 1996, p. 145, suggests that whilst this formulation is helpful, 'the dualism is unsatisfactory ... because of the confusing mixture of metaphorical and nonmetaphorical references to space.' I would assert however, that notions of territorial space, and functional space, are equally metaphorical. We may be able to touch the physical earth, but this is very different to touching territory which is given meaning through equally abstract ideas such as sovereignty, private property, ownership and so forth.
- ¹⁴⁴ Anderson, 1996, p. 134.
- ¹⁴⁵ Ibid.
- ¹⁴⁶ Ibid, pp. 139-41.
- ¹⁴⁷ Ruggie, 1993, p. 157.
- ¹⁴⁸ Bull, 1995, p. 245.
- ¹⁴⁹ Wæver, 1995, p. 424.
- ¹⁵⁰ Ruggie, pp. 159-160.
- ¹⁵¹ Anderson, 1996, p. 141.
- ¹⁵² Ibid, p. 172.
- ¹⁵³ Ibid.
- ¹⁵⁴ Wæver, 1995, p. 412.
- ¹⁵⁵ Cerny, 1995, p. 618.
- ¹⁵⁶ Anderson, 1996, p. 147.
- ¹⁵⁷ Michael Zürn, 'Democratic Governance Beyond the Nation-State: The EU and Other International Institutions', European Journal of International Relations, 2000, vol. 6, no. 2, p. 184.
- ¹⁵⁸ Wallace, Helen, 'Europeanisation and Globalisation: Complementary or Contradictory Trends?', New Political Economy, 2000, vol. 5, no. 3, p. 379.
- ¹⁵⁹ Scharpf, 1999, p. 28.
- ¹⁶⁰ Schmidt, 2002, p. 42.
- ¹⁶¹ Ibid.
- ¹⁶² Scharpf, 1999, p. 44.
- ¹⁶³ Desmond Dinan, Ever Close Union? An Introduction to the European Community, Basingstoke and London, Macmillan, 1994, p. 2.
- ¹⁶⁴ Wæver, 1995, p. 407. Whilst Wæver uses this phrase in the context of post-Cold War Europe, I suggest that it usefully captures the internal and external security concerns of Western Europe in the early post-war period.
- ¹⁶⁵ George Ross, 'European Integration and Globalization', in Roland Axtmann, Ed., Globalization and Europe: Theoretical and Empirical Investigations, London and Washington, Pinter, 1998, p. 165.
- ¹⁶⁶ Ibid, p. 174.
- ¹⁶⁷ Ibid, pp. 173-5.
- ¹⁶⁸ Ibid, p. 176.
- ¹⁶⁹ Scharpf, 1999, ch. 2. See also McGrew, 2002, p. 348.
- ¹⁷⁰ Ibid, p. 45.
- ¹⁷¹ Ibid, p. 85.
- ¹⁷² Helen Wallace, 'The Policy Process: A Moving Pendulum', in Helen Wallace and William Wallace, Eds., Policy-Making in the European Union, 4th Ed., Oxford, Oxford University Press, 2000, p. 49.
- ¹⁷³ Ross, 1998, p. 174.
- ¹⁷⁴ Schmidt, 2002, p. 43.
- ¹⁷⁵ Ben Rosamond, 'Discourses of globalization and the social construction of European identities', Journal of European Public Policy, 1999, vol. 6, no. 4, p. 661.
- ¹⁷⁶ Ross, 1998, p. 173.
- ¹⁷⁷ See Rosamond, 1999, pp. 662- 666.
- ¹⁷⁸ Schmidt, 2002, pp. 4, 14.
- ¹⁷⁹ Wallace, Helen, 'Europeanisation and Globalisation: Complementary or Contradictory Trends?' New Political Economy, 2000, vol. 5, no. 3, p. 379.
- ¹⁸⁰ Arie M. Kacowicz, 'Regionalization, Globalization, and Nationalism: Convergent, Divergent, or Overlapping?', Alternatives, 1999, vol. 24, no. 4, p. 550.
- ¹⁸¹ Rosamond 1999, p. 654.
- ¹⁸² Ibid, p. 656.

- ¹⁸³ European Central Bank, Review of the International Role of the Euro, December 2002, p. 14.
- ¹⁸⁴ Figures measured using the 'broad' definition of international securities comprising issues by non residents of the respective currency and domestic issued targeted at the international financial market. Using the 'narrow' definition, comprising only issues by non-residents of the respective currency area, the ordinal rankings remain the same, although the relative shares are different (euro 11 percent, US dollar 9 percent and Japanese yen remaining at 6 percent. See Ibid, pp. 10, 13-15.
- ¹⁸⁵ Ibid, p. 15.
- ¹⁸⁶ Ibid, p. 30. Figures are for spot trades although ordinal positions are identical for future trades, and consequently total global foreign exchange, although the respective shares are different. See *ibid*, pp. 30-32. See also European Central Bank, Review of the Foreign Exchange Market Structure, March 2003, p. 11.
- ¹⁸⁷ ECB, December 2002, pp. 10, 39.
- ¹⁸⁸ Ibid, p. 54.
- ¹⁸⁹ Ibid.
- ¹⁹⁰ Ibid.
- ¹⁹¹ European Central Bank, The Euro Equity Markets, August 2001, p. 8.
- ¹⁹² Ibid, p. 9.
- ¹⁹³ Ibid, p. 38. These instances of regional integration can be viewed as denationalising processes in that the integration and infrastructural development is linked with the interests of a specific corporate sub-sector.
- ¹⁹⁴ Ibid, p. 37, p. 44. This said, 'a plethora of interconnected factors and barriers' which are slowing European financial integration such as: regulatory inadequacies; institutional underdevelopment; legal and tax inconsistencies; political barriers; external trade barriers; and cultural differences in corporate governance and enterprise, are noted in the report, *ibid.*, p. 44-5, and in the Committee of Wise Men, Final Report of on the Regulation of European Securities Markets, Brussels, 15 February 2001, p. 10-11.
- ¹⁹⁵ Equity markets balance of payments data shows euro corporations focusing on US markets for acquisitions and portfolio investments. (ECB, August 2001, p. 9) In 2000, of all the merger and acquisitions related capital flows, 44 percent originated in the euro area and most of these were directed towards the US. (ECB, March 2003, p. 16) Moreover in the foreign exchange markets the euro is traded predominantly against the dollar. (Ibid, p. 11). With respect to the international debt securities market the picture is more mixed. Whilst US issues account for 30 percent of the total euro issues supply, and thus ranks highest, (ECB, December 2002, p. 18), as noted above, the demand for the issues seems to predominately originate within the euro area (ECB, December 2002, pp. 19, 54).
- ¹⁹⁶ Kacowicz, 1999, distinguishes between two types of regionalisation, which he refers to as 'regionalisation' and 'regionalism', and which closely resemble the distinction made here. Kacowicz uses 'regionalisation' to refer to undirected processes of social and economic integration and 'regionalism' to refer to the purposive attempts to create common functional and political arrangements. (p.251).
- ¹⁹⁷ See Thomas Diez, 'Speaking 'Europe': The Politics of Integration Discourse', in Thomas Christiansen, Knud Erik Jørgensen and Antje Wiener, Eds., The Social Construction of Europe, London, Sage, 2001, pp. 85-100, for a discussion of the role of linguistic construction in knowing and creating reality.
- ¹⁹⁸ Otmar Issing, 'The European Monetary Union in a globalised world', speech given at the Second Vienna Globalization Symposium, 11 May 2001.
- ¹⁹⁹ Ibid, p. 1.
- ²⁰⁰ Ibid, p. 3.
- ²⁰¹ Ibid, 7.
- ²⁰² Ibid, p. 6.
- ²⁰³ Ibid.
- ²⁰⁴ Although the link made between monetary policy and the generation of wealth for European society does discursively attempt to create a European 'intersubjective community'.
- ²⁰⁵ Kenneth Dyson, The Politics of the Euro-Zone: Stability or Breakdown?, Oxford, Oxford University Press, 1999, p. 25.
- ²⁰⁶ Kathleen R. McNamara, 'Rational Fictions: Central Bank Independence and the Social Logic of Delegation', West European Politics, 2002, vol. 25, no. 1, p. 52.
- ²⁰⁷ Ibid.
- ²⁰⁸ Dermot Hodson and Imelda Maher, Economic and monetary union: balancing credibility and legitimacy in an asymmetric policy-mix', Journal of European Public Policy, 2002, vol. 9, no. 3, p. 392; Verdun, 2000, pp. 97-102.
- ²⁰⁹ Simon Duncan, 'Obstacles to a Successful Equal Opportunities Policy in the European Union', The European Journal of Women's Studies, 1996, vol. 4, no. 4, p. 401; Jo Shaw, 'Law, Gender and the Internal Market' in Tamara K. Herve and David O'Keeffe, Eds., Sex Equality in the European Union, Chichester, John Wiley and Sons Ltd, 1996, p. 292.

- ²¹⁰ Duncan, 1996, p. 411.
- ²¹¹ Wolfgang Streeck, 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy', in Stephan Leibfried and Paul Pierson, Eds., European Social Policy: Between Fragmentation and Integration, Washington D. C., The Brookings Institute, 1995, p. 397.
- ²¹² Catherine Hoskyns, 1996, Integrating Gender: Women, Law and Politics in the European Union, London and New York, Verso, p. 45.
- ²¹³ Ibid, p. 50.
- ²¹⁴ Streeck, 1995, pp. 392-3.
- ²¹⁵ Ibid, p. 394.
- ²¹⁶ Ibid, p. 402.
- ²¹⁷ Cited in Sylvia Walby, 'The new regulatory state: the social powers of the European Union', British Journal of Sociology, 1999, vol. 50, no. 1, p. 126.
- ²¹⁸ Streeck, 1995, p. 400; Walby, 1999, p. 16.
- ²¹⁹ Hoskyns, 1996, pp. 44-5.
- ²²⁰ Ibid., pp. 54-5; Duncan, 1996, pp. 406-7.
- ²²¹ Duncan, 1996, p. 407.
- ²²² See section 5.4. on the history of the EU Gender Rights Regime'.
- ²²³ Hoskyns, 1996, p. 57.
- ²²⁴ Ilona Ostner and Jane Lewis, 'Gender and the Evolution of European Social Policies', in Leibfried and Pierson, 1995, p. 162.
- ²²⁵ Walby, 1999.
- ²²⁶ Ibid.
- ²²⁷ Ibid, p. 122.
- ²²⁸ Gordon Brown, 'The Road to Full Employment: Economic Reforms for a More Flexible and Dynamic Britain and Europe', speech given at the Centre for European Reform, 10 March 2003, p. 6.
- ²²⁹ Ibid, pp. 7-11.
- ²³⁰ Diane Perrons, 'Flexible Working Patterns and Equal Opportunities in the European Union: Conflict or Compatibility?', The European Journal of Women's Studies, 1999, vol. 6, no. 5, pp. 393-4.
- ²³¹ Ibid.
- ²³² Brown, 10 March 2003, p. 9.
- ²³³ Duncan 1996, refers to a gender contract as 'a rough social consensus on what men and women do, think and are'. (p. 412). Ostner and Lewis, 1995, use the terms 'gender order' or 'gender regime' to refer to 'the norms, principles, and policies informing the allocation of tasks, rights, and life chances to both sexes. Paid work, unpaid care, and their allocation are not neatly separated, but are located in a complex system of subordination and precedence. Gender regimes differ as to who should provide for a family's income or who should take care of the baby or the frail grandmother.' (p. 161, n. 7).
- ²³⁴ Although see Ch. 6 for a discussion of the implications of a richer reading of the subsidiarity principle for multi-level governance.
- ²³⁵ Mark A. Pollack and Emilie Hafner-Burton, 'Mainstreaming gender in the European Union', Journal of European Public Policy, 2000, vol. 7, no. 3, esp. pp. 439ff.
- ²³⁶ Ibid.
- ²³⁷ Ibid., p. 447.
- ²³⁸ Pollack and Hafner-Burton, 2000, p. 440.
- ²³⁹ Although as Shaw, 1996, points out, social policy is subordinated to market-making requirements with respect to accession countries preparations for adopting of the *acquis*. (pp. 291-2).
- ²⁴⁰ Ibid, p. 434.
- ²⁴¹ Molly Cochran, 'A Democratic Critique of Cosmopolitan Democracy: Pragmatism from the Bottom-Up', European Journal of International Relations, 2002, vol. 8, no. 4, p. 520.
- ²⁴² Agnes Allansdottir, et al., 'Innovation and competitiveness in European biotechnology', Enterprise Papers, no. 7, Enterprise Directorate-General, European Commission, Brussels, 2002, p. 1.
- ²⁴³ Lee Ann Patterson, 'Biotechnology Policy: Regulating Risks and Risking Regulation', in Helen Wallace and William Wallace, Eds., Policy-Making in the European Union, 4th Ed., Oxford, Oxford University Press, 2000, p. 318.
- ²⁴⁴ Commission of the European Communities, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions European Commission: Life sciences and biotechnology: A strategy for Europe', COM (2002) 27 final, 23. 1. 2002, p. 12.
- ²⁴⁵ Ibid, p. 8.
- ²⁴⁶ Allansdottir, et al., 2002, pp. 19-20.

- ²⁴⁷ Ibid. Alan Russell, 'Biotechnology and international political economy: actor-network in the knowledge structure', in Alan Russell and John Vogler, Eds., The international politics of biotechnology, Manchester and New York, Manchester University Press, 2000, p. 90.
- ²⁴⁸ John Vogler and Alan Russell, 'Introduction' in Alan Russell and John Vogler, Eds., The international politics of biotechnology, Manchester and New York, Manchester University Press, 2000, pp. 1-2.
- ²⁴⁹ Ibid, pp. vii, 19; Commission of the European Communities, 'Communication from the Commission: Towards a Strategic Vision of Life Sciences and Biotechnology: Consultation Document', COM (2001) 454 final, 4. 9. 2001, p. 8.
- ²⁵⁰ Allansdottir, et al., 2002, Ch. 5; COM (2001) 454 final, p. 9.
- ²⁵¹ Allansdottir, et al., 2002, pp. 45-6, 59; COM (2001) 454 final, p. 9.
- ²⁵² Allansdottir, et al., 2002, p. 56.
- ²⁵³ Ibid, p. 59.
- ²⁵⁴ COM (2001) 454 final, p. 8.
- ²⁵⁵ Allansdottir, et al., 2002, p. 24.
- ²⁵⁶ Allansdottir, et al., pp. 15-18. The average share of domestic EU research across the main chemical sub-sectors is 11.9 percent compared to 9.0 percent for US research conducted in the EU. In contrast whilst the share of EU biotechnology research conducted in the US is 14.6 percent (11.3 percent adjusted) US biotechnology research in the EU is only 4.9 percent. The level of activity is measured using patents which are widely used across the industry and provide a reliable indicator of innovation output. (p. 5)
- ²⁵⁷ Ibid., Ch. 6, COM (2002) 27 final, pp. 13-17; COM (2001) 454 final, pp. 9-11.
- ²⁵⁸ Allansdottir, et al., p. 73.
- ²⁵⁹ COM 2001 454 final, p. 8.
- ²⁶⁰ Vogler and Russell, 'Introduction' 2000, p. 2.
- ²⁶¹ Allansdottir, et al., 2002, p. 83.
- ²⁶² Owain Williams, 'Life patents, TRIPs and the international political economy of biotechnology', in Vogler and Russell, 2000, p. 78.
- ²⁶³ Patterson, 2000, p. 318.
- ²⁶⁴ COM (2001), 454 final, pp. 14-15; Commission of the European Communities, White Paper on European Governance, COM (2001) 428 final, 25.7.2001, p. 19.
- ²⁶⁵ COM (2001) 454 final, pp. 17- 21, Commission of the European Communities, White Paper on Food Safety, COM (1999) 719 final, Brussels, 12.1.2000.
- ²⁶⁶ COM (2002) 27 final, pp.14-16, 25; COM (2001) 454 final, pp. 15-17, COM (2001) 428 final.
- ²⁶⁷ Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms OJ L117, 8.5.1990; Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms OJ L117 8.5.1990.
- ²⁶⁸ Dennis F. Thompson, 'Democratic Theory and Global Society', The Journal of Political Philosophy, 1999, vol. 7, no. 2, p. 112.
- ²⁶⁹ Ibid; Anderson, 1996, p. 149.
- ²⁷⁰ John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations, Oxford, Oxford University Press, 2000, p. 116.
- ²⁷¹ Ibid, p. 129.
- ²⁷² Hedley Bull, The Anarchical Society: A Study of Order in World Politics, 2nd Ed., Basingstoke, Macmillan, 1995, p. 258.
- ²⁷³ Anderson, 1996, p. 149.

3. Analysing the EU as a transnational democratic polity: normative models of transnational democracy.

3.1. Introduction.

The argument is made in the previous chapter that the distinct but overlapping processes of globalisation and Europeanisation have destabilised the Westphalian institution of sovereignty, and, in so doing, have posed new challenges for territorially bounded conceptions of democracy. It is against this backdrop that a range of scholarship addresses the challenges of transnational democracy and the EU's potential for improving both input and output-oriented legitimacy. At the same time, an extensive literature has been authored which poses convincing arguments concerning the EU's democratic deficit.

The principal exponent in relation to the EU's potential to increase input and output-oriented legitimacy is Scharpf.¹ Scharpf contends that these distinct dimensions of legitimacy are founded on different prerequisites. The requirements for output-oriented legitimacy are, for Scharpf, 'less demanding than the assumptions necessary to establish input-oriented legitimacy.'² Specifically, '[w]hat is required is no more than the perception of a range of *common interests* that is sufficiently broad and stable to justify institutional arrangements for collective action.'³ Input-oriented legitimacy, on the other hand, demands a far thicker sense of collective identity in order that collective decisions taken by majority rule are not perceived as threatening to the minority.⁴ Whilst in Scharpf's view, these 'sociocultural preconditions of collective identity' can be 'more or less taken for granted' within established national states, he claims that:

there is no question that the Union is very far from having achieved the 'thick collective identity that we have come to take for granted in national democracies – and in its absence, institutional reforms will not greatly increase the input-oriented legitimacy of decisions taken by majority rule.'⁵

In the absence of the normative prerequisites for input-oriented legitimacy Scharpf asserts that the European polity 'can, for the time being, only aspire to the latter' – i.e. output-oriented legitimacy.⁶ Scharpf's evaluation is not unanimously accepted, however, and Zürn, in turn, argues that '[i]nternational institutions not only increase system effectiveness

or output legitimacy, but are also a normatively sensible response to the problems for democracy that are caused by globalization.⁷ Zürn's more positive assessment of the EU's potential derives from his adoption of an 'expansive conception of democracy' encompassing deliberative as well as aggregative aspects and his readiness to unpack the 'all embracing term *demos*'.⁸ This 'broad and ambiguous term' comprises notions of rights; trust; public spirit; public discourse and solidarity.⁹

Within the literature on transnational democracy three principal visions and models can be identified - democratic intergovernmentalism; cosmopolitan democracy and deliberative democracy. In each case they place different emphases on the various normative aspects and specify alternative institutional solutions. Public discourse, solidarity, and majority decision-making are important features of democratic intergovernmentalism; rights constitute a central element in cosmopolitan models of democracy; whilst opinion formation and discourse are crucial aspects of deliberative models of democracy.

In the previous chapter the argument is made that viewing the EU polity as a single entity can be misleading in view of the policy regimes differentiated patterns of enmeshment in regionalisation and globalisation; principal discourse, negative versus positive modes of integration; technocratisation versus politicisation of the policy area; and the balance between input and output-oriented legitimacy. Thus adopting a 'one size fits all' solution to describe, prescribe and resolve the challenges facing transnational democracy would seem to be inadequate.¹⁰ Instead it is contended (section 3.3.) that the EU's democratic qualities are better captured by conceiving of the EU polity as a series of interconnected entities, constituted by and constitutive of multiple public spheres.

It is from this 'multiple polities' perspective that section 3.4. specifies the normative foundations and institutional frameworks proposed by the three models of transnational democracy before applying them in the following chapters to the three empirical regimes introduced above (section 2.5.). In doing so we will explore just how far these normative solutions are in evidence within the EU polity and evaluate the extent to which they constitute evidence of a really existing transnational democracy.

Before specifying the details of these three models of transnational democracy the next section of the chapter (section 3.2.) reviews a number of institutional and normative arguments concerning the democratic quality of the EU. These arguments provide critiques for the models of transnational democracy developed in section 3.4. This is to say that each of these models elaborates and prescribes a distinct resolution of these normative and

institutional critiques in providing normative and institutional solutions to the EU's alleged democratic deficits.

3.2. EU democracy: *Institutional and Normative Themes.*

Discussions of the democratic qualities of the EU are organised around two broad themes – its institutional architecture and its normative underpinnings. The first group of discussions assess the various institutional channels for voice, representation and accountability anchored through the Council of Ministers, EP and Commission and their inter-institutional relationships. The discussions concerning the normative requirements for European democracy primarily involve competing evaluations regarding the status of a European demos. The analytical divide is not meant to suggest that these arguments are isolated from each other. Indeed both reflect on similar issues. Rather they express the different emphases within the literature regarding the EU's democratic legitimacy. The differences in emphases are significant not only in respect of their evaluation of European democratic legitimacy but, perhaps, just as importantly, because they predict strict limitations regarding the possibilities for the future democratisation of the EU. Thus for those arguments which suggest the EU's democratic deficit derives from the workings of the various intergovernmental and supranational mechanisms of voice, representation and accountability, the solution is (relatively) easy to cure through institutional reform. In contrast those normative analyses which doubt the existence of the political and social prerequisites for European democracy – chiefly a European demos - view the arguments for institutional reform as naïve and irrelevant. The institutional and normative analyses of the EU's democratic deficit are reviewed below. The purpose of this review is not to come to any definite conclusions regarding the EU's democratic qualities. Nor is it to offer any concrete prescriptions for enhancing the EU's democratic credentials. Rather it is to draw attention to the general themes running through the existing literature, the contestability of the various positions taken and to reflect on their implications with respect to the EU as a functioning transnational democracy. The indeterminacy of the review, it is suggested, arises from misreading the EU as a single polity.¹¹ Recalling the late modern 'neo-medieval' metaphor employed in the previous chapter, to capture the partial unbundling of state territoriality, we are reminded that the EU polity is constituted by, and constitutive of, 'a

complex mixture of old, new, and hybrid forms – ‘territorial’, ‘transterritorial’, and ‘functional’ forms of association and authority coexisting and interacting.¹² Under these conditions of differentiated integration it is suggested that no single model of transnational democracy, however sophisticated, will capture the multiplicity of institutional modes of representation and accountability and normative bases of the EU polity.

3.2.1. Institutional Themes.

Representation and accountability are institutionalised in the EU through two basic pathways – intergovernmental (indirect) and supranational (direct). The intergovernmental channels are primarily the Council of Ministers and the European Council and to a degree the Commission. The supranational linkage is constituted through the direct election of EP representatives (MEPs) by the EU citizenry. The pivotal role of the Commission however also provides it with a supranational dimension. This dimension is increasingly salient following the conferral on the EP of the Commissions formal investiture. The EP was first directly elected in 1979. Accordingly up until this point the principal channels of representation and accountability were intergovernmental.

The historical salience of indirect mechanisms of representation and accountability derives directly from the intergovernmental basis of the Community. From its inception as the Economic Coal and Steel Community (ECSC) in 1951, through the creation of the Union in 1991, and up to the present with the forthcoming planned adoption of a European Constitution, the masters of the Treaties have remained the member states. The pre-eminence of the states in Treaty-making was signified by the move from ad hoc state summits to regularised European Council Meetings. In addition to their role as the master of the Treaties the member-states are key actors in the more routine aspects of the Union business. The Commission College is designated by the heads of state in the European Council. Moreover as it occupies the institutional position of both co-legislator and co-executive, Council approval is required for most Community decisions. In view of the states’ institutional centrality and the national representatives’ regular exposure to democratic elections it is argued that the Community enjoys indirect democratic legitimation.¹³ This argument has been deployed periodically by key state actors. President de Gaulle asserted ‘that the state and its link with the nation provided the only proven basis for political

legitimacy and thus for popular legitimation.’¹⁴ More recently the British Prime Minister Tony Blair has argued that ‘the primary sources of democratic accountability in Europe are the directly elected and representative institutions of the nations of Europe, national parliaments and governments.’¹⁵ Similarly, in its appeal ruling in October 1993 on the constitutionality of the Treaty on European Union, (TEU), the German Constitutional Court stated that ‘it was primarily the peoples of the Member States which were called upon democratically to legitimize the exercise of sovereign powers of the community of states by way of the *national parliaments*.’¹⁶

Dehousse claims that two conditions must obtain in order for indirect legitimation to function properly. Firstly, ‘the decisions taken by the Community must be the genuine fruit of the collective will of the member states.’ Secondly, ‘it is necessary that the electorate be given the opportunity, when national elections take place, to express an opinion on European issues.’¹⁷ The first of these conditions points towards the requirement of unanimity within the Council. Increasingly this requirement does not hold where ‘majority voting (formal and informal) is now the norm.’¹⁸ Even where unanimity does hold each member state is required to negotiate its national position in the context of the other national positions which raises the prospect that it is not guaranteed ‘to emerge from the Council of Ministers with policies close to the ideal positions on which it was elected domestically.’¹⁹ As a counter to this Lord sets out the argument that whilst institutional and strategic constraints may mean a national interest is not secured:

[s]o long as the political preferences that shape Union bargaining are ‘formed domestically’ – in other words, governments decide on their ‘ideal positions’ within domestic democratic processes and then negotiate the best compromise given rules and alignments at the European level – there is no reason why common decision-making should require anything more than the electoral authorization of each national administration: each national government could still be described as maximizing the preferences of its own people and parliament.²⁰

Whether these conditions hold, though, is disputable. The issue of the relationship between national government positions in the Council and domestic democratic processes invokes the second of Dehousse’s requirements ‘that the electorate be given the opportunity, when national elections take place, to express an opinion on European issues’. All the evidence suggests EU issues do not feature very strongly in national elections.²¹ This is

partly a problem of the structural incongruity between the national and the European arenas which suggests that the 'dimensionality of choice is most unlikely to be identical as we move from national to European politics.'²² In this respect Decker notes that national '(party) political players show little interest in taking up this issue, since they fear that it could divide their parties. In this way, European issues are consciously being withdrawn from the competition between parties at the national level.'²³ A further problem concerning the requirement that the government's positions are formed domestically relates to the bargaining process within the Council itself. Reflecting on the deliberative qualities of the Council, Lord suggests that if Ministers come to meetings with only partially formed preferences which are only fully developed within the context of Council bargaining then 'we will find ourselves thrown back on the conclusions that the Council cannot be adequately authorized through the election of its parts.'²⁴ However as Eriksen and Fossum note, '[t]he question which informs much of the present debate among political theorists is whether it is the act of voting or whether it is the antecedent debate that is the characteristic feature which lends legitimacy to outcomes.'²⁵ As they rightly point out a majority 'voting result can not claim to reflect the common will, but only the will of the winners' which suggests that in order for a majority decision to be acceptable to a minority it 'requires non-majoritarian sources or additional arguing in order to be held to be legitimate.'²⁶ In line with these observations deliberation amongst the Council members would seem to add to the democratic legitimacy of decisions taken by majority procedures rather than detract from them.

The argument made by Lord that deliberation within the Council breaks the representative link between the national citizenry and the national Council, and that made by Eriksen and Fossum that deliberation improves the democratic legitimacy of majority decisions, would seem to be at odds. However, Gargarella suggests that 'a strong control over the representatives is not incompatible with the possibility of having open discussions, or representatives who change their initial thoughts.'²⁷ From Gargarella's perspective the limited democratic legitimacy of the Council is not due to its deliberative qualities but rather in view of its opacity in carrying out its functions. This includes the tendency to abstain from formal votes, the use of closed Council meetings and the role of the Committee of Permanent Representatives (COREPER) and its Working Parties for the preparation of much of the Council's business. This shift in emphasis, introduced by Gargarella, would suggest that improving the democratic legitimacy of the EU would involve both opening meetings to the public and improving the quality of the debate in order that it is accessible to the citizens.

Decker acknowledges that if EU integration were to proceed on purely intergovernmental lines then '[c]ontrol over this process by the national parliaments and the public in general would in principle be guaranteed.'²⁸ However, as he quite rightly appreciates, integration does not proceed on purely intergovernmental lines but instead is interpenetrated by the influence of supranationalism which weakens the influence of the member states.²⁹ This theme forms the crux of the standard democratic-deficit thesis.³⁰ Dehousse summarises this 'classical democracy deficit theory' as the outcome of 'a dispossession of the national legislative powers, which is only partly compensated for by the emergence of the European Parliament.'³¹ From early on in the history of the Community, the supranational community institutions – the Commission and the EP – advanced as the 'seemingly obvious solution to a loss of democratic accountability at the national level ... to grant more powers to the Parliament.'³² Following the presidential election of non-Gaullist Valéry Giscard d'Estaing in 1974, French opposition to a directly elected EP was dropped paving the way to the first direct elections in 1979.³³ This institutional innovation provided a direct link between the European citizenry and a key Community institution. Whilst initially the EP's powers were limited to a largely consultative role over the years it has secured greater powers across a range of activities. Following the ratification of the Treaty of Amsterdam it now shares equal legislative powers with the Council.³⁴ The TEU provided the EP with the right to request the Commission introduce legislation which, in the context of securing new powers with respect to the investiture of the President of the Commission and their College 'may be seen as coming close to a true right of initiative.'³⁵ Nonetheless, as indicated below appraisals of the institutional powers of the EP are mixed.

Historically, the EP's contribution to the legislative process was very limited. Under the consultation procedure, its role was primarily restricted to mandatory consultation within a number of policy areas, although the 1980 ECJ ruling that the Council must wait for the EP's opinion gave the EP 'de facto delaying power over legislation subject to the consultation procedure.'³⁶ The introduction of the Cooperation procedure (introduced under SEA 1987, and extended by TEU, 1993) and Codecision procedure (introduced under TEU, 1993, and extended by the Amsterdam Treaty, 1997), has given the EP greater powers of consultation, (in terms of the number of readings of a Council position it is entitled to consider), along with powers to accept, amend, or reject the Council's position. Furthermore, under the Codecision procedure, under certain circumstances, MEPs may join members of the Council on a Conciliation Committee in order to attempt to reconcile their respective policy differences. Lord notes that the EP 'makes much of co-decision as a reform that is making inroads into

the democratic deficit.³⁷ In this respect EP sources claim that co-decision gives it parity with the Council by conferring agenda-setting powers at each stage of the legislative process, and not just an opportunity to come in towards the end with a veto.³⁸ Other assessments are not as enthusiastic, however. Some MEPs still deem the EP's leverage in the legislative process insufficient.³⁹ In particular some commentators remain committed to the view that the procedures bestow upon the EP 'a limited right of rejection rather than a positive right of approval.'⁴⁰ As Grimm says, '[e]ven after its upgrading by the Maastricht Treaty, Parliament remains confined to veto rights.'⁴¹ Moreover a number of important policy areas which 'touch the essence of citizenship' remain outside the scope of the co-decision procedure.⁴²

A key aspect of European (national) parliamentary democracy reserves a central role for the parliamentary assemblies in the appointment of the government. By electing their representatives the electorate indirectly participate in the choice of the government. Those representatives who wish to be re-elected are required to take into account the views of their voters who may otherwise register their discontent at the ballot-box.⁴³ Changes introduced by the TEU require an incoming Commission to obtain the investiture of the EP before it is able to function thereby creating the link between the legislature and the executive.⁴⁴ The Commission, which historically had expansively interpreted its consultative role in respect of the appointment of the Commission President describing it as a 'confirmation hearing', brought the full weight of its previous experience to bear' in its interpretation of its expanded powers obtained under the TEU provisions.⁴⁵ This included requiring the individual nominees to appear before the relevant EP committee despite the absence of any treaty obligation and contrary to the recognised principle of collegiate responsibility.⁴⁶ The effectiveness of these procedures is disputed. Whilst 'the EP claims to have extracted important concessions during the 1994-95 investiture procedure' it remains the case that 'there is evidence that member governments intervened to prevent the EP from blocking the appointment of Jacques Santer as President of the Commission'.⁴⁷ Similarly, during the 1999 investiture, Commission President-designate Romano Prodi, 'refused to jettison any Commissioner not to the Parliaments liking, unless the EP uncovered evidence of a candidate's unsuitability for office.'⁴⁸ It is a mistake to dismiss the EPs power to hold the Commission to account as merely a 'legal procedure' though.⁴⁹ Such a contention is grounded in the experience of the EPs willingness to censure the Santer Commission in 1999, following allegations of corruption and cronyism - illustrating for the first time that the procedure was more than 'an empty power.'⁵⁰ By 'throwing the rascals out' (even though the

rascals jumped before they were pushed), the EP was seen to have asserted its right to hold the Commission accountable.’⁵¹

Despite the formal powers bestowed on the EP, and its demonstrated willingness and imagination in exercising them, Mather concludes that the EP is unable to provide ‘minimalist demo-benefits’ of constraining the powers of the leaders.⁵² She attributes this weakness to the fact that EP elections are not directly connected with the formation of the executive.⁵³ Adopting a similar argument Lord concludes that:

[g]iven an electoral mechanism that fails to complete the link between the domestic and European arenas, the idea that the formation procedure might allow the Commission to claim the status of being indirectly elected would seem to fall at the first fence.⁵⁴

Explicating this position Lord correctly reasons that, in order for the argument to hold that the EP’s powers of accountability with respect to the Commission provide a mechanism of democratic accountability, requires not just that the EP is able to demonstrate horizontal influence over the Commission with respect to its composition, portfolio and programme, but also that EP elections actually reflect voter concerns with respect to the formation of the Union’s executive.⁵⁵ As the aforementioned discussion acknowledges whether the EP’s powers of investiture and censure of the Commission are effective is a contested issue. However regardless of the effectiveness of these horizontal powers, if the EP is unable to genuinely reflect voters views with respect to the composition of the executive, serious doubts must be raised regarding their democratic authenticity. Accordingly, Mather is right to point out, regarding the EP’s censure of the commission: ‘it was conducted, presumably in the name of the electorate, [yet] without reference to them.’⁵⁶ Two distinct but interrelated weaknesses are identifiable with respect to the quality of the democratic link between the European electorate and the EU. The first concerns the very low levels of voter turnout. The second concerns the second order character of the EP elections.

The data with respect to voter turnout for EP elections since 1979 shows it to be pretty unremarkable. In the June 1999 EP elections the average voter turnout across the EU was 55 per cent.⁵⁷ This figure is lower than the turnout for any of the previous EP elections, where average voter turnout ranged between 63 per cent and 56 per cent from 1979 - 1994, which is ‘around 15 to 20 per cent lower than national general elections.’⁵⁸ Accordingly, it is worth noting that ‘[p]aradoxically, over the years, one has seen a gradual increase in the formal powers of the European Parliament, and a decrease in the turn-out to European

elections.⁵⁹ Furthermore these average turnout figures mask widely differing national variations. For instance, in the UK turnout was only 24 per cent (the lowest in the EU).⁶⁰ Therefore to 'the extent that the EP's democratic legitimacy is dependent upon electoral support, it is diminishing.'⁶¹ De Schoutheete rejects the claim that European elections do not attract enough voters to be genuinely representative. In order to support his position that the argument is 'unconvincing' he highlights that both US presidential elections, and UK parliamentary elections, often result in the election of an executive office holder, and government parliamentary majority respectively, even where they do not attract the support of a majority of the electorate.⁶² However, such an argument would seem to raise questions concerning the authenticity of national institutions of representation rather than put beyond question the authenticity of the representativeness of the EP.

Even if voter turnout is sufficiently high, this essentially quantitative measure is insufficient on its own to secure representative authenticity. In addition it is necessary that we consider the motivations of those that actually do vote. Of the 55 percent of EU citizens who voted in the 1999 EP elections, 16 percent responded that their motivation to vote was to protect national interests and 3 percent because they were against the EU. Only 11 percent gave their reason for voting as a reflection of being in favour of the EU.⁶³ Amongst these respondents clearly it was feelings of allegiance to their national state and not the Union that motivated them to vote in the EP elections. These views, expressed by the respondents, reflect Karlheinz Reif's observation with respect to EU elections, that they are of a 'second order character' by which he meant that the elections are dominated by national rather than European concerns.⁶⁴ A number of institutional factors contribute towards the second order character of the elections. Lord directs us towards the privileged access given to national governments⁶⁵, a point borne out by Mather who deems that it is the European Council, not the EP, which determines the broad thrust of EU policy.⁶⁶ Turning to the development of European mediatory institutions Grimm notes that '[m]ediatory structures have hardly even been formed here yet', citing the absence of a Europeanised parliamentary party system, European associations or citizen's movements, and European print or broadcast media.

The European parliamentary parties are amalgamations of several national parties which are more or less loosely organised especially contrasted with national parties. In this respect Mather notes the largest group in the 1999 parliament - the European Peoples Party/European Democrats (EPP/ED) - has three kinds of membership offering various degrees of attachment to the transnational party manifesto and programme.⁶⁷ Smith concludes that '[a]lthough the role of the transnational parties had increased by 1994, they

still played a very subordinate part compared with national parties.⁶⁸ This is not surprising in view that MEP's future career prospects depend upon their national party – as the controllers of future selection lists.⁶⁹

With respect to a Europeanised communications system, Grimm holds out that the prospects 'are absolutely non-existent.'⁷⁰ Reflecting on this he distinguishes between a Europeanised communications system and the national reporting of European topics. The latter 'are directed at a national public and remain attached to national viewpoints and communications habits. They can accordingly not create any European public nor establish any European discourse.'⁷¹ Whereas the former 'would by contrast mean that there would be newspapers and periodicals, radio and television programmes, offered and demanded on a European market and thus creating a nation-transcending communicative context.'⁷² Adopting this distinction Meyer confirms that whilst increased media attention is being directed towards the EU, content analyses points towards it predominately being of a national perspective.⁷³ The absence of these institutional relays between the organs of European governance and the European citizenry constitute the absence of a genuine European public sphere: that is a European level or Community wide 'symbolic space in which the discussion or debates pursued by the various political, social, religious, cultural and intellectual figures forming a society clash and reply to one another.'⁷⁴

Nonetheless, there are Community level initiatives aimed at developing a Europeanised media space which transcends the national communicative context involving both the facilitation of the free movement of television services within the Union and the promotion of European productions.⁷⁵ Whilst Harrison's and Woods' evaluation of the success of these initiatives is cautious,⁷⁶ they comment that:

at an aspiration level, we would hope to see greater reporting of political issues at the European level of governance, potentially generating a public sphere encompassing the citizenry of all Member States, rather than a series of national public spheres each including a European element.⁷⁷

A fundamental barrier against the development of a European public sphere is that of language. These barriers of language crystallise on both national and technical/functional axes.⁷⁸ Regarding national differences in language, there exist 11 official EU languages. In addition some EU citizens speak regional languages such as Irish, Catalan, or Luxembourgish, or other non-EU languages such as Arabic or Chinese.⁷⁹ With the immanent expansion of the EU the number of languages will rise even further.⁸⁰ The

existence of so many languages within the EU forecloses the possibility of the EU constituting a 'community of communication'.⁸¹ Whilst communication amongst Union representatives and other elite actors may be facilitated by lingua franca⁸² - in particular English⁸³ - 'a large majority of the Community citizens can communicate only in their own mother tongue, and thus remain cut off from direct understanding or communication in any Europe-wide communication.'⁸⁴ This means they are 'participatively restricted' and therefore disadvantaged in the European opinion-forming and interest-mediation process.'⁸⁵ A counter argument to this position can be formulated by acknowledging that EU citizens do possess foreign language skills. In fact 44 percent of EU citizens speak another language besides their mother tongue well enough to take part in a conversation.⁸⁶ Moreover, 31 percent of EU citizens cite English as their other language, making it the most widely spoken language in the EU at 47 percent.⁸⁷ However, Kymlicka would suggest that speaking a foreign language well enough to take part in a conversation may be insufficient to participate in political discourse, containing a 'ritualistic component' with the potential of rendering the meaning of the conversation inaccessible even to those citizens who know a 'foreign language in a technical sense'.⁸⁸ On this basis he concludes that 'democratic politics is politics in the vernacular' - that is to say in order to be genuinely participatory it needs to be conducted in the citizen's own tongue.⁸⁹

Viewed in these terms the absence of an established set of genuinely European mediatory institutions restricts the possibility of generating a pan-European public sphere. In turn, this seems to place severe limits on the possibility of developing meaningful and authentic democratic relays between the European citizenry and institutions of Community governance. However, I would suggest that these arguments which specify the apparent hopelessness of constituting inclusive and effective democratic mechanisms beyond the state are premised on an overly restrictive conception of the constitution of a pan-European public sphere. In particular, it is unnecessarily 'conceived as *one* public arena':⁹⁰

[t]here are many public spheres in modern states and they are not confined to national borders. There are subaltern, counterpublics and there are overarching publics transcending limitations of time and space made possible by new media technologies and audio-visual spaces. There are local publics, regional, national and international publics, and there are general publics, intermediate and semi-and quasi publics, smaller ones nested into larger ones.⁹¹

From this perspective democracy beyond the state no longer depends upon the institutionalisation of a single overarching public space – a single European public – but

instead is replaced by the lesser requirement of a series of sectoral public arenas – ‘dense communication networks with permeable borders, allowing a more active participation than the broader public discourse.’⁹² Whilst allowing for active participation of affected citizens, unlike the institutionalisation of a broader European wide public sphere, the functioning of multiple sectoral demoi are less reliant upon a common language, media or party system.⁹³

3.2.2. Normative Themes.

The preceding discussion of the requirements for the institutionalisation of democracy within Europe beyond the confines of the national state has involved a subtle shift in emphases from procedural and formal requirements to normative issues concerning the societal prerequisites for authentic democracy, in particular with respect to the function of a common language. This is unsurprising for as Decker notes ‘cultural and procedural perspectives overlap in its analysis.’⁹⁴ Reflecting on this very issue Closa observes that ‘[l]anguage has a different normative value if it is conceived either as a cultural expression of uniqueness (national or otherwise) or, merely, as a means of communication.’⁹⁵ If we move from the procedural towards the societal and cultural perspectives the prospects for authentic transnational European democracy are gloomy. This is because there is no European societal referent to correspond to the European institutions of governance. This is to say there is no European demos. Broadly speaking there are two strands to this argument. The first is the ‘soft’ or ‘not yet’ position which holds that the construction of a European identity is a normative requirement for the institutionalisation of authentic European democracy and that at present an intersubjective European community has not sufficiently developed. The alternative ‘hard’ variant not only holds that the construction of a European identity is empirically lacking at present but that the development of a European demos is normatively undesirable.⁹⁶ The difference in these perspectives lies in their specification of the social prerequisites for authentic democracy. Whilst the soft version, as expressed by Grimm, requires only a sense of collective identity which can have a variety of bases,⁹⁷ the hard version, specifies that the required sense of collective trust requires grounding in cultural linguistic ties which are only to be found in culturally homogenous national states.⁹⁸ Regardless of whether one adopts the soft or hard perspective Weiler comments that ‘[t]he rigorous implication of this view would be that in the absence of a demos, there cannot, by

definition be democracy or democratisation at the European level.⁹⁹ This argument has been recently deployed within the European Constitutional Convention by the UK parliamentary representative David Heathcoat-Amory:

Political theorists from Aristotle through De Tocqueville have recognized that successful, self governing units require a certain unity of language, history and culture; the classical definition of a *demos*. But the history and diversity of Europe has created no such European *demos* on which to found a supranational democracy Instead, European democracy must be founded on the building blocks of national self-government. It is here that the present *demos* exists.¹⁰⁰

This approach may be rebutted in two ways. The first challenge suggests that those evaluations which contend that a European *demos* does not exist are simply mistaken, and that Europe can meaningfully be conceived of as a community of communication, memory, and experience.¹⁰¹ Evaluating the validity of this argument in the context of over half a century of European integration Friese and Wagner argue that 'one may indeed argue that relations of trust and solidarity have been considerably strengthened compared to the 'starting point' in 1945.'¹⁰² However as Weiler, et al., comment '[t]he problem is that this argument simply does not ring true.'¹⁰³ Indeed, reviewing survey evidence of European identity, Harrison and Woods conclude that 'most European citizens would not primarily consider themselves to have a European identity.'¹⁰⁴

The second challenge takes issue with the propriety of the assertion that authentic democratic mechanisms require embedding in a pre-political social sense of identity. In his evaluation of the validity of this position Closa reflects on the paradox of an argument that postulates that in order for democratic political forms to be valid they require embedding in pre-democratic elements of identity building. As he rightly observes to do so 'does not allow a normative reorientation of the outcomes of the democratic process towards a redefinition of the original pre-existing entity in a democratic direction.'¹⁰⁵ From such a perspective the challenge is to 'detach the subject of democracy, the *demos*, from nationality.'¹⁰⁶ Weiler argues that that this requirement – the separation of *demos* and *ethnos* – is partially constituted by the development of European citizenship.¹⁰⁷ Reflecting on this notion Weiler comments we should understand the Union's citizenship provisions as:

the very conceptual decoupling of nationality/*Volk* from citizenship and as the conception of a polity, the *demos* of which, its membership, is understood in the first place in civic and political rather than ethno-cultural terms. On this view, the Union belongs to, is composed of, citizens who by *definition* do not

share the same nationality. The substance of membership (and thus of the demos) is in a commitment to the shared values of the Union as expressed in its constituent documents ...¹⁰⁸

Weiler suggests that the 'rationality of civic and political commitment can have at least as much normative legitimation and at least to some a high degree of psychological attachment'¹⁰⁹ although he acknowledges 'we don't know about public consciousness of a civic polity-based demos because the question has to be framed in this way in order to get a meaningful response.'¹¹⁰ Recent survey data does indicate however that a civic commitment to the European public sphere does resonate with European citizens of whom 63 per cent cited 'civic duty' as their motivation to vote in the June 1999 EP elections.¹¹¹ By separating *ethnos* from *demos* Weiler frees authentic democratic participation from the notion of a singular *demos* and allows us instead to think about democracy anchored in 'co-existing multiple *demos*.'¹¹² In doing so it provides the normative as well as the institutional justification for multiple public spheres constituted by, and constitutive of, fragmented and differentiated individuals (sectoral *demos*).

Whilst Weiler's formula separates *demos* and *ethnos*, and his explicitly declared aim is to establish a normative basis for democracy which is 'not based on real or imaginary trans-European cultural affinities'¹¹³ he nonetheless continues to anchor civic membership to a commitment to a set of shared European values. This is problematic for as Eriksen notes '[w]ithin modern societies there is a plurality of values and conflicting views about the good life among different groups, local communities and cultures.'¹¹⁴ By tying the notion of European civic *demos* to a commitment to a shared set of values Weiler suggests a lineage in thinking with civic-republican approaches to democracy which prioritise the good over the right.¹¹⁵ This view is reinforced by his declaration that '[a] *demos*, a people, cannot, after all, be a bunch of strangers.'¹¹⁶ Whilst such a statement holds with respect to republican notions of the citizenry meeting to discuss the public good, it is the antithesis of the modern constitutional state in which 'the modern idea of democratic citizenship makes solidarity between strangers possible.'¹¹⁷ In contrast to the civic republican emphasis on shared values and a commitment to an agreed 'good life' a more discourse theoretical approach, as promoted by Eriksen anchors citizenship to constitutionally guaranteed rights through which differing notions of the good-life are deliberated.¹¹⁸

3.3. EU polity: singular and multiple conceptions.

The preceding comments distinguish between two different conceptions of a European demos. The first approach conceives of a (potential) European demos as a single entity based on some sense of European shared identity. The second proposes jettisoning any thoughts of a singular European demos, as the basis for European democracy, and instead embeds the notion in multiple demoi which are constitutive of, and constituted by, multiple public spheres. This thesis adopts the latter as both a realistic and normatively justifiable approach. If we accept the normative and institutional viability of multiple European public spheres, a crucial issue is raised with respect to how we conceive of the EU polity – as a singular entity or as a series of interconnected multiple entities? Concerning this matter Weiler notes that ‘[a]lthough in a formal sense we can speak of the Union as a single polity, from the perspective of governance and power- its exercise, control and accountability – the notion of a European polity is no less uneasy than the notion of a European peoplehood.’¹¹⁹

Eriksen’s contention that ‘[t]he public sphere is not prior to or independent of decision-making agencies but is created and formed in opposition to them’ provides a useful insight for adopting the multiple polity above the single polity conception in relation to the EU.¹²⁰ Acknowledging the interplay between the institutions of governance and the European publics – that is their mutual constitutivity - suggests the potential benefits of conceiving the EU as a series of interconnected regimes in order to capture its democratic qualities. However, as the preceding debate illustrates, the existing literature concerning the EU’s democratic qualities largely treats the EU as a single entity. Analysing the EU as a single polity is likely to lead to two specific shortcomings. Firstly, it ‘obscures significant variations in democratic performance in a system where opportunities for representation and accountability are institutionalized differently across policies, legal instruments and Member States.’¹²¹ Secondly it tends to assume a ‘one size fits all’ solution for the democratisation of the EU polity.¹²² Taking this tack Weiler notes that ‘[v]ery rarely, if at all, is there more than cursory acknowledgement of the uneasy co-existence of competing visions and models of democracy, which, in turn, should inform both diagnosis, prognosis and possible remedy of democratic shortcomings.’¹²³ In this respect the deficiency of many evaluations of the democratic qualities of the EU is that they impose an empirically derived statal model which is ‘thereby elevated to a normative status, thus neutralising alternative proposals which are not explicitly grounded on the empirical model of the national democratic state.’¹²⁴

As the discussion in the preceding chapter illustrates the configurations of national, regional and global enmeshment differ between policy sectors, or regimes. Under these conditions a variety of different types of political space are likely to be constituted across territorial, transterritorial and functional lines, which have a differentiated affect on people's lives. Where such conditions pertain, if we are to take seriously the need to (re)constitute a degree of congruence between social and political spaces we are compelled to engage with differentiated approaches towards democratic legitimacy in European governance. Any single model of transnational democracy - be it input-oriented, output-oriented, or a combination of the two - will insufficiently capture the democratic quality of the EU.

Under these late-modern conditions, in which a variety of political and social spaces co-exist, overlap and interact, our challenge is to relate the Union's differentiated modes of governance to a variety of models of transnational democracy.

3.4. Models of transnational democracy.

Responding to this challenge, this section introduces three models of transnational democracy, which articulate both input and output dimensions of democracy, through diverse institutional solutions, grounded in different normative bases. The key institutional and normative themes introduced in the first part of this chapter provide the reference points around which the models of democracy are constructed. The three models of transnational democracy employed in this thesis are: Democratic Intergovernmentalism; Deliberative Democracy; and Cosmopolitan Democracy. In the following chapters (4, 5, and 6) these models are then applied to the three policy regimes, introduced in chapter 2, in order to investigate the democratic characteristics of the regimes and evaluate the explanatory power of the models themselves.

3.4.1. Democratic Intergovernmentalism.

Democratic intergovernmentalism, in common with a variety of contemporary liberal approaches such as Liberal Institutionalism and Liberal Intergovernmentalism, is characterised by 'a commitment to the sovereign state as the central actor in international

relations.¹²⁵ The model distinguishes itself from the other major statist IR approach - Realism - by linking state goals to national societal preferences, rather than explaining them by reference to the anarchical structure of the interstate system. The 'centrality of state-society relations to world politics'¹²⁶ are incorporated through a 'two stage process' in which preferences are formed by domestic coalitions and are then adopted as negotiating positions by national representatives in international fora. Accordingly 'the state is not an actor but a representative institution that ... constitute[s] the critical "transmission belt" by which the preferences and social power of individuals and groups are translated into state policy.'¹²⁷ In 'a partially globalized world'¹²⁸ characterised by conditions of increasing interdependence states are motivated to engage in cooperative behaviour in transnational institutions in order to negotiate the pattern of transnational externalities - that is the effect of their national policies on foreign societies.¹²⁹ Therefore transnational institutions facilitate cooperative solutions to collective action problems by reducing the 'transaction costs' of engaging in cooperative behaviour by reinforcing practices of reciprocity.¹³⁰ Expressed in terms of input and output-oriented democratic legitimacy, input-oriented legitimacy is constituted through the state representatives' pursuance of the aggregated preferences of their national citizens in the international negotiating fora, and output-oriented legitimacy is secured through collective agreements by which states achieve greater control over domestic policy outcomes than unilateral action would have obtained.

Input-oriented legitimacy.

According to the Model of democratic intergovernmentalism transnational institutions may be democratically authentic despite the absence of 'a global representative democracy.'¹³¹ Instead representation and accountability are achieved through 'chains of delegation.'¹³² Democratic authenticity at the transnational level is thereby anchored to the democratic credentials of the member states. Numerous democratic assessments of the European Union note historically how '[n]ational ministers and heads of government ... form a crucial link between national representation and Community legitimation.'¹³³ The contemporary salience of this indirect mode of democratic legitimation for the EU is reflected in a variety of ways. Echoing US president Woodrow Wilson's 'first point'¹³⁴ concerning the democratic membership of the League of Nations, Union membership is restricted to those states who respect inter alia the principle of democracy, following the

adoption of the TEU.¹³⁵ This requirement was reaffirmed through the adoption of the Copenhagen criteria in respect of the enlargement of the Union which requires 'that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities ...'¹³⁶ More recently the debate concerning the constitutional future of Europe has prompted claims by figures such as Peter Hain, UK minister for Europe 'that independent nation states 'must remain the bedrock' of the European Union ... from which the EU 'derives its essential legitimacy and strength.'¹³⁷ In sum, democratic intergovernmentalism 'is conceived as synonymous with creating a democratic order between (democratic) *states* (rather than in relations to *peoples*).'¹³⁸

Whilst it may be claimed that '[i]nternational regulation simply adds another link to the chain of delegation',¹³⁹ Dahl pointedly asks 'will not the extent of delegation ... go well beyond any acceptable threshold of democracy?'¹⁴⁰ Dahl roots his sceptical argument in the weak inclusion of ordinary citizens in opinion formation compared to policy elites, especially with respect to foreign affairs from which it follows that, 'public debate is one-sided and incomplete, and in the end the view and interests of the political leaders and activists prevail.'¹⁴¹ This leads him to speculate that 'if it is difficult enough for ordinary citizens to exercise much influence over decisions about foreign affairs in their own countries, should we not conclude that the obstacles will be far greater in international organizations?'¹⁴² Dahl responds to his question in the affirmative, predicating his assertion on two main factors: (1) what Weiler calls 'Inverted Regionalism' referring to a 'diminution ... in the level of control of each individual within the redrawn political boundaries'¹⁴³ and (2) the absence of a European demos/public space.¹⁴⁴

However in doing so he connects the democratisation of the international institutions with the development of direct representation and accountability at the European level itself rather than indirectly through the national states. Within the confines of the Democratic Intergovernmental model this move is unnecessary, and in response it may be asked: 'why can we not hold them [international institutions] accountable *indirectly* by debating at the national level how we want our national governments to act in intergovernmental contexts?'¹⁴⁵ Kymlicka's promotion of an intergovernmental approach towards transnational democracy is informed by a soft variant of the 'no demos' thesis which suggests that the required sense of underlying commonalities are absent at the European level. This commitment is not tied to a sense of *volk*, or pre political peoplehood: 'democracy does *not* require a common religion (or common lifestyles more generally); a common political ideology (e.g., right versus left);

or a common racial or ethnic descent.’¹⁴⁶ It does though, in Kymlicka’s view require a shared language through which people can participate in democratic deliberation because democratic politics is politics in the vernacular.’¹⁴⁷ The key site for ‘democratic politics remains the national state in Kymlicka’s analysis constituting the primary boundaries of distinct ‘communities of fate’¹⁴⁸ in which ‘language is profoundly important’ in the construction of their shared sense of identity.¹⁴⁹

Output-oriented legitimacy.

It is argued that transnational institutions create the context for more efficient policy solutions under conditions of interdependence by providing stable rules and procedures which facilitate the negotiation of the pattern of both positive and negative policy externalities. The argument is therefore one of a ‘logic of effectiveness [which] would justify enlarging the scale of government whenever the achievements of goals or the defence against threats, would be aided by the larger action space and resources of larger units.’¹⁵⁰ Simply put transnational institutions can improve national states output capacity and efficiency. Under conditions of globalisation these externalities are increasingly varied and include issues such as transnational environmental issues, externalised costs and benefits of economic and monetary policies; transnational migration; transnational crime and so forth, generating a greater number of collective action problems whose solution would benefit from suitable institutions of transnational governance.

From an intergovernmental perspective a ‘simple functional theory’ of global institutions is inadequate.¹⁵¹ As Keohane notes, ‘[e]ven if an institutional innovation would increase efficiency, no one may have the incentive to develop it, since institutional innovation is a public good.’¹⁵² In response to this remark Moravcsik suggests that institutions are the outcome of the range of underlying state preferences, in the first instance, and suggests that where ‘coordination or precommitment can improve the welfare of both parties relative to unilateral policy adjustments, states have an incentive to negotiate policy coordination.’¹⁵³ It is in these terms that he explains the development of the Union: ‘the EC can be analysed as a successful intergovernmental regime designed to manage economic interdependence through negotiated policy co-ordination.’¹⁵⁴ From the perspective of Democratic Intergovernmentalism, which prioritises the national state as the primary

democratic unit, output legitimacy can only be maintained where states freely enter into a transnational institution and are equally free to withdraw from them at a future point in time. In this vein, remarking on the decision of states to enter institutions of transnational governance Kymlicka comments that 'the legitimacy of these devolutions of power is generally seen as dependent on the (ongoing) consent of the national unit ... [where] [m]embers of these national collectivities debate amongst themselves, in the vernacular, how much power they wish to devolve upwards ... and periodically reassess, at the national level, whether they wish to reclaim some of these powers.'¹⁵⁵ National states are required to maintain control over decision-making not merely out of 'position-oriented institutional self-interest'¹⁵⁶ but because of the normative requirement that they represent their national community of fate. As Sharpf states '[i]f they must bear the political brunt, they must want to retain political control.'¹⁵⁷

3.4.2. *Cosmopolitan Democracy.*

Cosmopolitan democracy argues that increased interdependence between states and other transnational actors is constraining the full development of democracy within states. Archibugi suggests that alongside increased interdependence between communities engendered by new information communication technologies, structural changes mean that economic, political, social, and cultural decisions taken within any particular state are likely to have an effect beyond its borders.¹⁵⁸ As a consequence of ever more intense economic interconnectedness, Held suggests that 'the autonomy of democratically elected governments has been, and is increasingly, constrained by sources of unelected and unrepresentative economic power.'¹⁵⁹ In a similar vein, with respect to the domain of culture he notes that there is 'a growing disjuncture' between the idea of the state as a locus of national identity under conditions of growing cultural and media exchange.¹⁶⁰ Similar problems arise with respect to the democratic governance of the environment also, as a consequence of its transboundary characteristics.¹⁶¹ Clearly these issues are very different in their nature, and they crystallise in highly different institutional and social settings, however in each case it is proposed that '[t]he very process of governance can escape the reach of the nation-state.'¹⁶² The growing disjuncture between the states's territorially bounded authority structure and the

transterritorial nature of policy issues generates tensions regarding treatment of the state as the primary unit of democratic legitimacy. In this respect Held comments that:

the particular notion that the relevant constituencies of voluntary agreement are the communities of a bounded territory or a state, become problematic as soon as the issue of national, regional and global interconnectedness is considered and the nature of a so-called 'relevant community' is contested.¹⁶³

The cosmopolitan model problematises existing notions of territorially bounded democracy in both input and output terms. Input-oriented legitimacy is weakened because national citizens are affected by decisions in which they did not participate in the making of. Output-oriented legitimacy is undermined because the social space of interaction escapes the state regulatory space.¹⁶⁴ Where as, the model of democratic intergovernmentalism proposes that input and output-oriented legitimacy can be recovered by the participation of democratic states in institutions of transnational governance, the cosmopolitan model of democracy holds that this solution, by itself, is insufficient. It does so by challenging the validity of the intergovernmental perspective which maintains a linear relationship between democracy and international relations. Instead the cosmopolitan approach views the relationship between democracy and international relations as 'ambivalent': '[i]nternal democracy helps but does not determine the rise of a democratic world order, just as a democratic international system would not necessarily generate democracy in all states.'¹⁶⁵ However, it does conceptually link the prevailing conditions at different levels of governance, recognising that the development of democracy at any one level is interdependent with its development at other levels. Accordingly the cosmopolitan model of democracy proposes that in order to recover input and output-oriented legitimacy within the state, it must be buttressed by democracy beyond the state: it 'has to become a transnational affair if it is to be possible both within a restricted geographic domain and within the wider international community.'¹⁶⁶ Through this process of 'double democratization' democracy is deepened within the national community and extended across territorial borders.¹⁶⁷

Input-oriented legitimacy.

Input-oriented legitimacy is achieved when the people who are affected by a decision and the representatives of the decision-making system share the same political space.¹⁶⁸ That is; where the 'citizen-voters' and 'decision-makers' are congruent.¹⁶⁹ It is suggested by the cosmopolitan model that under conditions of globalisation, in which decisions taken outside the representative institutions of the state increasingly impact on a national citizenry, 'the idea of a political community of fate - of a self-determining collectivity - can no longer meaningfully be located within the boundaries of a single nation state alone.'¹⁷⁰ Instead under contemporary conditions of globalisation it is purported that there exist a multiple number of overlapping communities of fate, of which the state is only one.¹⁷¹ By this it is meant the system of national political communities are 'articulated and re-articulated today with complex economic, organizational, administrative, legal, and cultural processes and structures' which shape peoples life chances.¹⁷² In order to capture the sense in which, 'states can no longer be, and can no longer be regarded as, the sole centres of legitimate power within their own borders', Held suggests that the state ultimately 'withers away.'¹⁷³

For authentic democratic conditions to prevail cosmopolitanism requires that individuals receive equal opportunities to participate in these various communities of fate. This position is encapsulated in Held's principle of democratic autonomy which specifies that individuals 'should be free and equal in the determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others.'¹⁷⁴ Each individual's right to autonomy is founded upon the expression of their equal moral worth, and the belief that they 'should enjoy in principle equal consideration of their interests.'¹⁷⁵ As the cosmopolitan model proposes that individuals are incorporated in multiple overlapping communities of fate, it follows that the 'relevant community'¹⁷⁶ of voice and representation cannot be selected a priori to an understanding of the forces which are shaping individuals lives, in any particular instance. Contra democratic intergovernmentalism, cosmopolitanism stipulates that the national state cannot automatically be identified as the relevant arena for democratic participation. By specifying these conditions cosmopolitanism frees democratic principles from any automatic ties with the state and instead links democratic participation to an individual's enjoyment of the principle of autonomy. The challenge which cosmopolitanism faces, as a result of disputing the state as the natural propagator of democracy, is specifying how authentic democracy is to be achieved.

The principle of autonomy is unlikely to be realised if it remains a moral aspiration. To be realised in practice it is necessary that the principle is embedded in, and upheld by, a constitutional legal framework.¹⁷⁷ This requirement reflects two conditions necessary for the universal practice of autonomy. Firstly, that in order to protect everyone's right to enjoy the principle of autonomy individual freedom must be limited in order not to negate the rights of others. This is to say '[t]he freedom of action of each person must be one of accommodation to the liberties (and potential liberties) of others.'¹⁷⁸ Secondly, that individuals experience different relations to the world which hinder or help their (potential) ability to enjoy an equal opportunity to self-determination. These differences in relations to the world are not 'prima facie legitimate differences of choice and outcome' but rather 'unacceptable structures of difference that reflect conditions that prevent or partially prevent the pursuit of self-chosen activities for some.'¹⁷⁹

In order to overcome these 'unacceptable structures of difference' which restrict some individuals fully pursuing their capabilities, requires that they have access to the necessary resources to overcome these disadvantages.¹⁸⁰ Held refers to this empowering constitutional framework, in which these empowering rights are enshrined, as a 'democratic public law'.¹⁸¹ In fleshing out the key dimensions of a democratic public law Held identifies seven clusters of empowering rights: health; social; cultural; civic; economic; pacific; and political,¹⁸² which correspond to seven sites of power: body; welfare; culture; civic associations; the economy; coercive and organised violence; and legal and political institutions, which operate to exclude or marginalise certain individuals from experiencing an equal opportunity of self-determination.¹⁸³ The scope of the rights and obligations constituted in the democratic public law distinguishes it from the restricted liberal-democratic focus on civil and political rights.¹⁸⁴ In order to create a common framework of political action - 'a framework of equal autonomy for all participants in public life' - requires empowering rights across all the sites of power if the democratic process is not to be 'one-sided, incomplete and distorted.'¹⁸⁵

However as it stands the specification for the entrenchment of autonomy remains incomplete. In this respect Held notes that 'democratic law can prevail only if it is established both within the power domains of particular political communities and within those which cut across them.'¹⁸⁶ As has been established above, from the cosmopolitan perspective 'the political authority of states is but one moment in a complex, overlapping regime of political authority ... in a complex network of authority relations, where networks are regularised or patterned interactions between independent but interconnected political agents, nodes of activity, or sites of political power.'¹⁸⁷ In a context where '[s]ites of power

can be national, transnational and international' then democratic law must be entrenched both nationally and internationally: '[d]emocratic public law needs to be buttressed and supported by an international structure of ... 'cosmopolitan democratic law'.'¹⁸⁸ Under these conditions of cosmopolitanism, individuals would participate in multiple overlapping communities of fate that 'significantly affect them' – that is 'people would in principle come to enjoy multiple citizenships'¹⁸⁹ whose participation would be guaranteed and circumscribed by an overarching 'cluster of democratic rights and duties which cut across all key domains of power' - that is under cosmopolitan law.¹⁹⁰

Output-oriented legitimacy.

Output-oriented legitimacy is achieved when the regulatory space and the social space of interaction are congruent – that is where symmetry holds between 'decision-makers' and their 'constituents'.¹⁹¹ Under conditions of globalisation and increasing interdependence in which '[g]oods, capital, people knowledge, images, communications and weapons, as well as crime, culture, pollutants, drugs, fashions and beliefs, readily flow across territorial boundaries.'¹⁹² Accordingly, these boundaries are 'increasingly insignificant in so far as social activity and relations no longer stop ... at the 'water's edge'.¹⁹³ This means that significant aspects of activity escape the regulatory control of the national state. Broadly speaking Held identifies five disjunctures – law, polity, security, identity and economy - which disrupt the congruence between the national decision-makers and their constituents.¹⁹⁴ Held suggests that these disjunctures indicate, not only that 'national communities do not exclusively program the action and decisions of governmental and parliamentary bodies', (input-oriented legitimacy), but also that, states, 'by no means simply determine what is right or appropriate for their own citizens' (output-oriented legitimacy).

The Cosmopolitan model recognises that under conditions of globalisation and interdependence, the capacity and autonomy of the state is circumscribed by the complex of intergovernmental and transnational relations within which it is immersed: 'the locus of effective political power can no longer be assumed to be national governments ... [instead] ... effective power is shared and bartered by diverse forces and agencies at national, regional and international levels.'¹⁹⁵ State output-oriented legitimacy is diminished in two specific ways. Firstly the autonomy of the state – 'the ability ... to act free of international and

transnational constraints, and to achieve goals once they have been set'- is curtailed in that the range of viable policy decisions available to the state is reduced.¹⁹⁶ In this respect Held notes that, '[n]ational controls and regulations have limited effectiveness if they are at odds with wider international conditions.'¹⁹⁷ Secondly, when states do enact policy, 'the outcome of these decisions frequently 'stretch' beyond national frontiers.'¹⁹⁸ The 'spillover effects' of national policies mean that policy consequences are externalised onto foreign states and citizenry.¹⁹⁹ As Held notes, international institutions offer a way of facilitating intensive collaboration, as a means of wresting back policy effectiveness under conditions of interdependence.²⁰⁰ However, such solutions are too simple and these institutions, under liberal international arrangements, themselves become a source of ineffectiveness, in that policy outcomes are 'skewed to dominant geopolitical and geo-economic interests', rather than the citizenry at large.²⁰¹

Under globalising conditions in which the state is only one power amongst many in a complex of intergovernmental and transnational relations and where restrictions on state autonomy and policy spillover are creating overlapping communities of fate, cosmopolitanism posits that effective governance can only be achieved by developing and delivering policy in multiple arenas at various levels which coincide with the relevant community(ies). The choice of the appropriate level of governance is guided by the twin principles of inclusiveness and subsidiarity which 'points to the necessity of both the decentralization and centralisation of political power.'²⁰² These principles balance the configuration of input and output aspects, for '[i]f decision making is decentralized as much as possible, it maximizes the opportunity of each person to influence the social conditions that shape his or her life' (input), whilst, '[i]f the decisions at issue are translocal, transnational or transregional, then political institutions need not only be locally based but also have a wider scope and framework of operation.'²⁰³ In output terms therefore, the decision regarding the appropriate site of governance is guided by considerations of the effective level of governance, but always with a view to achieving self-determination at the lowest possible level.²⁰⁴

3.4.3. *Deliberative Democracy.*

Whereas democratic intergovernmentalism articulates input and output-oriented legitimacy through the indirect democratic authorisation of international institutions, and cosmopolitanism attaches their substantive realisation to the provision of bundles of empowering rights across multiple sites of power, the model of deliberative democracy anchors legitimacy in ‘the anonymous and dispersed forms of communication in civil society – in the public spheres – combined with institutionalized discourses within the formal political complex.’²⁰⁵ It is by prioritising the discursive ‘essence of democratic legitimacy’ that deliberative democracy is eminently adapted to the transnational context. Indeed, as Dryzek stresses, the model of deliberative democracy ‘can cope with fluid boundaries, and the production of outcomes across boundaries.’²⁰⁶

Dryzek’s confidence in deliberation across boundaries, in particular the boundaries of national communities, is premised on the claim that ‘deliberation does not *require* such an identity, still less one that stops at national boundaries.’²⁰⁷ In doing so the terms of legitimacy are not automatically tied to a specific site of governance; above all ‘the intimate link between democracy and the state can be severed.’²⁰⁸ Other deliberative authors are not so willing to diminish the importance of the state as an arena for deliberative democracy. In this respect Thompson asserts that, ‘we should recognize that for the foreseeable future the power exercised by states ... is likely to be more legitimate (more justifiable to the persons bound by them) than that exercised by other institutions.’²⁰⁹ Nonetheless it should be recognised that Thompson acknowledges the ‘problem of many majorities’ which arise under conditions of globalisation and, accordingly, argues for a less exclusive notion of citizenship that aspires to include the claims of, ‘not only their electoral constituents but also what may be called their *moral* constituents.’²¹⁰ A similar case is forwarded by Goodin who argues it is ‘generally a mistake to (re)cast political arguments in terms of a demand for greater inclusion in a standardly exclusive sort of a state.’²¹¹ In order to be less exclusive he suggests that the inclusion of non-citizens interests is possible if we internalise the interests of the ‘other’ through a process of deliberative democracy within – that is by imagining yourself in their place.²¹²

Despite the differences in emphases amongst these authors, concerning the most appropriate arena for democratic politics, they converge around the contention that it is the processes of reflexive deliberation, prior to decision-making, rather than any aggregation of

preferences alone, which constitute democratic legitimacy. Despite this ‘robust core’ within the various thoughts on deliberative democracy, nevertheless, ‘[t]he intentions diverge widely’ with respect to what counts as deliberation and also with respect to the emphasis placed on voice and representation (input) and decision making and outcome (output).²¹³ Accordingly the following section outlines how the dimensions of input and output-oriented legitimacy are articulated within the model of deliberative democracy adopted by this thesis.

Input-oriented legitimacy.

The model of Deliberative Democracy attaches considerable importance to the process of deliberation and discussion which occur prior to any aggregation of preferences for obtaining input-oriented legitimacy.²¹⁴ In this respect Dryzek characterises deliberative democracy as ‘a theory for which democratic legitimacy depends upon the ability of *all* those subject to a decision to participate in authentic deliberation.’²¹⁵ Dryzek ties realising input aspects of democracy to three necessary criteria. The first criterion requires the participation of everyone who is affected by the decision. The second requires that participation and control is authentic or substantive rather than merely symbolic.²¹⁶ The third issue requires the widest range of decisions to be subject to democratic deliberation.²¹⁷ Each of these dimensions require realisation for democracy to be fully developed and exclusion along any of the dimensions reduces the quality of democratic input. In considering exclusion from deliberation, Pellizzoni considers the exercise of two different forms of external power - power *over* communication and power *in* communication.²¹⁸ Whilst the former concerns ‘who may speak’ – that is whether conditions are applied to their right to participate, the latter relates to ‘how they may speak’- that is the legitimacy of the types of arguments that may be deployed and the language that may be used in their construction.²¹⁹ The operation of power over communication and power in communication are intimately related, as:

[d]enying someone’s legitimation to take part in a discussion [power over] means denying the relevance of what s/he has to say [power in]. Vice versa, belittling a certain type of argument [power in] means delegitimizing the interlocutor, denying his/her identity, and therefore excluding him/her [power over].²²⁰

Nonetheless, whilst they may be considered functional equivalents, power over communication may be applied using a variety of means, whilst power in communication operates solely within discourse.²²¹ Therefore although they are closely related they nevertheless represent different modes of inclusion and exclusion. Recalling Dryzek's distinction between inclusion and authenticity it is suggested that power over communication is most usefully related to inclusion whilst power in communication concerns the authenticity of inclusion. With this in mind, each of the dimensions: (1) inclusion; (2) authenticity; and (3) scope, are considered in turn.

(1) Inclusion. As noted above the principle of inclusion requires that anyone who is subject to a decision may participate in its formulation. Exclusion from deliberation is therefore undemocratic. With this principle in mind it is useful to recall that democratic inclusion has largely relied on membership of a national state. Or, to phrase it slightly differently, that democratic participation is largely conditional upon national citizenship. Moreover, inclusion in decision-making circles has often involved 'more than the attainment of basic citizenship rights', and instead has relied upon state-sponsorship.²²² This form of active inclusion has traditionally involved the incorporation of labour and business organisations into a tripartite concertation of government with the state. This form of sponsorship could be (and has shown some evidence of being) extended beyond the immediately economic interests to include other groups such as environmentalists.²²³ The historical problem with state sponsored inclusion is the very limited range of interests that have been included.²²⁴

Forms of democratic inclusion tied to nationally determined conditions (be it citizenship rights or state sponsorship) are increasingly problematic though. Under conditions of globalisation and growing interdependence between states and their national societies, the effects of policy spill-over means that foreign citizens are affected by decisions in whose making they are excluded. Under these contemporary conditions this requires that solutions to exclusion have to be conceived of in terms beyond the state. To do so requires recognising the legitimacy of moral constituents alongside electoral constituents, thereby extending the principle of inclusion beyond the state borders in those instances where non citizens are likely to be bound by a state's decision.²²⁵ Dryzek suggests that this can be achieved, at least in part, through processes of argumentation within and across transnational civil society, which is 'a realm of relatively (though, of course, not perfectly) unconstrained communication.'²²⁶ The relative ease of entering the transnational public sphere – 'that is the politicized aspect of transnational civil society' - means that a wide variety of actors are able

to voice their opinions on a large number of issues.²²⁷ The power of the public sphere is located in its crucial potential to ‘change the terms of discourse and the balance of different components in the international constellation of discourses.’²²⁸ This is not insignificant because it means that the power to frame the terms of policy debate is widely distributed, and thus potentially highly inclusive.²²⁹

Nevertheless it is important to recognise that at some point a decision will need to be made, especially as discussed below, under conditions of rational plurality where consensus is not achievable. Moreover, it is necessary to recall that the public sphere is the realm of opinion formation only. Will formation – that is the process of decision making - occurs in the institutions of governance.²³⁰ This requirement means that we need to take notice of the institutionalised discourses as well as the discourses in the public sphere. They are important because they narrow down alternatives for decision-making – that is they (partially) filter public opinion.²³¹ However they can also ‘refine and enlarge opinions by passing them through the deliberate concern of chosen members of the *demos*.’²³² The relationship between the wider discourses in the public sphere and the institutionalised discourses depends in part on the constitution of interaction modes.²³³ In this respect the quality of representation will be shaped by institutional incentives to generate generalised arguments, such as conditions of unanimity or the presence of established legal norms and procedures which set standards of admissibility.²³⁴ Whether or not a particular interaction context generates authentic deliberation remains a question for empirical analysis.²³⁵

(2) Authenticity. Even under those conditions in which inclusion is extended – perhaps through the recognition of the legitimacy of the claims of a moral constituency – there is no guarantee that inclusion will be authentic. In this respect Dryzek notes that ‘democratic theorists who advocate a strategy of progressive inclusion of as many groups as possible in the state fail to recognize that the conditions for authentic as opposed to symbolic inclusion here are quite demanding.’²³⁶ Dryzek links achieving authenticity of inclusion to the prevailing state imperatives – that is ‘any function that governmental structures must perform if those structures are to secure longevity and stability.’²³⁷ Examples of state imperatives include domestic peace keeping, responding to external threats, preventing capital flight and raising revenues.²³⁸ Only if the aims of an actor accords with the imperatives of the state – that is ‘when equivalence is discovered between the goods sought by a group and some aspect of what the state must do in terms of public policy’ will inclusion be authentic.²³⁹ Inclusion in the absence of such an equivalence is likely to lead to cooption where the ‘group in question is confined in its operations to peripheral aspects of public policy, or best receives

only symbolic rewards.²⁴⁰ The balance between authentic and symbolic inclusion hinges also on the operation of power in discourse. In this respect Pellizzoni observes that:

[a]mong the obstacles to the development of more extensive and incisive public participation is the fact that technological and environmental questions are often so entangled as to practically exclude lay people from the discussion.²⁴¹

It is suggested that issues which are characterised by high levels of complexity and deep uncertainty, in which the role of science is accorded supremacy in generating knowledge claims, are increasingly prevalent in the contemporary globalising world.²⁴² Moreover many of these environmental and technical issues have a supranational dimension.²⁴³ This means that across a wide range of areas citizens may be participatively restricted because they are not sufficiently familiar with the forms of expert knowledge deployed or capable of constructing their arguments in the required technical language.²⁴⁴ In these instances 'scientific discourse acts as a filter [and] participants who cannot present generally acceptable arguments will find their submissions easily delegitimated.'²⁴⁵ Under these conditions the question we must ask, poses Habermas, is 'how can the power of technical control be brought within the range of the consensus of acting and transacting citizens?'²⁴⁶ To escape the domination of technology requires in Habermas's opinion nothing less than 'the development of a political decision-making process tied to the principle of general discussion free from domination.'²⁴⁷ The extent to which this response rather begs the question however can be appreciated if we reflect on Dryzek's conception of democratic authenticity: 'the degree to which democratic control is engaged through communication that encourages reflection upon preferences without coercion.'²⁴⁸ Habermas's assertion of the need to develop authentic deliberation, in order to promote control over technology offers very little in itself when it is technological domination that is the source of the problem. It does, however, prompt our attention to consider differences in individuals abilities to participate effectively in different sorts of argument. This is significant; especially where deliberation is associated with argumentation between 'participants who are committed to the values of rationality and impartiality'.²⁴⁹ By insisting on certain criteria implies that only arguments of a certain type are acceptable. In his consideration of this issue with respect to issues of globalised complexity Giddens notes that in principle 'expert knowledge is open to re-appropriation by anyone with the necessary time and resources to become trained.'²⁵⁰ If we accept this assertion, an obvious solution for regaining control is simply to raise the cognitive competence of citizens to the same level as experts.²⁵¹ However, this strategy

prioritises certain forms of knowledge, whilst marginalising others. By requiring citizens to frame their arguments in certain ways is in itself an exercise in power, undermining the deliberative principle of free and unconstrained speech. Moreover it may well realise a ‘perverse mechanism’ where the process turns the original contents [of the discussion] into something different’ in particular through the need to translate arguments into an acceptable scientific language.²⁵² Accordingly there would seem to be a good case for allowing other forms of communication in addition to rational argument, especially if we share Dryzek’s opinion that ‘[d]isursive democracy is not an exclusive gentlemen’s club.’²⁵³ Other modes of communication which we need to consider include rhetoric, testimony/storytelling, and greeting.²⁵⁴ Dryzek proposes the *conditional* admission of a variety of forms of communication, including all those aforementioned. Their admission should be conditional on two tests: (1) that they do not involve any threat of coercion; and (2) that they should connect the particular to the general.²⁵⁵ Nevertheless, whilst welcoming the inclusion of a variety of forms of communication Dryzek maintains that ultimately ‘their deployment only makes sense in a context where argument about what is to be done remains central.’²⁵⁶

(3) Scope. Finally deliberation potentially extends the range of issues under control by widening the policy agenda. As noted above, public opinion – which is the outcome of the contestation of discourses within the public sphere – can be translated through communicative power into state action. Expanding on this point Dryzek notes that in particular public opinion impacts on policy ‘in the way terms are defined and issues are framed’, and accordingly ‘[t]he relative weight of competing discourses in civil society can have major implications for the content of public policy.’²⁵⁷ In this respect he reflects on the positive impact on US policy generated by shifts in the balance of public opinion on issues of civil rights and the environment.²⁵⁸ Shifts in the balance of public discourses can generate an extension of the prevailing state imperatives – that is those functions that governmental structures must perform if those structures are to secure longevity and stability. In doing so it results in an extension in those issues that can be brought under democratic control.

Output-oriented legitimacy.

Output-oriented legitimacy requires that political choices ‘effectively promote the common welfare of the constituency in question.’²⁵⁹ As set out above, discovery of the

‘constituency in question’ is accomplished through an open process of deliberation in which those who believe they would be affected by a decision may participate in an open and public discussion to justify their claims. However deliberation also enhances policy effectiveness by improving the quality of the decisions taken for the constituency. Broadly speaking the deliberative model claims four ways in which the quality of decision-making is improved: (1) the generation of Pareto superior decisions; (2) the production of fairer decisions; (3) the achievement of a larger consensus; and (4) conferring decisions with greater legitimacy.²⁶⁰

(1) Pareto optimality is achieved where no one can be made better off without someone being made worse off – thus maximising the welfare of the community. In order to achieve optimal equilibria requires the members of the community understand their own and others self-interests as only through an intersubjective understanding of interests can a community solution be identified. Deliberation contributes towards this process by improving intersubjective understanding in two ways.²⁶¹ Firstly deliberation can help reveal private information. Secondly it can contribute towards overcoming the bounded rationality of individuals – ‘the fact that our imaginations and calculating abilities are limited and fallible.’²⁶² Fearon suggests two possible ways deliberation may lessen the impact of bounded rationality: ‘additively’ – that is by sharing our limited knowledge; and multiplicatively – that is the public generation of ideas through ‘brainstorming’ which would not have occurred privately.²⁶³ This argument suggests that public deliberations have a cognitive dimension.²⁶⁴ We may ‘refer to this as a process of *normative learning* as it is not solely based on experience but on arguments of a certain moral or ethical quality.’²⁶⁵

(2) As well as tending to contribute towards objectively better solutions for matters of public concern, it may be argued that deliberation also helps produce fairer or more just decisions, where fairness is linked to the procedure of deliberation itself.²⁶⁶ This does not simply reflect the presence of mechanisms of procedural impartiality, such as flipping a coin, but instead implies a more normative sense of fairness.²⁶⁷ In particular, it reflects the mode of participation, what may be referred to as normative argumentation, which requires the development of shared notions of what ought to be done.²⁶⁸ In order to generate common intersubjective understandings participants are required to enlarge their position – that is they are required to present arguments that take consideration not just of their interests, but of the ‘generalized other’ as well.²⁶⁹ As Elster acknowledges, participants may not adhere to notions of normative argumentation, and instead may remain motivated by strategic action – that is the pursuit of their own private interests. However the requirement that ‘even self-interested speakers are forced or induced to argue in terms of the public interest’ in public

can lead to fairer decisions – an effect that Elster labels the civilising effect of hypocrisy.²⁷⁰ As Elster notes '[p]ublicity does not eliminate base motives, but forces or induces speakers to hide them.'²⁷¹ This may simply be for strategic reasons or out of a 'desire not to appear selfish or self-interested.'²⁷² However the requirement that arguments are presented in publicly justifiable terms may prevent self-interested arguments from making it onto a voting agenda. The process of framing private desires in terms of the public good, may, through 'various psychological mechanisms, reshape ones private desires.'²⁷³

(3) By definition any decision which is only supported by a majority involves an imposition upon a minority who do not agree with the decision. Unanimity therefore is a normatively superior mode of decision-making, in that a decision made on this basis can claim the support of all. The model of deliberative democracy outlined in this thesis promotes the principle of unconstrained communication and reflection which, through the affect of normative learning, may bring about the transformation of original preferences thereby generating policy decisions which are acceptable to the generalised other. In this sense we may say that 'parties try to talk themselves into consensus by applying standards of impartiality.'²⁷⁴ Nonetheless whilst we may accept that public deliberation 'in this sense *aims* at rational agreement' this does not mean we have to accept it is bound to lead to it.²⁷⁵ In this respect Dryzek notes that with unrestricted deliberation consensus may be achieved. However, citing Elster he acknowledges that '[h]uman beings may prove so irreducibly different that consensus about normative judgements is precluded even under ideal conditions' of communicative rationality.²⁷⁶ This does not preclude the possibility of reaching different qualities of agreement, for even without complete agreement on common goals, the process of deliberation may well enable, 'consensus based on mutual recognition of legitimate, if different, interests.'²⁷⁷ A distinction is made between consensus which is the result of 'one argument that persuades all those concerned in the same way' and instances where 'parties reach consensus for different reasons.'²⁷⁸ The former may be described as a 'rational consensus'²⁷⁹ in that acceptance of the decision's correctness is based on evidence of its capacity to produce the most advantageous consequences for everyone.²⁸⁰ The latter is only a 'qualified consensus'²⁸¹ because it is not a consensus based on genuine cognitive improvement resulting from the best argument.²⁸² Reflecting on these distinctions Pellizzoni questions whether we are required to accept that 'non-strategic agreement only occurs when the parties reach consensus on the reasons for a choice'²⁸³ This is a crucial question in the presence of intractable problems characterised by incommensurable positions which suggest that the notion of the unity of reason is merely a myth.²⁸⁴ An acceptable answer would seem

to recall that deliberation *aims* at rational agreement. On this basis strategic and deliberative behaviour may be distinguished in terms of 'the presence or absence of a commitment to finding at least a partial meshing among individual plans.'²⁸⁵ Commenting on agreements which are based on this less demanding deliberative standard Eriksen states that they 'neither rest upon a pure convergence of interests nor are they negotiated compromises between contending parties. They are communicatively achieved *working agreements*.'²⁸⁶ The aims of working agreements are more modest and rather than achieve a consensus amongst all concerning principles and broad goals, they aim 'to devise concrete solutions for concrete and circumscribed problems'²⁸⁷ where the reasons provided convince many but not necessarily all concerned.²⁸⁸

(4) The preceding discussion concerning the quality of the agreement is intimately connected to the democratic legitimacy of the decision. Principally it is argued that decisions reached by deliberation are more legitimate than those which are the outcome of strategic bargaining or mere voting. This is because any bargaining outcome is at least partly based on the relative strength of the parties bargaining positions which means that the outcome is more a reflection of power rather than reason.²⁸⁹ In turn '[a] voting result cannot claim to reflect the common will but only the will of the winners.'²⁹⁰ Only under conditions of unanimity would the freedom of all be guaranteed. However, as noted above, within the terms of deliberation there are good reasons to doubt the notion of the unity of reason, requiring the specification of alternative grounds of legitimacy. The less demanding principle suggests retaining a commitment to finding more widely accepted solutions within the community but accepts that, in view of the plurality of reason, some may still reasonably disagree. Therefore in all likelihood on some occasions, decisions with only the support of the majority will be possible. On this basis it is sometimes (fallaciously) claimed that deliberation is no more legitimate than a mere aggregation of preferences. However unanimity is not required for deliberative legitimacy. Instead the legitimacy of a decision merely requires the *deliberation of all*, where 'the minority understands and respects the reasons provided by the majority and accepts the result because of a fair process.'²⁹¹

The three models of transnational democracy which have been analysed in this chapter, and which are applied to three EU policy regimes in the forthcoming chapters, comprise distinct solutions of transnational democracy. They constitute diverse normative and institutional evaluations of the required conditions for obtaining transnational democracy and this is reflected in their respective democratic prescriptions. The preceding sections have offered an extended analysis of the prescriptive models, providing both comparison and

contrast between the ideal types in relation to: the type of democracy; principal actors; relevant community of fate; relationship between national and international spheres; and the constitution of input and output oriented legitimacy. The main assertions offered in the analysis are presented in table 3.1. below.

	Democratic Intergovernmentalism	Cosmopolitan Democracy	Deliberative Democracy
Type of Democracy	Representative/indirect – (chains of delegation)	Mixed (Direct and representative, depending on the level of governance)	Direct (Voice)
Principal Actor	Sovereign state	Autonomous individual	Transnational civil society
Relevant community of fate	Domestic constituencies (Common language)	Various, overlapping communities of fate	All communities who are affected by a collective decision
Relationship between national and international spheres	Linear – national preferences represented in international sphere	Ambivalent– process of double democratisation – deepening within states and extending beyond territorial borders.	Legitimacy severed from state and political community. Fluid borders to incorporate moral and electoral constituencies
Input oriented legitimacy	Aggregated preferences of national citizens negotiated in international fora	Democratic autonomy – equal access to the various communities of voice and representation at multiple levels of governance guaranteed by cosmopolitan law	Reflexive deliberation of all
Output oriented legitimacy	Logic of effectiveness Collective agreements giving states greater control over domestic policy outcomes	Logic of effectiveness versus self determination (principles of effectiveness versus subsidiarity)	Improved decision-making: Pareto superior outcomes Fairer decisions Greater consensus Democratic legitimacy

Table 3.1. Principal dimensions of models of democracy.

3.5. Conclusion.

The preceding discussion has reviewed the principal debates about the EU's democratic legitimacy. Whilst in the early years of the Community output-oriented notions of legitimacy were viewed as sufficient, the growth in its size, scope and reach has generated awareness of the Community's democratic deficit, and calls for further democratisation.²⁹² Whilst certain scholars, of whom Scharpf is an exemplar, continue to suggest that effective policy output provides a sufficient normative foundation for European governance this thesis rejects this position as an a priori assumption. As Lord notes, 'the normative qualities of democratic rule are not satisfied by the efficient alignment of policy output with citizen preferences, since a technocracy or benign dictatorship could achieve such a result.'²⁹³ Instead, it is suggested that transnational democratic governance must be firmly anchored to both input and output dimensions in order to claim legitimacy. This chapter, building on the analysis of chapter 2, argues that the overlapping processes of globalisation and Europeanisation have generated new sovereignty principles in which authority is configured by complex national, regional and global enmeshments which have a differentiated but real affect on people's lives. Accordingly, if we are to take seriously the need to (re)constitute a degree of congruence between social and political spaces, we are compelled to engage with differentiated approaches towards democratic legitimacy in European governance which reflect the partiality of the unbundling process.

No single model of transnational democracy can adequately reflect the characteristics and qualities of a polity constituted by, and constitutive of, multiple differentiated intergovernmental and supranational influences across a range of policy regimes, giving rise to a Union which increasingly reflects the principle of variable geometry. Instead, we need to deploy a range of models which vary in their particular constitution of democratic input and output-oriented legitimacy according to the policy area in question. Adopting this approach provides a serious response to Weiler's claim, introduced earlier in the chapter (section 3.3) that '[v]ery rarely, if at all, is there more than cursory acknowledgement of the uneasy co-existence of competing visions and models of democracy, which, in turn, should inform both diagnosis, prognosis and possible remedy of democratic shortcomings.'²⁹⁴

The three models of transnational democracy developed in this chapter are: (1) democratic intergovernmentalism; (2) cosmopolitan Democracy; (3) deliberative democracy. These models are ideal types, each of which gives varying priority and significance to the key institutional and normative themes, thus providing different articulations of input and output-

oriented legitimacy. Democratic intergovernmentalism is underpinned by an acknowledgement that effective governance, under conditions of globalisation, requires institutional coordination beyond the state, but retains the state as the key site for the articulation of input-oriented legitimacy. This democratic prescription is premised on the argument that, whilst transterritorial and functional sites of power may well increasingly impact on citizens' lives, thus requiring coordinated action beyond the state, the national state nevertheless remains the relevant community of fate. It is within this community that citizens formulate their responses to the very issues brought about by globalisation and Europeanisation. The normative justification for this prescription is based on a soft version of the 'no demos' thesis which claims that the required social prerequisites for authentic democracy are not (yet) present at the European level. Of particular significance in this respect is the absence of a common European language and hence a suitably developed European public sphere through which people can participate.

The model of cosmopolitan democracy posits a very different solution for effective democratic governance under conditions of Europeanisation and globalisation. Of particular significance is the normative significance it places on the state compared to the model of democratic intergovernmentalism. Whilst it continues to recognise the importance of the state as a key site of power and identity formation, it contests far more robustly the claim that the state remains the only legitimate site for democracy. In this respect it rejects the intergovernmental contention that the state always remains the relevant community of fate. Instead cosmopolitanism claims that under conditions of complex interdependence, in which people's life chances are affected by denationalised sites of power, democracy must be rearticulated along the same denationalised lines also. In doing so it calls for a process of double democratisation whereby democracy is deepened within the national community and extended across territorial borders. Whereas democratic intergovernmentalism anchors authentic participation to the prevailing societal conditions in the national state – in particular the existence of a common language and public sphere, cosmopolitanism links participation within the multiple overlapping communities to the development of clusters of enabling rights embedded in an authoritative overarching cosmopolitan democratic law.

Both the intergovernmental and cosmopolitan models emphasise, in different ways, formal institutions as a prerequisite for authentic democracy. Democratic intergovernmentalism assigns primacy to the organs of representative government at the national level, whereas the promises of cosmopolitan democracy are tied to the provision of an overarching set of transnationally binding enabling rights and the ultimate development of



a global democratic parliament. Compared to these two models of transnational democracy, the deliberative model of democracy represents a deontological shift in emphasis. This does not mean that the deliberative model dismisses the importance of properly functioning institutions. Instead, the claim being made is that, the standards of democratic authenticity are located less in formal rules and principally in the processes of reflexive deliberation amongst the relevant community(ies). Authentic participation is thus linked not to membership of a particular community, nor to a series of formal enabling rights but rather, at least in the first instance, to the anonymous and dispersed forms of communication in civil society. Contestation amongst these discourses provides the possibility for communication across difference thereby allowing reflection and the possibility a modification of preferences. Confidence in communicative power provides a transmission mechanism from the public spheres – conceived in the multiple - to the institutions of governance thereby providing the possibility that a shift in the balance of the relative power of discourses will impact of the imperatives of state, reflecting public opinion.

Each of these models offers an idealised prescription for the realisation of input and output dimensions of democracy under conditions of globalisation and Europeanisation. Their prescriptions are differentiated both in their varying articulation of input and output-oriented legitimacy and their varying prescriptions concerning the normative and institutional requirements for their realisation. Without evaluating their empirical veracity, however, it is difficult to go much further than specify their normative and empirical commitments and reflect more generally on their contribution to the problems of democracy in a globalising world. Thus, chapter 4 evaluates the democratic qualities of the ECB through the model of democratic intergovernmentalism; chapter 5 analyses the democratic characteristics of the EU gender rights regime through the model of cosmopolitan democracy; and chapter 6 assesses the democratic features of the regulation of agro-food biotechnologies in the EU through the model of deliberative democracy. In each case the purpose of the case studies is to reflect on the relevance of the normative model itself as well as evaluate the democratic qualities of the policy regimes.

Notes for Chapter 3. The EU as a transnational democratic polity and models of transnational democracy.

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- ⁵ Ibid, p. 9.
- ⁶ Ibid, p. 12.
- ⁷ Michael Zürn, 'Democratic Governance Beyond the Nation-State: The EU and Other International Institutions', European Journal of International Relations, 2000, vol. 6, no. 2, p. 184.
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- ⁹ Ibid, pp. 196-199.
- ¹⁰ J. H. H. Weiler, Ulrich R. Haltern and Franz C. Mayer, 'European Democracy and Its Critique', West European Politics, 1995, vol. 18, no. 3, p. 5.
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- ¹⁵ Prime Minister's Speech to the Polish Stock Exchange, 6 October 2000, cited in Christopher Lord, 'Assessing Democracy in a Contested Polity', Journal of Common Market Studies, 2001, vol. 39, no. 4, p. 655.
- ¹⁶ Cited in Wallace and Smith, 1995, p. 150. *Emphasis added.*
- ¹⁷ Dehousse, 1995, p. 120.
- ¹⁸ Christopher Lord, Democracy in the European Union, Sheffield, Sheffield Academic Press, 1998, p. 31.
- ¹⁹ Ibid, p. 32.
- ²⁰ Ibid.
- ²¹ Ibid, p. 30.
- ²² Lord, 1998, p. 31.
- ²³ Frank Decker, 'Governance beyond the nation state. Reflections on the democratic deficit of the European Union', Journal of European Public Policy, 2002, vol. 8, no. 2, pp. 260-61.
- ²⁴ Lord, 1998, pp. 28-32.
- ²⁵ Erik Oddvar Eriksen and John Erik Fossum, 'Post-national integration', in Erik Oddvar Eriksen and John Erik Fossum, Eds., Democracy in the European Union: Integration through deliberation? London and New York, Routledge, 2000, p. 17.
- ²⁶ Ibid.
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- ²⁸ Decker, 2002, p. 259.
- ²⁹ Ibid.
- ³⁰ Weiler, et al., 1995, pp. 4-5.
- ³¹ Dehousse, 1995, p. 122.
- ³² Wallace and Smith, 1995, p. 149.
- ³³ Ibid, pp. 149-150.
- ³⁴ Gargarella, 2000, p. 191.
- ³⁵ Dehousse, 1995, p. 127.
- ³⁶ Desmond Dinan, An Introduction to the European Community, Basingstoke and London, Macmillan, 1994, p. 274.
- ³⁷ Lord, 2001, p. 650.
- ³⁸ Dinan, 1994, p. 274.
- ³⁹ Ibid., p. 299.
- ⁴⁰ Ibid., p. 280.
- ⁴¹ Dieter Grimm, 'Does Europe Need a Constitution?' European Law Journal, 1995, vol. 1, no. 3, p. 283.
- ⁴² Albert Weale, 'Between representation and constitutionalism in the European Union', in Albert Weale and Michael Nentwich, Eds., Political Theory and the European Union: Legitimacy, constitutional choice and citizenship, London and New York, Routledge, 1998, p. 55.

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- ⁴³ Dehousse, 1995, p. 122.
- ⁴⁴ Ibid, p. 123.
- ⁴⁵ Martin Westlake, 'The European Parliament's Emerging Powers of Appointment', Journal of Common Market Studies, 1998, vol. 36, no. 3, pp. 438-9.
- ⁴⁶ Ibid, p. 440.
- ⁴⁷ Lord, 2001, p. 651.
- ⁴⁸ Desmond Dinan, 'Governance and Institutions 1999: Resignation, Reform and Renewal', Journal of Common Market Studies, 2000, vol. 38, Annual Review, p. 30.
- ⁴⁹ Decker, 2002, p. 261.
- ⁵⁰ Lord, 1998, p. 60.
- ⁵¹ Dinan, 2000, p. 28. Having survived one censure motion, in exchange for allowing the establishment of a committee of independent experts to investigate the allegations against the Commission, the Commission was forced to resign once it became clear that the EP would censure any Commission that retained the French Commissioner Edith Cresson who refused to resign - retaining the support of the French government, and whom Santer was powerless to remove.
- ⁵² Janet Mather, 'The European Parliament – A Model of Representative Democracy?' West European Politics, 2001, vol. 24, no. 1, pp. 183-4.
- ⁵³ Ibid, p. 183.
- ⁵⁴ Lord, 1998, p. 36.
- ⁵⁵ Ibid, p. 35.
- ⁵⁶ Mather, 2001, p. 197.
- ⁵⁷ European Commission, Eurobarometer: Public Opinion in the European Union, Report Number 52, April 2000, p. 82.
- ⁵⁸ Lord, 1998, pp. 35-36.
- ⁵⁹ Weiler, et al., 1995, p. 8.
- ⁶⁰ Eurobarometer Report 52, 2000, p. 89.
- ⁶¹ Mather, 2001, p. 181.
- ⁶² Philippe de Schoutheete, The Case for Europe: Unity, Diversity, and Democracy in the European Union, Boulder and London, Lynne Rienner Publishers, 2000, pp. 53-54.
- ⁶³ Eurobarometer Report 52, 2000, p. 85.
- ⁶⁴ Julie Smith, 'How European are European elections?', in John Gaffney, Ed., Political parties and the European Union, London and New York, Routledge, 1996, p. 276.
- ⁶⁵ Lord, 1998, p. 35.
- ⁶⁶ Mather, 2001, p. 183.
- ⁶⁷ Mather, 2001, p. 194.
- ⁶⁸ Smith, 1996, p. 281.
- ⁶⁹ Mather, pp. 194, 196.
- ⁷⁰ Grimm, 1994, p. 294.
- ⁷¹ Ibid, p. 295.
- ⁷² Ibid.
- ⁷³ Christoph Meyer, 'Political Legitimacy and the Invisibility of Politics: Exploring the European Union's Communication Deficit', Journal of Common Market Studies, 1999, vol. 37, no. 4, p. 621.
- ⁷⁴ De Schoutheete, 2000, p. 58.
- ⁷⁵ Jackie Harrison, and Lorna Woods, 'European Citizenship: Can Audio-Visual Policy Make a Difference?', Journal of Common Market Studies, 2000, vol. 38, no. 3, pp. 480-1.
- ⁷⁶ Ibid, esp. pp. 481-490.
- ⁷⁷ Ibid, p. 485.
- ⁷⁸ See section 3.4.3. on deliberative democracy for a discussion in relation to the technical axis.
- ⁷⁹ Eurobarometer Report 52, 2000, p. 90.
- ⁸⁰ Decker, 2002, p. 264.
- ⁸¹ Ibid, pp. 263-4.
- ⁸² Ibid, p. 264.
- ⁸³ Closa, 1998, p. 178.
- ⁸⁴ Grimm, 1995, p. 295.
- ⁸⁵ Ibid.
- ⁸⁶ Eurobarometer Report 52, 2000, p. 91. Whether this is another EU language or not however is not made clear.
- ⁸⁷ Ibid, 93.

- ⁸⁸ Will Kymlicka, 'Citizenship in an era of globalization: commentary on Held', in Shapiro and Hacker-Cordón, Democracy's Edges, 1999, Cambridge, Cambridge University Press, p. 121.
- ⁸⁹ Ibid, p. 121.
- ⁹⁰ Erik Oddvar Eriksen, 'Deliberative supranationalism in the EU', in Eriksen and Fossum, 2000, p. 53, Erik Oddvar Eriksen, 'Towards a people's Europe? On Assessing Democratic Deficit in the EU', paper presented to the Workshop: Innovation in Democratic Theory, European Consortium for Political Research, Annual Joint Sessions, Mannheim, Germany 26-31 March, 1999, p. 17. *Original emphasis*.
- ⁹¹ Eriksen, 2000, p. 54; 1999, pp. 17-18.
- ⁹² Michael Zürn, 'Governance Beyond the Nation-State: The EU and Other International Institutions', European Journal of International Relations, 2000, vol. 6, no. 2, p. 198.
- ⁹³ Ibid, p. 199.
- ⁹⁴ Decker, 2002, p. 264.
- ⁹⁵ Closa, 1998, p. 178.
- ⁹⁶ Weiler, et al., 1995, p. 13.
- ⁹⁷ Grimm, 1995, p. 297.
- ⁹⁸ This hard position is conditionally reflected in Claus Offe's specification of the required social-cultural prerequisites for democracy, in which he suggests that the required levels of trust are most likely to arise from beliefs in essential sameness and where the nation state is specified as the optimal sized container for development of trust and solidarity. See Fritz Scharpf, Governing in Europe: Effective and Democratic?, New York, Oxford University Press, 1999, pp. 7-9 and Heidrun Friese and Peter Wagner, 'Survey Article: The Nascent Political Philosophy of the European Polity', The Journal of Political Philosophy, 2002, vol. 10, no. 3, p. 346.
- ⁹⁹ Weiler, et al., 1995, pp. 13
- ¹⁰⁰ David Heathcoat-Amory, Member of the Convention, 'A new Future for Europe', CONV 266/02 Brussels, 12 September 2002, pp. 3-4.
- ¹⁰¹ Decker, 2002, p. 263-4.
- ¹⁰² Heidrun Friese and Peter Wagner, 'Survey Article: The Nascent Political Philosophy of the European Polity', The Journal of Political Philosophy, 2002, vol. 10, no. 2, p. 347.
- ¹⁰³ Weiler, et al., 1995, p. 16.
- ¹⁰⁴ Harrison and Woods, 2000, p. 477.
- ¹⁰⁵ Closa, 1998, p. 174.
- ¹⁰⁶ Ibid.
- ¹⁰⁷ Weiler, et al, 1995, pp. 19-24; J. H. H. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', European Law Journal, 1995a, vol., 1, no. 3, pp. 240-256; J. H. H. Weiler, 'To be a European citizen – Eros and civilization', Journal of European Public Policy, 1997, vol. 4, no. 4, pp. 502-511.
- ¹⁰⁸ Weiler, 1995a, p. 252.
- ¹⁰⁹ Ibid, p. 253.
- ¹¹⁰ Ibid, p. 254.
- ¹¹¹ Eurobarometer, April 2000, p. 85.
- ¹¹² Weiler, 1995a, p. 252.
- ¹¹³ Ibid.
- ¹¹⁴ Eriksen, 2000, p. 50.
- ¹¹⁵ Ibid, p. 49.
- ¹¹⁶ Weiler, 1997, p. 503.
- ¹¹⁷ Eriksen, 2000, p. 51.
- ¹¹⁸ Ibid.
- ¹¹⁹ Weiler, 1995a, p. 5.
- ¹²⁰ Ibid, p. 55.
- ¹²¹ Lord, 2001, p. 644.
- ¹²² Ibid.
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- ¹²⁴ Closa, 1998, p. 177
- ¹²⁵ David Long, 'The Harvard School of Liberal International Theory: A Case for Closure', Millennium, 1995, vol. 24, no. 3, p. 490.
- ¹²⁶ Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics, International Organization, 1997, vol. 51, no. 4, p. 515.
- ¹²⁷ Moravcsik, 1997, p. 518.
- ¹²⁸ Robert O. Keohane, 'Governance in a Partially Globalized World: Presidential Address, American Political Science Association, 2000', American Political Science Review, 2001, vol. 95, no. 1, pp. 1-13.

- ¹²⁹ Ibid, p. 2; Moravcsik, 1997, pp. 520-521; Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', Journal of Common Market Studies, 1993, vol. 31, no. 4, pp. 485-6.
- ¹³⁰ Robert O. Keohane, 'International Institutions: Can Interdependence Work?', Foreign Policy, Spring 1998, p. 86.
- ¹³¹ Keohane, 2001, p. 9.
- ¹³² Ibid.
- ¹³³ Wallace and Smith, 1995, p. 153.
- ¹³⁴ Moravcsik, 1997, p. 545.
- ¹³⁵ Article 49 of the EU Treaty.
- ¹³⁶ Cited in William V. Wallace, 'Enlarging The European Union - An Overview', Perspectives on European Politics and Society, 2001, vol., no. 1, pp. 1-18.
- ¹³⁷ Peter Norman, 'Independent nations states 'must remain the bedrock of the EU'', Financial Times, 30 January 2002, p. 3. Similar comments were made by former British Conservative Party leader, Ian Duncan Smith, in his 'New Europe' speech, in which he expressly called for 'A New Europe of democracies. Intergovernmental – not supranational.' Ian Duncan Smith, 'A new Europe', Keynote speech on European Policy in Prague, 10 July, 2003, <http://www.conservatives.com/news.article.cfm>.
- ¹³⁸ Anthony McGrew, 'Liberal Internationalism: Between Realism and Cosmopolitanism', in David Held and Anthony McGrew, Eds., Governing Globalisation: Power, Authority and Global Governance, Cambridge, Polity, p. 278.
- ¹³⁹ Keohane, 1998, p. 93.
- ¹⁴⁰ Robert Dahl, 'Can international organizations be democratic? A skeptic's view', in Ian Shapiro and Casiano Hacker-Cordón, Democracy's Edges, Cambridge, Cambridge University Press, 1999, p. 32
- ¹⁴¹ Ibid, p. 27.
- ¹⁴² Ibid, p. 32.
- ¹⁴³ Weiler, et al., 1995, p. 6.
- ¹⁴⁴ Dahl, 1999, p. 30-31
- ¹⁴⁵ Kymlicka, 1999, p. 123. *Original emphasis*.
- ¹⁴⁶ Ibid, p. 119.
- ¹⁴⁷ Ibid, p. 121.
- ¹⁴⁸ Ibid, p. 115.
- ¹⁴⁹ Ibid, p. 122.
- ¹⁵⁰ Fritz W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', Public Administration, Vol. 66, Autumn, p. 239.
- ¹⁵¹ Keohane, 2001, p. 4.
- ¹⁵² Ibid.
- ¹⁵³ Moravcsik, 1997, p. 521.
- ¹⁵⁴ Moravcsik, 1993, p. 474.
- ¹⁵⁵ Ibid. The issue of exit with regards to the EU is a moot point, commentators suggesting that whilst member states retain their formal sovereign right to withdraw from the Union, practicably it is unthinkable. However the impending enlargement of the Union, and the commensurate increase of transaction costs of unanimity has brought this issue very much onto the agenda with Valéry Giscard d'Estaing's Constitutional Convention proposing the inclusion of an explicit exit clause into the planned constitutional treaty, in order to rectify this difficulty. See George Parker and Daniel Dombey, 'Exit route from EU planned', Financial Times, 24 October 2002, p. 1.
- ¹⁵⁶ Scharpf, 1999, p. 25.
- ¹⁵⁷ Ibid.
- ¹⁵⁸ Daniele Archibugi, 'Principles of Cosmopolitan Democracy', in Daniel Archibugi, David Held and Martin Köhler, Re-imagining Political Community: Studies in Cosmopolitan Democracy, Polity, 1998, pp. 204-5.
- ¹⁵⁹ David Held, 'The transformation of political community: rethinking democracy in the context of globalization', in Ian Shapiro and Casiano Hacker-Cordón (Eds.), Democracy's Edges, Cambridge University Press, Cambridge, 1999, p.98
- ¹⁶⁰ Ibid.
- ¹⁶¹ Ibid., pp. 99-100.
- ¹⁶² David Held, 'Democracy: From City-states to a Cosmopolitan Order?', Political Studies, 1992, XL, Special Issue, p. 21.
- ¹⁶³ David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance, Cambridge, Polity Press, 1995, p. 18.

- ¹⁶⁴ Michael Zürn, 'Democratic Governance Beyond the Nation-State: The EU and Other International Institutions', European Journal of International Relations, 2000, vol. 6, no. 2, pp. 188-9.
- ¹⁶⁵ Archibugi, 1999, p. 209.
- ¹⁶⁶ David Held, 'Democracy: From City-states to a Cosmopolitan Order?' Political Studies, vol. XL, Special Issue, 1992, p. 33.
- ¹⁶⁷ David Held, 'Regulating Globalization? The Reinvention of Politics', International Sociology, 2000, vol. 15, no. 2, p. 402, David Held, 1996, Models of Democracy, (2nd Ed.), Cambridge, Polity Press, p. 354.
- ¹⁶⁸ Zürn, 2000, p. 188.
- ¹⁶⁹ Held, 1995, pp. 16, 224.
- ¹⁷⁰ Held, 1999, p. 103.
- ¹⁷¹ David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty', Legal Theory, 2002, vol. 9, no. 1, p. 33; Held, 2000, p. 402.
- ¹⁷² Held, 1999, p. 103.
- ¹⁷³ Ibid, p. 106, 2002, p. 33.
- ¹⁷⁴ Held, 1995, p. 147.
- ¹⁷⁵ David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty', Legal Theory, 2002, vol 9, no. 1, p. 25.
- ¹⁷⁶ Held, 1999, p. 104.
- ¹⁷⁷ See Thomas W. Pogge, 'Cosmopolitanism and Sovereignty', Ethics, 1992, vol. 103, no. 1, pp. 48-75, for a discussion of the distinctions between legal and moral cosmopolitanism and the related issues of institutional and interactional cosmopolitanism.
- ¹⁷⁸ Ibid., p. 26.
- ¹⁷⁹ Ibid.
- ¹⁸⁰ Held, 1995, pp. 201-6.
- ¹⁸¹ Ibid., p. 200.
- ¹⁸² Ibid., pp. 191-201.
- ¹⁸³ Ibid., pp. 176-185.
- ¹⁸⁴ Ibid., p. 190, and 2002, p. 22.
- ¹⁸⁵ Held., 1995, pp. 190-191.
- ¹⁸⁶ Held, 1995, pp. 226-7.
- ¹⁸⁷ Held, 2002, pp. 32-33.
- ¹⁸⁸ Held, 1995, p. 227.
- ¹⁸⁹ Held, 2002, p. 33.
- ¹⁹⁰ Held, 1999, p. 105, see also Held 1995, pp. 189-206.
- ¹⁹¹ Zürn, 2000, p. 188, Held, 1995, pp. 16, 224.
- ¹⁹² Held, 1995, p. 121.
- ¹⁹³ Ibid.
- ¹⁹⁴ Held, 1995, chs. 5-6.
- ¹⁹⁵ Held, 2000, p. 399.
- ¹⁹⁶ David Held, 'Democracy, the nation-state and the global system', Economy and Society, 1991, vol. 20, no. 2, p. 150.
- ¹⁹⁷ Held, 1995, p. 31.
- ¹⁹⁸ Held, 1991, p. 143.
- ¹⁹⁹ Held, 2002, p. 21.
- ²⁰⁰ Held, 1991, pp. 145-146.
- ²⁰¹ Held, 2002, p. 21.
- ²⁰² Ibid, p. 28.
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- ²⁰⁴ Held, 1995, p. 235.
- ²⁰⁵ Eriksen, 2000, p. 52.
- ²⁰⁶ John S. Dryzek, 'Transnational Democracy', The Journal of Political Philosophy, 1999, vol. 7, no. 1, pp. 44.
- ²⁰⁷ John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations, Oxford, Oxford University Press, 2000, p., 129. *Original emphasis*.
- ²⁰⁸ Dryzek, 1999, p. 44.
- ²⁰⁹ Dennis F. Thompson, 'Democratic Theory and Global Society', The Journal of Political Philosophy, 1999, vol. 7, no. 2, p. 118.
- ²¹⁰ Ibid, pp. 119-120. *Original emphasis*.
- ²¹¹ Robert E. Goodin, Reflexive Democracy, New York, Oxford University Press, 2003, p. 204.

- ²¹² Ibid, chs. 9 -11. The key difference of course between Thompson's and Goodin's solutions is that whilst Thompson argues for giving foreign moral constituents an actual voice through various institutional mechanisms (pp. 121-2), Goodin proposes to give their interests voice by 'imaginatively' incorporating them through the national electors (p. 219, n. 16).
- ²¹³ Jon Elster, Ed, Deliberative Democracy, Cambridge, Cambridge University Press, 1998, p. 8.
- ²¹⁴ Whether a distinction between deliberation and discussion is important is raised by James Fearon, 'Deliberation as Discussion', in Elster, 1998, pp. 44-68. He proposes that deliberation suggests a particular, more serious sort of conversation whereas 'discussion need not be careful, serious, and reasoned.' (p.63). As will be made clear in the following commentary the notion of deliberation deployed in this thesis is open towards a variety of modes of communication and therefore includes the types of interactions which Fearon may be inclined to describe as discussions rather than deliberations.
- ²¹⁵ John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations, Oxford, Oxford University Press, 2000, p. 85.
- ²¹⁶ Ibid, p. 86.
- ²¹⁷ Ibid.
- ²¹⁸ Luigi Pellizzoni, 'The myth of the best argument: power, deliberation and reason', British Journal of Sociology, 2001, vol. 52, no. 1, p.60.
- ²¹⁹ Ibid, pp. 60-61.
- ²²⁰ Ibid, p. 61.
- ²²¹ Ibid, p. 62.
- ²²² Dryzek, 2000, p. 86.
- ²²³ Ibid, p. 91.
- ²²⁴ Ibid, p. 92.
- ²²⁵ Thompson, 1999, p. 120.
- ²²⁶ Dryzek, 2000, p. 131; Dryzek, 1999, p. 45.
- ²²⁷ Dryzek, 2000, p. 130. It is worth noting that Dryzek acknowledges that, in order to effectively participate in the public sphere, 'one does need a certain minimum of conventional political resources: money, personnel, access to the media, and credibility.' (1999, p. 46, 2000, p. 131).
- ²²⁸ Dryzek, 2000, p. 131.
- ²²⁹ Ibid, Dryzek, 1999, p. 46.
- ²³⁰ Eriksen, 2000, p. 54.
- ²³¹ Ibid, p. 55.
- ²³² Ibid, p. 56. *Original emphasis*.
- ²³³ Ibid, p. 57.
- ²³⁴ Ibid, Christian Joerges and Michele Everson, 'Challenging the bureaucratic challenge', in Eriksen and Fossum, 2000, p. 182.
- ²³⁵ Eriksen, 2000, p. 58.
- ²³⁶ Dryzek, 2000, p. 85.
- ²³⁷ Ibid, p. 83.
- ²³⁸ Ibid.
- ²³⁹ Ibid, p. 88.
- ²⁴⁰ Ibid.
- ²⁴¹ Pellizzoni, Luigi, 1999, 'Reflexive Modernization and Beyond: Knowledge and Value in the Politics of Environment and Technology', Theory, Culture and Society, vol. 16, no. 4, p. 99.
- ²⁴² Ulrich Beck, Risk Society: Towards a New Modernity, London, Sage Publications, 1992.
- ²⁴³ Ibid, p. 105.
- ²⁴⁴ This form of exclusion from effective participation may be usefully reflected on through Kymlicka's assertion that democratic politics is politics of the vernacular. (See sections 3.2.1. and 3.4.1.).
- ²⁴⁵ Christian Joerges and Jurgen Neyer, 'Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector', Journal of European Public Policy, 1997, vol. 4, no. 4, p. 616.
- ²⁴⁶ Jürgen Habermas, Toward a Rational Society: Student Protest, Science and Politics, London, Heinemann, 1971, p. 57.
- ²⁴⁷ Ibid, p. 61.
- ²⁴⁸ Dryzek, 2000, p. 8.
- ²⁴⁹ Elster, 1998, p. 8. *Original emphasis*.
- ²⁵⁰ Anthony Giddens, 'Living in a Post-Traditional Society', in Anthony Giddens and Scott Lash, Eds., Reflexive modernization politics, tradition and aesthetics in the modern social order, Cambridge, Polity, 1994, p. 91.
- ²⁵¹ Pellizzoni, 1999, p. 101.

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- ²⁵² Ibid, p. 109.
- ²⁵³ Dryzek, 2000, p. 169.
- ²⁵⁴ Ibid, ch. 2, 3, pp. 167.
- ²⁵⁵ Ibid, p. 68.
- ²⁵⁶ Ibid, p. 168.
- ²⁵⁷ Dryzek, 2000, p. 101.
- ²⁵⁸ Ibid, pp. 79-80.
- ²⁵⁹ Scharpf, 1999, p. 6.
- ²⁶⁰ Diego Gambetta, “‘Claro’: An Essay on Discursive Machismo”, in Elster, 1998, p. 24.
- ²⁶¹ Although see Adam Przeworski, ‘Deliberation and Ideological Domination’, in Elster, 1998, pp. 140-160 for an argument that deliberation may lead to suboptimal solutions by encouraging people to hold beliefs that are not in their best interest through a manipulation of mutual expectations – that is the beliefs individuals have about the beliefs of others.
- ²⁶² Fearon, 1998, p. 49.
- ²⁶³ Ibid, p. 50.
- ²⁶⁴ Maeve Cooke, ‘Five arguments for deliberative democracy’, in Maurizio Passerin D’Entrèves, Ed., Democracy as public deliberation: New Perspectives, Manchester and New York, Manchester University Press, 2002, p. 60.
- ²⁶⁵ Erik Oddvar Eriksen and John Erik Fossum, ‘Post-national integration’, in Eriksen and Fossum, 2000, p. 16. *Original emphasis*. See David Estlund’s discussion of ‘epistemic proceduralism’ for an extended argument concerning the tendency for democratic procedures to produce outcomes (judgeable by independent standards) of a superior epistemic quality. David Estlund, ‘Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority’, in James Bohman and William Rehg, Eds., Deliberative Democracy: Essays on Reason and Politics, Cambridge, Massachusetts and London, England, The MIT Press, 1997, pp.173-204.
- ²⁶⁶ Cooke, 2002, p. 57.
- ²⁶⁷ Ibid, p. 59.
- ²⁶⁸ Eriksen, 2000, p. 48.
- ²⁶⁹ Ibid.
- ²⁷⁰ Elster, 1998, p. 12.
- ²⁷¹ Jon Elster, ‘Deliberation and Constitution Making’ in Elster, 1998, p. 111.
- ²⁷² Fearon, 1998, p. 54.
- ²⁷³ Ibid, 1998, p. 54.
- ²⁷⁴ Eriksen, 2000, pp. 48-9.
- ²⁷⁵ Cooke, 2002, p. 54. *Original emphasis*.
- ²⁷⁶ John S. Dryzek, Discursive Democracy: Politics, Policy and Political Science, Cambridge, Cambridge University Press, 1990, p. 16.
- ²⁷⁷ Ibid, p. 71.
- ²⁷⁸ Pellizzoni, 2001, p. 68.
- ²⁷⁹ Eriksen, 2000, p. 59.
- ²⁸⁰ Pellizzoni, 2001, p. 68.
- ²⁸¹ Eriksen, 2000, p. 59.
- ²⁸² Pellizzoni, 2001, p. 68.
- ²⁸³ Ibid, p. 69.
- ²⁸⁴ Ibid, p. 72.
- ²⁸⁵ Ibid, p. 78.
- ²⁸⁶ Eriksen, 2000, p. 59. See also Dryzek, 2000, pp. 47-50.
- ²⁸⁷ Pellizzoni, 2001, p. 79.
- ²⁸⁸ Eriksen, 2000, p. 59.
- ²⁸⁹ Ibid, pp. 58-9.
- ²⁹⁰ Eriksen and Fossum, 2000, p. 17.
- ²⁹¹ Eriksen and Fossum, 2000, p. 18; Eriksen, 2000, p. 59.
- ²⁹² Wallace and Smith, 1995.
- ²⁹³ Lord, 2001, p. 644.
- ²⁹⁴ Weiler, 1995, p. 5.

4. Case Study 1: Democratic Intergovernmentalism and the European Central Bank (ECB).

4.1. Introduction.

A variety of strands of economic theory suggests that under conditions of increasing levels of complex interdependence associated with economic and monetary integration and highly mobile capital markets, multilateral policy coordination between states is required to re-establish effective control over various aspects of economic policy including, amongst others, monetary, fiscal, and employment policies.¹ These include Mundell's Assignment Problem which claims that as capital markets become increasingly integrated and the volume of capital flows rise state policy makers can only choose two of the three following policy choices at a time: free capital flows, monetary policy autonomy, fixed exchange rates.² Optimum Currency Area (OCA) theory suggests that exchange between countries can take place more efficiently within a single monetary unit.³ A number of institutional and policy solutions, in relation to multilateral economic and monetary policy coordination and management, have been practiced by European states during the post-war period, the most important of which have been the Bretton Woods system, European Snake and European Monetary System (EMS).⁴ In this respect European Economic and Monetary Union (EMU) constitutes just the latest in a series of experiments in multilateral exchange rate regimes. However EMU is unique in that it is the very first occasion when national states have ceded all aspects of monetary policy to a supranational institution - in this case the European Central Bank (ECB). The motivation for pursuing price stability in the Euro area by transferring monetary policy to a fully autonomous ECB is underpinned by the rise of monetarism, and the historical success of the Bundesbank in achieving monetary policy credibility – particularly in the eyes of the capital markets - in order to achieve policy effectiveness (output-oriented legitimacy). The overall legitimacy of the regime does not rest solely on its effectiveness however and a number of mechanisms of representation exist which at least indirectly connect the ECB with European citizens. These include the procedures of appointment, mechanisms of formal accountability before the EP Monetary Committee and the ECOFIN, as well as more informal representations in the Eurogroup. The

mechanisms are both supranational and intergovernmental and in this respect reflect the asymmetrical union founded by EMU.

The ECB primarily emphasises output dimensions of legitimacy. Reflecting on the legitimacy of EMU Verdun and Christiansen highlight that the 'discourse ... has essentially been output-oriented' and in this they identify the fragility of its legitimacy, depending as it does upon the continued success of EMU.⁵ Indeed considerable resources of the ECB are devoted to communicating the effectiveness of the policy to both the markets and other interested parties which according to Issing are the principal elements of the ECB's accountability and transparency.⁶ However within an EU constituted by national states, which are ultimately responsible to their national citizenry, output-oriented legitimacy requires not just enhanced policy effectiveness in relation to the overall performance of the Euro-area economies but for the individual units as well.⁷ In the context of an asymmetrical EMU, in which the member states remain responsible for key aspects of the macroeconomic mix, effective macroeconomic management requires cooperation between the supranational ECB and intergovernmental member states.⁸

In view that the ECB enjoys such high levels of autonomy and is guaranteed freedom from all kinds of national political interference, arguments concerning intergovernmental bases of legitimacy would seem misplaced.⁹ However this line of argument makes the mistake of misinterpreting EMU as simply an exercise in economic technocracy where as it is very much a highly political project in which national political will is as important as arguments of functional economic logic.¹⁰ In her comparison of the contrasting fortunes of the recent experiment in EMU with the earlier failure in the 1970s this very conclusion is drawn by Verdun, who suggests that member states were attracted to a European solution from the 1980s onwards by their positive interpretation of benefits to national interests.¹¹ The supranational ECB is embedded within a regime constituted primarily by national political units, whose legitimacy is dependent upon the continued support of their national constituencies. In this regard Fligstein and McNamara note that if the ECB 'chooses to ignore the real problems of the member state governments, its basis of legitimacy with those governments and the citizens of Europe will be undermined.'¹² Therefore in order for the ECB to establish firm legitimacy it is essential that it is sensitive to the various national conditions and does reflect the distinct national positions in relation to discharging its responsibilities of formulating and implementing a Euro-wide monetary policy.

Reflecting on the conditions of legitimate governance in the modern state Verdun and Christiansen suggest that at a minimum 'the institutions of representative democracy [must]

ensure that elected governments fulfil the demands of ‘most of the people, most of the time.’¹³ Thus whilst this rarely means that ‘public policy is determined by citizen preferences’ it does at least imply ‘the potential of removal from office of those who are seen as failing to deliver on the expectations of the majority.’¹⁴ This notion of legitimacy involves both input and output aspects of legitimacy – policy must reflect nationally constituted citizen preferences and effectively realise them. Thus under conditions of an asymmetrical EMU in which the responsibilities of macroeconomic management are split between intergovernmental and supranational actors, and where the national state and citizens remain the ECB’s principal constituents, this thesis argues that the bases of the ECB’s legitimacy in both input and output terms are primarily intergovernmental.

4.2. Model of Democratic Intergovernmentalism.

According to the Model of democratic intergovernmentalism the principal anchor of legitimacy in relation to transnational modes of governance is the national state. Despite acknowledging that processes of globalisation and Europeanisation are increasing the levels of interdependence between states and thus providing motivation to coordinate behaviour through multilateral institutions, it is maintained that national states continue to constitute distinctive communities of fate within which ‘citizens still want to confront the challenges of globalization.’¹⁵ The contention that the state still remains the principal community of fate does not require upholding volkish conceptions of national demos which irresistibly tie authentic democratic participation to notions of cultural homogeneity and common ethnic origin. Instead it merely argues that participation in democratic politics requires a public space constituted by a common language and shared media using that common language.¹⁶ In the absence of a European common language and genuinely Europeanised media, participatory politics at the European level remains elite dominated.¹⁷ Under these circumstances it is contended that the direct participation of citizens in trans-European politics is both unrealistic and unnecessary. Intergovernmental mechanisms of legitimacy are both available and adequate in offering the mechanisms for participation and representation at the national level, in which the ‘legitimate authority of higher-level political bodies depends on this ongoing process of debate and consent at the national level.’¹⁸ Therefore in respect of output-oriented legitimacy the state participates in transnational institutions in

order to increase the effectiveness of its fate control in relation to its citizens and their nationally constituted interests. In terms of input-oriented legitimacy, the primary constituency remains the national citizenry and the continued participation of the state within the transnational institution remains contingent upon its representing the interests of national citizens, whose views are voiced through their participation in national democratic politics.

4.3. EMU as a democratic intergovernmental framework.

As the preceding commentary notes the principal anchor of democratic legitimacy, according to the model of democratic intergovernmentalism, is the national state. In order to increase their output-oriented legitimacy states enter transnational institutions which have the anticipated benefit of reducing transaction costs. Moreover the states continue to represent the interests of their national citizens, which are articulated in nationally constituted democratic practices, thus providing input-oriented legitimacy also. The purpose of this forthcoming section is to set out how this model of democratic intergovernmentalism conceptually applies to the EMU regime. In order to do so it considers how input-oriented and output-oriented legitimacy are constituted using principal-agent analysis; a heuristic device which guides our consideration of the institutional relationship between the member states (the principles) and the ECB (the agent).¹⁹

The nub of the principal-agent model is that 'one actor (the principal) has an incentive to delegate power to another actor (the agent) with the expectation that subsequently the latter will act in a way which is consistent with the initial preferences of the former. The incentive to delegate is usually motivated by a desire to reduce transaction costs.'²⁰ In output-oriented terms the logic of delegation is explained in terms of enhanced policy effectiveness through the reduction in transaction costs. Institutions reduce transaction costs – that is the costs of making and enforcing agreements – by reducing uncertainty and enhancing the credibility of commitments.²¹ Credibility is emphasised in particular in relation to monetary policy 'as it reduces the cost of disinflation and contributes towards price stability.'²² In turn this requires that the central bank in charge of monetary policy enjoys credibility - especially in the eyes of the financial markets – which hinges on these economic actors believing that 'it will do what it says'.²³ Therefore a central proposition made by a principal-agent approach is that states have delegated monetary policy competence to independent central banks in order to

resolve commitment problems and increase policy credibility.²⁴ This proposition is substantiated by recourse to the time-inconsistency literature ‘according to which political priorities, with their short-term policy horizons driven by the need to re-election, are thought to usurp economic imperatives in the face of the business cycle.’²⁵ Alongside the problems associated with the ‘political business cycle’ is the associated problem of the historical political choices of leftwing parties to pursue expansionist economic policies which are contended to be inimical to price stability.²⁶ Majone presents these credibility shortcomings as a consequence of ‘ill-defined political property rights’ where the achievements of today’s democratic politicians can easily be turned over by those of tomorrow.²⁷ Continuing in these terms he argues that:

delegation amounts to a transfer of political property rights in a given policy area to decision-makers who are one step removed from election returns. The stronger the legal basis of independence, the better defined are the rights of the new ‘owners.’ The strongest basis of secure political property rights is a constitutional guarantee of independence, as in the case of the European Central Bank ...²⁸

In short, in terms of output-oriented legitimacy, delegation to an independent agency – on this occasion a Central Bank – is rational because it is expected to ‘address a compelling problem and produce better outcomes – a more optimal level of inflation in conjunction with employment and growth.’²⁹ However output rationality depends upon the preferences of the agency reflecting those of the principal – that is the ECB’s preferences reflecting those of the member states and the citizens who they represent.

The danger that principal-agent theory highlights in respect of delegating policy to an autonomous agent such as the ECB is the risk of agency losses.³⁰ This manifests itself in two different ways. The first occurs as ‘shirking’ or ‘drift’ where the agency pursues its own agenda rather than that of the principal. The second form is that of agency slippage whereby even acting in good faith the collective decisions of the agency are add odds with the preferences of the principal.³¹ Thus the central critique provided by principal-agent analysis is that, ‘the function of supranational institutions may reflect not so much the preferences and intentions of their member state principles but rather the preferences and the autonomous agency, of the supranational institutions themselves.’³² If this situation does arise then it presents a fundamental challenge to the notion of indirect input-oriented legitimacy. Turning to the ECB, Elgie presents two related arguments which maintain the principal-agent link and

thus support the indirect mechanisms of voice and representation outlined by the model of democratic intergovernmentalism.

The first argument concentrates upon the democratic quality of the decision made by the member states to delegate their monetary policy competence to the ECB. The crux of this argument is that '[a]n independent ECB was the express wish of EU governments and, by extension, EU citizens as a whole. Here ... anything that the ECB does, at least within the confines of the Maastricht/Amsterdam Treaties, can be considered democratic and should not be considered as shirking.'³³ Indeed in this respect Otmar Issing, a member of the ECB executive board, remarks that '[t]he Eurosystem's formal democratic legitimacy is derived from the ratification process of the Maastricht Treaty.'³⁴ Such a perspective is buttressed by 1993 decision of the German Constitutional Court which upheld the 'constitutionality and legitimacy of the Maastricht Treaty on the democratic legitimacy of the Member States which signed it.'³⁵

The second argument which may be deployed to suggest that the ECB is a 'democratically responsible institution' is that despite its considerable autonomy 'the Bank is still justified in acting independently because it can claim that it is simply following the preferences of those who delegated this power to the Bank in the first place.'³⁶ The argument goes thus: the TEU bestowed the responsibility upon the ECB to pursue the primary objective of price stability, which it has in turn defined as 'a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2% ... over the medium term'.³⁷ Provided it pursues this objective rigorously its legitimacy derives from its pursuance of the principles democratically delegated preferences. In reviewing the terms of its mandate De Haan and Eijffinger question the democratic legitimacy of delegating responsibility to the ECB for operationalising the meaning of price stability. However they conclude that 'this cannot be blamed on the ECB as this is how it has been established in the TEU.'³⁸ Reviewing the institutional design of the ECB, and in particular emphasising its restrictive mandate, Heisenberg and Richmond conclude that the opportunities for agency losses are 'virtually nonexistent.'³⁹ However as they rightly note this does not resolve the issue of gaps appearing between the preferences of the member states and the ECB as an outcome of a 'shift in the policy preferences by heads of government.'⁴⁰ In their opinion the opportunities for formally renegotiating the terms of delegation are 'virtually nonexistent' in view that such a move would require unanimity amongst the member states, and the likelihood of generating turmoil in the financial markets. Indeed in view of the unlikelihood of a treaty renegotiation Pollack refers to it as a 'nuclear option.'⁴¹ Furthermore Heisenberg and

Richmond suggest that the possibilities for member states to indirectly influence the ECB are likely to be ineffective.⁴² However this thesis contests their submission and suggests that they under-appreciate the importance of the political leverage granted to the member states by the asymmetrical EMU. It is to this aspect of EMU that this chapter now turns, contextualising it in the historical development of European Economic and Monetary Union.

4.4. The Evolution of EMU: An intergovernmental trajectory.

Although economic and monetary union were not objectives of the Treaty of Rome in 1958, coordination in these policy areas certainly was.⁴³ To assist in these tasks the Treaty called for the creation of an advisory Monetary Committee. This was formed in 1958 and its membership was composed of senior finance ministers, deputy governors from the central banks and two representatives from the Commission.⁴⁴ In the following decade a number of Commission policy initiatives were taken to increase economic and monetary integration. These included setting up a Short Term Policy Committee to monitor members states aggregate demand policies in 1960 followed by Monet's Action Programme in 1962, again emphasising economic coordination. Following a Commission proposal in 1963 for further coordination measures a further three committees were set up: a Committee of Central Bank Governors, a Budgetary Policy Committee and a Medium-Term Policy Committee. Further integration during the decade remained unfeasible however. 'This was mainly due to the fact that an international monetary system existed, and because exchange rates were stable until 1967.'⁴⁵

It was not until 1970 that the first plan for economic and monetary union was published, following on from the exchange rate crisis leading to the devaluation of sterling in 1967 and increasing awareness of the shakiness of the Bretton Woods System.⁴⁶ The Werner Report advocated creating a monetary union with complete convertibility of currencies, irrevocable fixed exchange rates, and free capital movements. The report struck a balance between the concerns of 'economists' and 'monetarists'; the former arguing that economic convergence between the national economies was a necessary condition for monetary integration whilst the monetarists argued that monetary integration would induce economic convergence.⁴⁷ The Werner compromise package has been called 'parallelism' suggesting that both paths towards EMU were compatible.⁴⁸

The Werner plan was ultimately unsuccessful and only the first of three stages was successfully implemented, establishing the intra-EC exchange rate regime known as the Snake which placed restrictions on the permitted movements between the participating currencies.⁴⁹ The emphasis placed on parallelism involved the creation of a Centre of Decision for Economic Policy (CDEP) alongside a Community system for the central banks.⁵⁰ It represented a plan for a symmetrical EMU involving close ex-ante policy coordination underpinned by positive integration across a wide range of policy competences. This differs considerably from the EMU devised by the Delors Report in 1989 which has led to the establishment of a Euro-zone constituted by centralised monetary union and implicit decentralised fiscal coordination.⁵¹ According to Dyson this shift from a symmetrical to asymmetrical union 'was bound up with the paradigm shift from Keynesianism to sound money.'⁵² This sound money paradigm, henceforward referred simply to as monetarism, was ultimately 'elevated to policy orthodoxy' in response to the perceived failure of 'the previous *dirigiste* paradigm' constituted by state intervention according to Keynesian principles of aggregate demand management.⁵³ Thus, the shift to monetarism was prompted by the confluence of three key factors; a series of policy failures by member governments such as Italy and France who continued to pursue autonomous Keynesian management policies under conditions of increasing capital mobility, the existence of an ideational alternative to Keynesianism in the form of monetarism; and the example offered by Germany of monetarist-informed policy success at a time when national governments were searching for alternatives.⁵⁴

The institutional design of the ECB was directed by a monetarist epistemic community, dominated by European central bankers, whose policy beliefs converged on a set of principled normative and causal beliefs and shared criteria for weighing knowledge in respect of the common enterprise.⁵⁵ (See figure 4.1. at the end of this section for a summary of the regime's principal institutional features). This had been absent during the formulation of the Werner plan for EMU which was contested by the rival advocacy coalitions of the monetarists and economists.⁵⁶ Indeed the membership of the Werner Group was wide ranging and included Central Bank Governors, the chairs of the Short and Medium term Economic, Monetary and Budgetary Policy Committees as well as a Commission representative.⁵⁷ In contrast, the membership of the Delors Committee overwhelmingly comprised of central bank governors, who together with monetary economists converged around 'a shared belief in the priority to sound money and finances and in the vital importance of credibility to effective policies.'⁵⁸ Surrounding the monetarist epistemic

community constituted by the Delors Committee was a 'clear constituency for monetary orthodoxy' including, inter alia, national politicians, finance ministry officials, and members of the business - especially finance - community.⁵⁹ Subsequent to the ratification of the Maastricht Treaty, the European Monetary Institute (EMI) - the transitional body prior to the ECB - also 'joined the EMU camp'.⁶⁰ Following stage three of monetary integration, the ECB itself has provided the institutional setting for monetary orthodoxy, and regularised meetings of national and European central bankers.

The dominance of the monetarist policy frame has shaped the development of an ECB centric Euro- Zone, isolated from the short-term political influence of the member states, in order that it may effectively pursue its objective of maintaining price stability in the medium term.⁶¹ This institutional solution is deemed the most effective because it purportedly increases policy credibility, following a virtuous circle in which 'a good monetary policy is credible to the financial markets, reduces uncertainty in those markets, and will be rewarded by low long term interest rates, which in turn, facilitate higher fixed capital investment.'⁶² Indeed the ECB has regularly and rigorously transmitted these very policy messages since its inception:

The institutional independence of central banks allows monetary policy-makers to focus on safeguarding price stability in a lasting and credible manner, without being subject to short-term political considerations. A large body of theoretical analysis, supported by substantial empirical evidence, supports the view that central bank independence leads to an improved design and implementation of monetary policy and, therefore, to more stable prices.⁶³

The specific constitutional status of the ECB and its clearly defined primary objective of maintaining price stability reflect modern economic thinking, supported by historical evidence. Indeed, those central banks endowed with independence and given a clear mandate to ensure price stability have proven to be the most successful in delivering low inflation and providing a trusted and stable currency.⁶⁴

Despite the emphasis in monetarist economic thought and the praxis of the ECB regarding the importance of insulating monetary policy from political interference it is recognised, in the literature on EMU and in its institutional design, that effective monetary policy and the maintenance of price stability requires a favourable broader policy mix. In this regard Hodson and Maher comment that '[w]hen it comes to macroeconomics in practice, the pursuit of price stability takes us beyond the mere boundaries of monetary policy. In particular, the aggregate stance of fiscal policy and developments in the wage

level will have an impact on inflation and hence on the credibility of the central banker's commitment to price stability.⁶⁵ Thus, although under the asymmetrical arrangements monetary policy is explicitly directed by the ECB, whilst other areas of economic policy remain under the decentralised control of the member states, the framework requires the 'implicit coordination' of these other areas in line with the pursuit of price stability.⁶⁶

Two policy specific instruments have been developed in order to provide the required level of fiscal policy coordination between the member states: the Broad Economic Policy Guidelines (BEPG) and the Stability and Growth Pact (SGP). The BEPG were originally adopted under the TEU, and later refined at the European Council meeting in Luxembourg in 1997.⁶⁷ They require the member states adopt economic policies which are consistent with the functioning of EMU, and which are subject to multilateral surveillance through the submission of annual reports. Where the Commission feels that a member state's policies are inconsistent with its responsibilities it may recommend the ECOFIN address a recommendation to the member state concerned and may choose to make this recommendation public.⁶⁸ Through the adoption of the SGP in 1997 member states further committed themselves to maintaining budgets close to balance and in particular to avoid excessive government deficits - defined as a deficit above 3 percent of GDP, unless deemed temporary or arising under exceptional circumstances.⁶⁹ Where a state is considered to have exceeded the 3 percent reference value the Excessive Deficit Procedure (EDP) may be invoked by the Commission to warn the member state it is near to breaching the EDP reference values and request the Council recommend the necessary measures to bring the budget into balance in the medium term.⁷⁰ Failure to do so may lead to punitive action being instigated against the non-compliant state which ultimately would result in significant fines of between 0.2% and 0.5 of its GDP being levied.⁷¹

In the context of the member states fiscal commitments to support EMU and the ECB's 'power to make governments pay for 'lax' fiscal policies', Dyson concludes that the institutional design of EMU is ECB centric.⁷² Nonetheless he qualifies this conclusion and suggests that 'it needs careful finessing.'⁷³ In this regard it is imperative to recognise the intergovernmental nature of the BEPG, SGP and EDP. Whilst the Commission plays a key role in coordinating the instruments of multilateral surveillance and initiates the procedures of non-compliance, it is the ECOFIN who ultimately decides whether or not to invoke the measures of recommendation or sanction. Moreover, in the final instance it requires the member states do comply with their obligations under the instruments. As the following section demonstrates the implementation of these instruments in practice has followed this

intergovernmental logic, being shaped by the member states perceptions of their interests and their relative bargaining positions.

Since the beginning of stage 3 of EMU and the inception of the ECB, the instruments for recommendation and reprimand provided for by the BEPG and the SGP have been invoked on a number of occasions. In January 2001 the Commission recommended that Ireland be reprimanded over its budget, in view of its high level of price inflation. On 12 February 2001 the ECOFIN decided to address the reprimand to Ireland in the following direct terms:

[t]he Council recalls that it has repeatedly urged the Irish authorities, most recently in its 2000 broad guidelines of the economic policies, to ensure economic stability by means of fiscal policy. The Council regrets that this advice was not reflected in the budget for 2001, despite developments in the course of 2000 indicating an increasing extent of overheating. The Council considers that Irish fiscal policy in 2001 is not consistent with the broad guidelines of the economic policies as regards budgetary policy. The Council has therefore decided, together with this Opinion, to make a recommendation under Article 99(4) of the Treaty establishing the European Community with a view to ending this inconsistency.⁷⁴

The provisions of the BEPG do not extend for the implementation of fines, merely peer review and public admonishment to put pressure on the non-compliant member state.⁷⁵ In his evaluation of the Ireland situation Lilico noted that '[i]t is expected that Ireland will bow to pressure, and raise taxes as it must.'⁷⁶ This prediction seems to be largely borne out with the Council on 6 November 2001, endorsing a Commission report 'which concluded that the implementation of the budget for 2001, although marked by a severe revenue shortfall, reflected some of the concerns underlying the recommendations.'⁷⁷

A year on from Ireland's reprimand, on 30 January 2002, the Commission recommended to the Council, this time under the SGP that it issue early warnings to Germany and Portugal in relation to their budget deficits approaching the 3 percent reference value. In its press release the Commission emphasised its preventative nature stating that, 'an early warning should not necessarily be interpreted as a criticism of the budgetary strategy being pursued by the Member State concerned.'⁷⁸ Additionally, its appraisal of the UK's annual convergence report claimed that the UK's projected budget deficit of 1.2 percent by 2004-5 would be in breach of the SGP's requirement that governments run budgets near to balance or in surplus over the medium term, and urged it to bring its public finances back into line with EU guidelines.⁷⁹ The UK refused to take any corrective measures in response to the

censure, arguing that the Commission's interpretation of the SGP was too narrow and failed to allow sufficient cyclical adjustment.⁸⁰ The UK Chancellor has repeated his assertions for a more flexible framework, at the same time rejecting any move towards a centralisation of the enforcement of the SGP.⁸¹ At its meeting on 12 February 2002 the ECOFIN decided unanimously not to vote on the Commission recommendations to issue early warnings to Germany and Portugal and to close the procedure.⁸² Whilst Hans Eichel refused to comment on whether Germany planned to lobby the other ECOFIN members for support, it is widely speculated that such intergovernmental bargaining did occur and received the active support of both France and the UK.⁸³

More recently, between November 2002 and May 2003, the initial stages of the EDP have been invoked by the Commission against Germany, for their continued breach of the conditions of the SGP.⁸⁴ On both of these occasions the Commission's action has been supported by the Council who decided that these member states were running excessive deficits and issued recommendations to both countries to bring their budgets back into line with the requirements of the SGP.⁸⁵ Despite the contrasting responses by these member states - where Germany has attempted to adopt the necessary measures, whilst France has openly defied the EU recommendations - both countries are likely to exceed the 3 percent GDP reference figure for a third successive year in 2004. France in particular has publicly cited its own national interests as justification for violating the SGP.⁸⁶ Although the Schröder government in Germany has attempted to adopt the necessary health, pension and labour market reforms it has been required to make compromises with domestic groups including the leftwing of its own Social Democratic Party, (SPD), and the opposition Christian Democrats, (CDU), who control the Bundesrat regional upper chamber.⁸⁷ Moreover, whilst the UK remains outside of the Euro it has nonetheless pursued a critical stance towards the SGP and has, as noted above, called for a more flexible interpretation of its provisions. Such a position is likely to be reinforced by events such as the publication of a recent ECB Article which suggests that maintaining comprehensive public health provisions and the requirements of the SGP would be increasingly incompatible.⁸⁸

The requirements of the SGP mean the Commission will be able to recommend the Council impose financial penalties against both member states if they continue to run excessive deficits as expected. However in view of the anticipated recalcitrance of France to abide by such a recommendation, and the likely support of Germany, Italy and Britain, the Commission has accepted that 'it is neither economically or politically possible for the Commission to apply sanctions to one of Europe's most powerful member states.'⁸⁹ Indeed

in the face of the likelihood of both Germany and France breaching the relevant reference values the Commission has indicated it is considering a resolution which avoids an overt confrontation with the two most powerful member states. This is likely to involve the Commission recommending that special circumstances apply which justify not applying the financial sanctions required under the SGP.⁹⁰ In this regard the war in Iraq has been considered as a possible exceptional circumstance by Germany, France and Britain and the Commission has previously confirmed that the special provisions of the SGP could be taken as a reference to a war.⁹¹

As this commentary indicates, the functioning of the asymmetric economic and monetary union requires the political support of the national member states – in particular the most powerful members such as France, Germany, and the UK. The Commission has acknowledged this in as much as it is looking for a way of avoiding a direct showdown with France over its excessive deficit. An ECB centric reading of EMU needs to be interpreted in this light. Despite the constitutional autonomy of the ECB, a statute reading of the ECB's centrality clearly has its limitations and, in particular, does not necessarily capture the 'the actual practice in policy-making rather than the formal rules.'⁹² Despite the separation of competences in centralised monetary policy and decentralised fiscal policy 'working relations between the ECB and other policy-making bodies within the EU are necessary for the proper fulfilment of the Euro system's tasks.'⁹³ There exists, therefore, a condition of mutual dependence between the ECB and the member states in successfully managing the European economy, where the ECB's authority ultimately remains contingent upon the political support of the member states. In this regard Dyson notes that '[i]n such a context the technical judgements of the ECB will have to be consistent with domestic political acceptability.'⁹⁴

In practice the member governments 'continue to provide a focal point in the operation of the Euro-zone, even if the rules of the game favour the ECB.'⁹⁵ Drawing on our model of democratic intergovernmentalism we may say that citizens vote for a particular government in the hope that they will reflect their preferences, and if they perceive the incumbent government has failed to reflect these preferences adequately, then, in subsequent elections the electorate may well vote them out of office in favour of an alternative party or coalition. A government which does not seem to pursue its citizens' wishes lacks input-oriented legitimacy. Whilst economic and monetary policy is continually framed in terms of a mid-term orientation, 'real life takes place in the short term'.⁹⁶ Thus whilst a medium term perspective may be appropriate for central bankers to judge the effectiveness of their policy, for ordinary citizens short term economic shocks and imbalances can have real negative impacts on key issues such

as their employment opportunities, wage levels, and savings values. It is to their democratically elected governments that these citizens look at such times, and with whom primary responsibility for their management lies. Accordingly despite its statutory autonomy in the pursuance of price stability through managing the monetary policy instrument for the entire Euro area, the ECB's legitimacy remains tied to the support of the national governments, and therefore 'if it [chooses to ignore the real problems of the member state governments, its basis of legitimacy with those governments and the citizens of Europe will be undermined.'⁹⁷

Despite its supranational status and constitutional autonomy, the ECB's legitimacy ultimately depends upon the support of the national states and their citizens. Accordingly, the following two sections describe and evaluate the mechanisms for voice and representation (input-oriented legitimacy) and effective fate control (output-oriented legitimacy), in order to evaluate the proposal that the ECB's legitimacy is primarily intergovernmental.

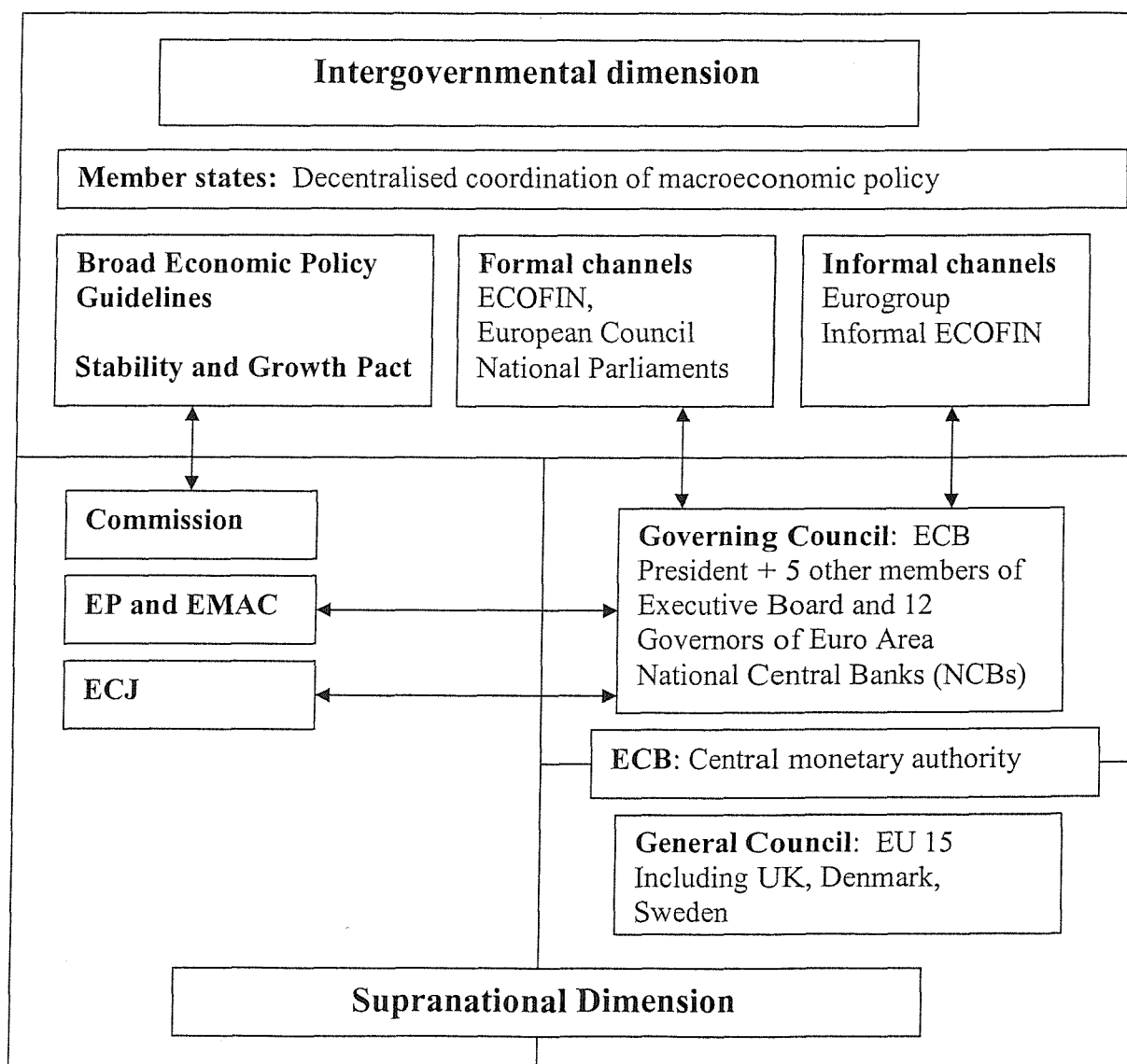


Figure 4.1. Principal features of EMU Institutional Architecture

4.5. Input-oriented legitimacy: voice and representation.

The channels of voice and representation within EMU are both supranational and intergovernmental. They reflect the mixed institutional pathways of voice and representation adopted within the EU more generally and the Euro area more specifically in which, '[t]he EU and national levels are at once separate and interacting.'⁹⁸ The principal supranational channel for representing European citizens is the EP in conjunction with the competent parliamentary committee – the Economic Monetary and Affairs Committee (EMAC). In particular the EP has formal powers in relation to the appointment of the ECB President and other members of the Executive Board and to hold hearings of the Executive Board Members. In addition, in view that the ECB is embedded within the institutional framework of the EU, EU citizens are also offered the opportunity of voice through the European Court of Justice (ECJ) and the process of judicial review.⁹⁹ Formal intergovernmental voice and representation occurs through the EU intergovernmental institutions such as the European Council, which selects the members of the Executive Board, the ECOFIN, which has regular contact with the members of the ECB, and directly through member states' appointment of, and hearings with, their national central bank representative on the ECB Governing Council – the principal decision-making body.

Alongside these formal channels of intergovernmental representation it is argued that more informal opportunities of voice operate through institutions such as the Eurogroup. The EU Treaty and the ECB Statute bestow considerable autonomy on the ECB constraining the formal opportunities to direct the ECB's policy positions. In view of the limited formal opportunities for voice and representation the importance of the informal channels of input-oriented legitimacy are consequently very important.

4.5.1. Supranational channels of voice and representation.

The formal powers of the EP in relation to the ECB principally concern the appointment of the ECB President and the other members of the Executive Board. Furthermore, it holds regular hearings of the Executive Board members before the EMAC and the ECB's presidential address is given before a plenary of the EP. Opinion varies with respect to the power of the EP in relation to the ECB. Dyson contends that ostensibly the EP is a 'junior partner' and 'is more spectator than player in the operation of the Euro Zone.'¹⁰⁰

In contrast, Lord claims that, 'the Treaty provisions on parliamentary involvement represent with best combination of central bank independence and democratic accountability that is obtainable within the parameters of the EU's political system.'¹⁰¹ The EP asserts that it is, 'the only directly elected institution at this [supranational] level' and therefore, 'is a particularly appropriate institution to hold the ECB to account.'¹⁰²

In relation to its powers over the appointment of the ECB Executive Board, strictly speaking the provisions of the EC Treaty and the ECB Statute only accord the EP with a right to be 'consulted' upon the choice of candidate proposed by the European Council.¹⁰³ However, the EP has, according to Lord, 'put a maximal interpretation on its Treaty powers to scrutinise the Central Bank.'¹⁰⁴ It has achieved this by instituting under its own internal rules, procedures detailed in rule 36 for the appointment of the ECB President and other members of the Executive Board.¹⁰⁵ These internal procedures specify that the candidate shall appear before the competent committee (EMAC); that the committee shall make a recommendation to the EP as to whether the candidate should be approved; and if the opinion of the EP should be negative then the Council shall be requested to withdraw the nominee and submit a new candidate.¹⁰⁶ In developing these internal procedures Lord suggests that the EP has, 'sought to turn its right to be consulted on the appointment of the ECB's executive into a power akin to that of the US Senate to 'hear' and confirm nominees for the Federal Reserve.'¹⁰⁷ Indeed, in a recent statement on the EP's role in the appointment procedure Christa Randzio-Plath, chair of the EMAC, compared the relationship between the EP and ECB with that of the US Congress and Federal Reserve, commenting that '[t]he hearing is only one part of the broader role - entrusted to the European Parliament, much like the US Congress vis-à-vis the Federal Reserve - of oversight and constant monitoring of our Central Bank ...'¹⁰⁸ During his hearing before the EMAC in 1998, President designate Wim Duisenberg was asked on a number of occasions whether he would take up the Presidency in the event of a negative vote by the EP. In response he answered, 'I would look very carefully at the grounds on which that decision was based and at the degree of support such a decision had in the European Parliament.'¹⁰⁹ When pressed on this point later on in the hearing, Duisenberg stated that, '[i]f there was a wave of unanimous disapproval, that would be different for me than if there was a slim majority.'¹¹⁰ Accordingly, despite the importance of these hearings, there is a clear sense in which the EP's powers over the appointments to the Executive Board remain conditional.¹¹¹

In addition to its role in the appointment of the President and other members of the Executive Board, the EP also has powers conferred upon it by the EU Treaty and the ECB

Statute to receive an annual report by the ECB President, which may be followed by a general debate.¹¹² When receiving the President's annual report the EP has decided to hear it at a plenary session rather than in committee in order to 'obtain maximum publicity'.¹¹³ At his own discretion the ECB President has additionally 'expressed his willingness to appear before the European Parliament at least four times a year, apart from the presentation of the annual report.'¹¹⁴ Finally, the ECB President and other members of the Executive Board may be heard by the EMAC, at its request or on the initiative of the ECB Executive Board.¹¹⁵

The EP has used the opportunities afforded by these meetings to voice its opinion regarding the objectives pursued by the ECB tenaciously; interrogating the President and the other members of the Executive Board in relation to their views concerning the relationships between the Bank's principal objective of price stability and its secondary responsibility to, 'support the general economic policies in the Community'.¹¹⁶ In view that both objectives are specified in the Treaty and ESCB Statute, Lord argues such an approach is completely in line with the principle of central bank independence, where it 'constrains the agent to achieve' its mandated objectives.¹¹⁷

During the meeting between the President-designate, and the EMAC in May 1998, Duisenberg was asked on two separate occasions to comment on the relationship between the primary objective and the secondary objective of supporting the broader economic positions of the EU economies. In its March 2001 meeting with the ECB President, the EMAC again asked the President to explicate the relationship between price stability and the other EU economic policies, such as employment and growth, and explain the ways in which it was promoting them.¹¹⁸ Only two months later, in its meeting in May 2001, the EMAC further pressed the President on this very same issue.¹¹⁹ The transcripts of these meetings reveal that throughout these engagements the responses provided by Duisenberg have consistently conflated two goals, contending that the pursuance of price stability is the best way the ECB can contribute towards the broader economic objectives. The EMAC has not been prepared to accept this line of argument, and in this respect the comments made by a member of the EMAC in an extended conversation with the ECB president are exemplary:

Mr President, with all due respect, you have just repeated for the umpteenth time your credo. Once again, we all agree that your primary task is to uphold price stability. But at the same time the Treaty does tell you that you should act towards social and economic cohesion. It is not enough to say that by fighting inflation you are making adequate contribution to the other tasks required of you under the Treaty.¹²⁰

Most recently in its meeting with the new President-designate, Jean-Claude Trichet, the EMAC has demonstrated its intention of continuing to attempt to vigorously constrain the ECB to pursue both of its objectives, and specify the relationship between them. In this regard, the Chair of the EMAC put it to Trichet that ‘we still do not know when and under what circumstances the European Central Bank supports economic policies’; at the same time asking him, ‘[h]ow do you see the different duties that you have to carry out under your mandate to work towards financial stability?’¹²¹ The effectiveness of the EP’s representations and voice is clearly related to its regular contact with the ECB and its ability to constrain it by engaging it in a dialogue concerning the pursuance of its objectives. In this regard Lord contends that, ‘the Bank will have less scope to evade responsibility by keeping goals vague, or by changing them as its goes along.’¹²²

The ECB is provided with considerable autonomy from the Community political institutions, reflected in its location outside of the normal institutional structure provided for in Article 4 of the Treaty.¹²³ Nonetheless the Treaty provisions grant the ECJ the right to give preliminary rulings concerning the validity and interpretation of the acts of the Bank.¹²⁴ The regulations and decisions made by the ECB have legal status; they ‘may be invoked by interested parties in national courts assuming that the conditions for direct effect are met.’¹²⁵ In view that the rules regulating the ECB are located within the Treaty and the Statute which constitute primary law:

[a]ll decisions adopted by the ECB take direct effect in all Member States and therefore it is possible for undertaking and private individuals who consider themselves to have suffered from a measure infringing on their rights as established by an ECB act to claim damages before a domestic court.¹²⁶

The opportunity of voice for EU citizens provided by judicial review requires considerable qualification though. Firstly, despite the direct applicability of its legal instruments, these ‘acts have only a very limited direct effect on individuals.’¹²⁷ Furthermore the ECJ has previously ruled that, ‘the rights of individuals within the monetary policy are extremely limited in relation to the State.’¹²⁸ Under such conditions it is contended that individuals are unlikely to receive an effective judicial remedy.¹²⁹ Accordingly it may be fairly concluded that:

[e]ven though the legislative powers of the ESCB are subject to judicial review by the ECJ, which often is not the case with these agencies, the powers of the Bank represent quite a far-fetched model of indirect participation ...¹³⁰

Both the EP and the ECJ thus provide formal supranational channels of voice and representation between European citizens' and the ECB. Nonetheless there are clear restrictions placed on these opportunities for input. In considering the EP's relations to the ECB it must be acknowledged that, along with the other political institutions of the Community, it is restricted from attempting to formally instruct the ECB. Furthermore, its enhanced role in the appointment of the Executive Board and the institutionalisation of the regular meetings with the ECB President, reflect its own institutional creativity and the goodwill of the ECB, rather than formal powers per se. These limitations regarding its 'horizontal'¹³¹ influence are compounded when the institutional and normative weaknesses of the vertical links between the EU citizens and the EP itself are taken into account. In particular, as was noted in the preceding chapter, (section 3.2.), as the electoral cycle of the EU legislature is not connected with the appointment of the executive, the elections themselves are primarily second order in nature; shaped by nationally constituted debates and low voter turnout.¹³² Accordingly, this raises serious questions regarding the EP's claim to be acting in the name of the European citizenry.

With these reservations in mind, we will now turn to the intergovernmental channels of voice and representation.

4.5.2. Intergovernmental channels of voice and representation.

The formal intergovernmental channels of voice and representation are provided both by the institutional links between the intergovernmental community institutions (the European Council and the ECOFIN) and the ECB, and by the institutional links between the member states and the ECB, constituted by the decentralised structure of the ESCB. The EU Treaty confers the power to appoint the President and other members of the ECB principally upon the heads of the member state, upon a recommendation from the ECOFIN. In addition formal channels of communication are required, under the Treaty and ECB Statute, between the ECOFIN and the ECB. In this respect the President of the ECOFIN may participate in the meetings of the ECB Governing Council, and may submit a motion for deliberation. Moreover the Council are required to invite the ECB President to any meetings in which it is discussing matters relating to the objectives of the ECB. Finally the ECB is required to

address a report to the European Council and the ECOFIN and, in relation to the latter duty, the ECB president is required to present this report to the ECOFIN in person.¹³³

During his confirmation hearing before the EMAC, President-designate Wim Duisenberg noted that, the requirements for nomination by the heads of state do not make any reference to nationality.¹³⁴ However he conceded that ‘ultimately appointments like these are political appointments’ adding that ‘[o]nly in most cases they are not surrounded by so much commotion.’¹³⁵ The commotion to which he referred concerned the conflict between the French and the Dutch (supported by Germany) concerning the proposed candidate for the ECB presidency. Duisenberg had succeeded Lamfalussy as the President of the EMI, on the general understanding that he would also be the first ECB President.¹³⁶ This understanding had been contested by French President Chirac from the outset.¹³⁷ Chirac cultivated the support of the Socialist Prime Minister Lionel Jospin, culminating in November 1999 with the announcement of a rival French candidate, Jean-Claude Trichet.¹³⁸ The conflict between France and the Netherlands was resolved after extended negotiations within the European Council, leading to an informal agreement that Duisenberg would not complete his full term of eight years office.¹³⁹ In a revealing comment made about this deal, at the press conference announcing Duisenberg’s selection as the ECB President Designate, Chirac contended that it was normal for countries to represent their own interests and argued that this was exactly what the French had done by nominating Trichet.¹⁴⁰ Despite Buiter’s contention that it was ‘a rogues’ agreement’, and expressed ‘hope and expectation that the first incumbent will be treated it with the respect it deserves’, it seems that the terms of the intergovernmental agreement have held sway.¹⁴¹ In February 2002 Duisenberg did indeed announce his intention to stand down after four years and Trichet was selected as the next Presidential candidate by the ECOFIN in July 2003.¹⁴²

Under the provisions of the Treaty and the Statute, the President and the other members of the Executive Board are appointed for fixed, non-renewable terms of office of eight years.¹⁴³ During his appointment hearing in May 1998 Duisenberg indicated that the period of eight years was a compromise between different national periods. Nonetheless the choice of a relatively long, non-renewable, period of office, from which the incumbent can only be removed in the case of ‘serious misconduct’, or if he is unable to perform his duties,¹⁴⁴ is clearly designed, ‘to prevent political interference and provide for a high level of autonomy.’¹⁴⁵ However, contra this logic, Brentford suggests that, ‘[a] non-renewable term of office can encourage a member of the Executive Board to adapt policy very slightly in order to give leeway to national interests, in the knowledge that the term of office is coming

to an end and where future career prospects are to be considered.’¹⁴⁶ The validity of such an argument would seem to be borne out in view of the political interference in relation to Duisenberg’s and Trichet’s appointments outlined earlier in the discussion.

The level of intergovernmental influence over the ECB is reinforced by the overall membership of the principal authoritative decision making body, the Governing Council. Its membership comprises the President and the five other members of the Executive Board, and the twelve Governors of the national central banks.¹⁴⁷ This means that the Executive Board - the more overtly supranational component of the Governing Council - is in a permanent minority,¹⁴⁸ each member having one vote and the Council acting by a simple majority.¹⁴⁹ The Governing Council has a collective responsibility to pursue its mandate in respect of the whole Euro area.¹⁵⁰ Nevertheless the EMAC have pointedly inquired in respect of the national governors: ‘[a]re they responsible only to the President of the Central Bank or do they maintain some kind of responsibility to the Member States?’¹⁵¹ Despite their European mandate, it remains that the NCB members of the Governing Council are appointed by their national governments and are not subject to approval by the Executive Board.¹⁵² Moreover, during their term of office the central bank national governors remain accountable to their national parliaments.¹⁵³ The tension surrounding the European mandate vis-à-vis national interests has come to the fore nowhere more prominently than in relation to the openness of the decision making process, in particular the refusal of the Governing Council to publish its minutes or voting records. The Chief Economist of the ECB, Issing has justified this stance on the grounds that it bolsters the collective sense or responsibility of the Governing Council and to limit the influence that national politicians may knowingly exert on their central bank governor.¹⁵⁴ Implicitly at least, this stance suggests that national interests hold sway in the Governing Council. Considering this issue Dyson notes that national central bank officials are well-represented in the specialist committees that prepare the decisions for the ECB governing council, sometimes chairing the meetings, ‘and hence have an opportunity for continuing influence.’¹⁵⁵ The nature of the relations between the supranational and intergovernmental institutions remains a thorny issue, and continues to be tested. Thus at Trichet’s nominee hearing before the EMAC in 2003, a member of the committee asked, ‘is the ECB such a fragile construction that it cannot take this [greater openness]? You hint that there is unity, but that there are also national interests. You hint that the unity is fragile and therefore the ECB cannot be open.’¹⁵⁶

The most regular contact between the ECB and the national government representatives occur in the context of the Governing Council-ECOFIN meetings. The

President of the ECOFIN may participate in the meetings of the ECB Governing Council, and may submit a motion for deliberation. Moreover the ECB President is invited to ECOFIN meetings which concern the matters of EMU. In relation to these exchanges Trichet notes 'every fortnight we meet in the flesh, which creates very close links.'¹⁵⁷ However, as with all relations with the ECB, the political actors are formally bound by respect for the institution's independence. In this context the ECB has been active in countering by national politicians' overt public attempts to influence its behaviour. The attempts by the German Social Democratic Finance Minister, Oskar Lafontaine, are highly illustrative in this regard. Lafontaine vocally advocated the ECB reprioritised growth and employment objectives and challenged the monetary consensus by promoting Keynesian demand-management policies.¹⁵⁸ The confrontation with the ECB concluded with Lafontaine's resignation as Finance Minister, illustrating 'the risks of pursuing too confrontational a policy of 'voice' in dealing with the ECB.'¹⁵⁹

Despite the formal restrictions placed upon the member states, in relation to their attempts to influence the ECB, and the clear failure of openly confronting the ECB, more informal indirect ways of, 'shaping the unspoken expectations of the EMU process', need to be considered.¹⁶⁰ Elgie continues, '[i]n this regard, there is the potential for the Euro group to play a key role.'¹⁶¹ The Euro group was conceived as a political counterweight to the ECB, as an outcome of French-German negotiations.¹⁶² In order to protect the autonomy of the ECB, the Germans resisted French calls for an 'economic government', and instead conceded the establishment of an informal forum of the Euro area members.¹⁶³ Whilst it lacks a treaty basis or formal authority, its informal quality may well also be its strength, through its capacity as a 'generator of informal resources'.¹⁶⁴ The meetings are small - restricted to ministers, European Commissioner and ECB President, each having one accompanying person.¹⁶⁵ Indeed the ECB has been keen to emphasise the informal nature of the Euro-group, noting that it 'could be regarded as an attempt to establish, at the euro area level, a communication channel comparable with the *informal* contacts between governments and central banks which traditionally exist within nation states.'¹⁶⁶ Duisenberg expressed his understanding of it at the outset as 'an informal get-together'.¹⁶⁷ Informality pervades other ECB-member state interactions also. In this respect informal ECB-ECOFIN meetings are regularly held for 'frank and open discussion - free from the usual procedural constraints of the Council'.¹⁶⁸ Even in the context of the formal Governing Council meetings, Brentford suggests that, '[p]articipation ... even in the absence of voting rights, may afford a greater influence on the decision-making process than imagined.'¹⁶⁹ The efficacy of this informal

approach was indicated by the ECB's first interest rate cut in 1999, following Lafontaine's resignation. At the press conference announcing the cut, Duisenberg replied that he, 'did not have that much difficulty' with the reporter's words, when asked if he had met the governments half way.¹⁷⁰ Subsequent attempts at tacit policy influence can be detected, such as the 'coded call' recently made to the ECB by the SPD-Green coalition in Germany to cut interest rates, in order to promote economic growth;¹⁷¹ further indicating the perceived potential of establishing, 'a more discrete and subtle dialogue with the ECB.'¹⁷² This said, as noted in the preceding discussion, the relations between the ECB and certain member states - in particular France - have become increasingly fractious, involving public criticism of the Stability and Growth Pact and overt admissions in relation to breaches of the EMU fiscal and budgetary rules.¹⁷³ The stance of the French government can be related to its 2002 election commitments to make tax cuts and, from the perspective of the model of democratic intergovernmentalism, a national government's commitment to an election promise is completely justifiable in terms of input-oriented legitimacy; by pursuing the cuts the government would be articulating the preferences of (at least some of) its national citizens expressed at the ballot-box.

The tax cuts may also be justified in output-oriented terms as a policy measure to promote national employment and economic growth. These policy areas remain within the strict competence of the member governments, and their relative capability to deliver on these responsibilities is a direct measure of their output-oriented legitimacy in this regard. On the other hand, competence in relation to monetary policy and the pursuance of the principal objective of price stability has been transferred to the ECB. In order for the ECB to achieve output-oriented legitimacy it needs to fulfil this mandate, as it has persistently emphasised. However it also needs to be recalled that the ECB is required to balance its primary responsibility for maintaining price stability with the secondary goal of supporting the general policies of the member states, thus complicating the criteria of output oriented legitimacy. These issues are considered in the following section.

4.6. Output-oriented legitimacy: Effectiveness.

As noted in the opening section of this chapter, output-oriented legitimacy implies 'effective fate control' – that is the capacity of governments to achieve 'a high degree of

effectiveness in achieving the goals, and avoiding the dangers, that citizens collectively care about.¹⁷⁴ Under conditions of increasing interdependence, constituted by the processes of globalisation and Europeanisation, autonomous economic and monetary management by European national states has become increasingly ineffective. In order to achieve greater fate control for their citizens the Euro member states have agreed to coordinate their national economic policies and delegate monetary policy to the ECB.

The rationale behind these institutional commitments and self imposed constraints is to increase policy credibility, where credibility, 'is based on the expectation that an institution can fulfil the functions it has been delegated and will properly carry out the function it is entrusted with.'¹⁷⁵ Credibility reduces the transaction costs, 'because agents act on the basis of what they believe will happen, not on what public authorities say they would like to happen.'¹⁷⁶ Thus, although in 1990 France had a lower rate of inflation than recently reunified Germany, its long term interest rates were still higher because the financial markets ascribed France with a higher 'risk premium', reflecting their disapproval of the Keynesian expansionist policies pursued under Mitterrand in the early 1980s which had resulted in three separate currency devaluations.¹⁷⁷ Credibility is, 'of paramount importance in EMU' and in this respect it is inherent in its 'constitutional design'.¹⁷⁸ Indeed, Trichet referred to it as 'the greatest success of the euro'.¹⁷⁹ In achieving credibility we may argue that the ECB achieves a 'form of legitimacy that is created through beneficial results'.¹⁸⁰ Nonetheless as Hodson and Maher argue:

there is an inherent tension in achieving a balance between credibility (with its audience of the markets) and legitimacy (with its audience of the general public) of the economic and monetary policy-mix, where credibility and legitimacy are conceptually distinct but causally related.¹⁸¹

However, in the final instance, 'legitimacy rests with the ability of the institution to deliver policy outcomes', which in turn depends upon building and maintaining credibility or market legitimacy.¹⁸² Thus, despite inherent tension, the two concepts are also mutually supportive. In this respect Verdun and Christiansen contend that '[i]t is thought that once EMU provides successful economic effects, its institutions will gain credibility and legitimacy'.¹⁸³

4.6.1. Supranational effectiveness.

The ECB's principal objective, as laid down by the EC Treaty and the ECB Statute, is the maintenance of price stability.¹⁸⁴ This is a euro area-wide mandate, applying to the euro economy overall, rather than any particular state or region in particular. In this regard, Dyson remarks on the Executive Board's sense of 'special responsibility to the European public that transcended any notion of accountability to elected governments.'¹⁸⁵ The ECB itself has asserted that the achievement of output oriented legitimacy ultimately depends upon whether it achieves price stability within the Euro- area:

[w]hether or not a task has been accomplished must be evaluated by reference to the observable policy outcome. The primary objective of the Eurosystem is to maintain price stability in the euro area. This primary objective is the ultimate benchmark against which the performance of the Eurosystem has to be evaluated.¹⁸⁶

Neither the Treaty or the Statute provide a definition of price stability and so, 'it is left to the ECB to provide an operational expression of its primary objective', thus; '[a]ny body ... charged with holding the central bank accountable is therefore strictly speaking not provided with an effective yardstick to evaluate the performance of the ECB.'¹⁸⁷ In order to pursue its mandate the ECB has adopted the 'Stability-oriented monetary policy strategy of the ESCB', which contains a quantitative definition of price stability.¹⁸⁸ The ECB has defined price stability as 'a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2% ... over the medium term'.¹⁸⁹ By announcing a quantitative definition of price stability the ECB contends that it has provided 'in precise terms, the yardstick against which the Eurosystem's performance should be measured'.¹⁹⁰ However, the ECB remains at liberty to change its definition of price stability, 'whenever it deems such a step necessary and no one can prevent it from doing so.'¹⁹¹ In practice its freedom to do so is mitigated by its institutional relations with the EP where regular meetings with the EMAC provide the ECB with, 'less scope to evade responsibility by keeping goals vague, or by changing them as it goes along.'¹⁹²

The current definition of price stability adopted by the ECB raises difficulties of interpretation and measuring the bank's effectiveness in achieving price stability. Firstly, although price stability is defined as a rate of inflation of below 2 percent in the medium term, the medium term remains undefined.¹⁹³ Secondly, although the principal objective of

price stability is fairly straight forward, the strategy adopted by the ECB to explain its policy is far more complicated. The ECB's Stability-oriented monetary policy strategy incorporates both money supply and inflation targeting, which it refers to as the 'two pillars'.

The twin pillars of monetary aggregates and non-monetary indicators provide the framework, which the ECB uses 'to organise the analysis and presentation of the information relevant for monetary policy making in order to maintain price stability.'¹⁹⁴ The first pillar - which assigns a prominent role for money, incorporates a quantitative reference value for monetary growth - an annual growth rate of 4½ percent for the broad monetary aggregate M3¹⁹⁵ - alongside an analysis of its key components and counterparts and other leading monetary and credit indicators pertinent to developments in the medium term price level.¹⁹⁶ The second pillar - a broadly based assessment of other non-monetary economic indicators - encompasses a wide range of variables, such as: wages; the exchange rate; bond prices and the yield curve; various measures of real activity; fiscal policy indicators; price and cost indices; business and consumer surveys; and inflation forecasts, in order to assess both short and medium term price developments.¹⁹⁷ These pillars are not targets in their own right. Rather they are instrumental in achieving the primary goal of price stability, in providing a framework for the analysis and presentation of monetary policy making.¹⁹⁸

Commenting on this complex strategy Wynne remarks that it, 'might seem to defeat the purpose of articulating a strategy in the first place', and concludes that '[h]aving to detail all these contingences makes it considerably harder to communicate with the general public'.¹⁹⁹ Commenting on this dilemma the ECB remarks that, 'some trade-off between simplicity and openness may exist.'²⁰⁰ Remarking upon the ECB's communications policy Issing contends that, 'the 'public's right to know' has to be balanced by the public's need to understand', and furthermore, that "'more information' does not necessarily and by itself contribute to greater clarity.'²⁰¹ This leads us to address the highly technocratic nature of EMU, in which monetary policy involves 'highly complex cause-effect relations.'²⁰² In order to pursue its mandate the ECB embodies high levels of technical expertise,²⁰³ relating to how the financial markets operate, retaining market confidence, and averting financial crises.²⁰⁴

The ECB bankers may be viewed as an epistemic community who share a belief in the cause effect mechanisms in generating inflation,²⁰⁵ used to interpret the mass of monetary and economic indicators and reconcile potentially conflicting signals.²⁰⁶ In this respect the public at large are at a considerable cognitive disadvantage, relying to a great extent upon the ECB's own pronouncements to judge the Bank's effectiveness in maintaining price stability. In this respect we may conclude that 'it is almost impossible for outsiders to demonstrate that

the ESCB is mistaken its judgements'.²⁰⁷ Indeed under these conditions, Lord questions the capability of the EMAC – a central supranational channel of voice and representation - to 'mobilise specialised forms of knowledge in an immensely technical policy area.'²⁰⁸

The ECB identifies two main audiences who it is required to convince regarding its credibility and effectiveness - 'the public in general, and the financial markets in particular.'²⁰⁹ In this regard Leino suggests that 'every statement by a central bank is ... a message to the market and is intended to influence market operations',²¹⁰ and Wyplosz contends that, '[m]ost central bank communication is geared at financial markets and financial media ... while general information geared at the general public takes a backseat.'²¹¹ In view of the proximity of the bankers to the financial markets and the very real likelihood that effectiveness will be judged primarily by the financial market actors, rather than by EU citizens, this again highlights the tension between market and democratic legitimacy. The emphasis on the preferences of the financial markets above the general public instantiates what Sassen has described as 'economic citizenship', where economic actors, as opposed to state citizens are increasingly viewed as the relevant constituency by institutions of governance.²¹² (See section 2.3.1.).

4.6.2. Intergovernmental effectiveness.

Despite the ECB's insistence that its level of effectiveness should be measured strictly on the narrow criterion of price stability, as already noted, it has been also delegated the additional responsibility 'to support the general economic policies in the Community',²¹³ including the promotion of, 'a high level of employment and of social protection'.²¹⁴ This is important because, whilst a medium term perspective may be appropriate for central bankers to judge the effectiveness of their policy, for ordinary citizens short term economic shocks and imbalances can have real negative impacts on key issues such as their employment opportunities, wage levels, and savings values. In this respect, any lasting notion of output-oriented legitimacy is more likely to depend upon achieving the 'appropriate policy mix',²¹⁵ despite attempts by the ECB to conflate the two objectives.²¹⁶ Within the division of competences under the asymmetric union, the primary responsibility for wider macro-economic policies such as fiscal and employment issues remains devolved with the member states, despite mechanisms of coordination (see section 4.4.). Thus, the final policy mix and

the output-oriented legitimacy of EMU will be determined not only by the ECB but by the member states as well, who will continue to be answerable to their national citizens. The underlying importance of the role of national states in providing output-oriented legitimacy is underscored when we consider experiences of asymmetric shocks within the Union.²¹⁷ In order to further consider this matter, it is useful to return to the theory of Optimal Currency Areas introduced earlier in the chapter (section 4.1.).

OCA Theory suggests that the, 'conditions for an OCA are that members of the currency union should experience mostly symmetric shocks and that economic cycles should be synchronous.'²¹⁸ Convergence between the national economies is important because upon entering EMU a single monetary policy has been adopted which suits the average conditions across the union and is therefore not suited to those countries experiencing strong inflationary or recessionary pressures.²¹⁹ Member states within EMU have forfeited monetary policy and exchange rate instruments for the purposes of demand management and adjustment purposes at the national level.²²⁰ Accordingly national responses to asymmetric shocks fall upon a variety of other ameliorating mechanisms such as labour mobility, fiscal transfers and price and wage flexibility.²²¹

Although evaluations in relation to EMU as satisfying the criteria of an OCA are contested, broad opinion seems to indicate that it is not an OCA. Moreover labour force immobility, a highly restricted Community budget and wage and price market rigidities mean that the effectiveness of the range of ameliorating mechanisms is doubtful.²²² In terms of national fiscal autonomy, euro-member states are tightly constrained by commitments made under the SGP. Nevertheless, under circumstances in which European citizens still value full-employment, and responsibility for the broad economic conditions within the Union remain devolved 'the people of Europe will want *their* governments to respond to economic downturns.'²²³

In the event of asymmetrical economic shocks various possible policy responses giving rise to different institutional impacts have been debated – ranging from a renegotiation of the terms of EMU to its complete collapse.²²⁴ The policy stances of France in particular, and the continued difficulties experienced in Germany, alongside the critical comments made by the Commission and the UK, all indicate the likelihood that the terms of the SGP will be renegotiated at some point in the near future, in order that the national states can effect the appropriate policy mix and contribute towards output oriented legitimacy, which continues to be based on ideas of social justice and does merely the absolute pursuit of price stability at any cost. In the final evaluation, in order for EMU to achieve lasting output-oriented

legitimacy it is necessary that the policy mix adopted within EMU is judged by national constituencies to contribute towards output-oriented legitimacy.²²⁵

4.7. Conclusion.

The Model of democratic intergovernmentalism contends that the national state continues to constitute the principal node for transnational democratic legitimacy. Output oriented legitimacy is enhanced as participation in the international organisation increases the state's effectiveness in providing the range of public goods demanded by its citizenry. In terms of input-oriented legitimacy, the preferences of its national citizenry continue to be voiced primarily in the domestic democratic process and are then represented by the national state actors participating within international institutions.

Various aspects of economic theory suggest benefits arising from EMU for national states. Scholarship on Optimal Currency Areas (OCAs) intimates that EMU enables states to regain control over economic and monetary policy under contemporary conditions of increasing interdependence constituted by processes of globalisation and Europeanisation. Additional benefits are derived through increasing economies of scale, lowering currency exchange transaction costs and exchange rate security.²²⁶ Mundell's Assignment Problem contends that under conditions of increasing capital mobility states are constrained in their policy choices regarding monetary autonomy and exchange rate freedom. More specifically, time-inconsistency literature maintains that credible policy commitments are necessary to improve policy effectiveness and prescribes delegation to politically insulated non-majoritarian institutions, to provide the necessary credibility. These insights provide a context in which to understand the expected benefits of EMU; the ways in which it enhances participating states governance capacity and hence output-oriented legitimacy; and reasons for EMU institutional design comprising a politically insulated independent central bank at its centre.

Despite democratic intergovernmentalism's underlying predisposition towards output oriented legitimacy, principal-agency theory guides our understanding of the parallel constitution of input-oriented legitimacy. In particular, it draws attention to the initial delegation of authority by the national political principals and the ultimate option of exit maintained by the participants. Moreover, the continued responsibility of member states for key aspects of macroeconomic policy and their co-control over the overall policy mix,

underpins their continued influence over matters of day to day policy. This is crucial, for despite its mandate towards the Euro area overall, it remains the case that the ECB requires the continued support of the principal political actors - the member states, and their national constituencies. This entails the ECB's sensitivity in relation to differentiated national experiences of EMU and the implementation of its mandate if it is to generate political legitimacy.

Whilst national states public attempts to directly influence the ECB's inflation rate policy have been unsuccessful - as the confrontation with the German Finance Minister, Lafontaine visibly illustrates - more informal attempts at influencing ECB policy are likely to be more fruitful as they do not overtly breach the independence of the ECB. In this respect the Eurogroup is an important actor, providing as it does an informal, intimate setting within which open and frank policy exchanges can occur.

A number of limitations in relation to democratic intergovernmentalism need to be mentioned however, both in terms of the own model's normative prescriptions and its purchase over the legitimacy practices within the EMU. The model prescribes a two level game, giving primacy to domestic politics as the constituency for preference formation and subsequent representation by the state within the international fora. However as Moravcsik admits, within domestic constituencies there exist substantial 'variations in societal influence', and that, '[e]ven where government institutions are formally fair and open, a relatively inegalitarian distribution of property, risk, information, or organizational capabilities may create social or economic monopolies able to dominate policy.'²²⁷ These power inequalities are further exacerbated by differential power resources available to the different member states in their bargaining practices. Within the context of EMU this has led some of the smaller euro-members to voice their discontent in relation to the more powerful states influence within the EMU - especially in relation to their unpunished infringement of the Stability and Growth Pact (SGP) rules.²²⁸ The accommodation of these power asymmetries in power within the model of democratic intergovernmentalism sits uneasily alongside a normative commitment to political equality, except in the most formal of terms.

The marginalisation of certain voices in the state's representations sets clear limits on the authenticity of the state's input oriented legitimacy. This is further undermined by what Moravcsik calls 'agency slack', which refers to the opportunities governments' may have in pursuing policies which are not directly influenced by domestic politics.²²⁹ These opportunities for autonomy are more pronounced under conditions of uncertainty,²³⁰ which are the very conditions under which monetary policy is conducted.²³¹

Uncertainty and technocracy are closely associated and in this respect the influence of a monetarist epistemic community in establishing a 'sound money discourse' has been noted.²³² The importance of the monetarist discourse as a constitutive factor in relation to the type of integration adopted through EMU has already been considered earlier on in this thesis (sections 2.5.1. and 4.4.). The salience of this highly technical discourse operates to exclude potentially relevant voices from the debate. This remains a serious weakness in the institutionalisation of input-oriented legitimacy within the EMU framework and requires further consideration. Accordingly this matter is reflected on in the concluding chapter using the insights offered by the model of deliberative democracy (section 7.2.1).

A further insight offered by the deliberative model concerns the process of social learning within policy regimes. Again this would seem to have relevance in relation to EMU both in the context of the supranational institutions of the ECB, such as the Governing Council and the informal intergovernmental institutions like the Eurogroup, which emphasise the importance of argument and persuasion within policy negotiations. If this is the case, then it challenges the value of an intergovernmentalist framework, which attaches significant importance to domestic politics as the arena for preference formation. Indeed these insights have led some authors to contend that the EMU regime cannot be adequately captured by a 'pure intergovernmentalist framework',²³³ posing instead that it displays qualities of a 'Kantian culture', in which policy formulation is shaped by justifiable arguments rather than fixed bargaining positions.²³⁴ Again this important issue is given further consideration in the concluding chapter (section 7.2.1.).

Despite these weaknesses in the fit between the model and EMU, democratic intergovernmentalism does provide some useful insights concerning the constitution of legitimacy within the regime. It draws our attention to the continued importance of the member states as the principal political units within the EMU without whose support EMU would fail. More specifically it highlights the need for the ECB to accommodate national interests in terms of its policy stance if it is to enjoy output-oriented legitimacy, and the importance of the overall policy mix which requires co-ordination with the member states. Despite its emphasis on output-oriented legitimacy, it does incorporate input-oriented legitimacy through the channels of intergovernmental representation such as the ECOFIN and the Eurogroup. The opportunity for intergovernmental influence is embedded within the asymmetrical institutional framework, which requires the ECB receives member states support in relation to the overall policy mix, in order for it to achieve its principal goal of price stability in the Euro area.

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5. Case study 2: Cosmopolitan Democracy and Gender Policy.

5.1. Introduction.

The EU gender equality regime is delimited by a cluster of policy initiatives and legal provisions, the purpose of which is to promote gender equality.¹ Historically the competencies of the EU have been limited to equal rights in the workplace. However more recent policy initiatives - primarily in the 1990s - have reflected a recognition that gender equality in the workplace can only be achieved with the adoption of commensurate policies in the domestic sphere - especially in those areas concerning family policy, childcare and maternity/paternity provision. Moreover the introduction of gender mainstreaming from the mid 1990s has marked an attempt to extend gender perspectives across all EU policy areas. These policies aim to reduce the exclusion and marginalisation of women and gendered individuals in various areas of life - in particular economic activity - although the promotion of participation in electoral politics and civic associations also receives attention.

Held's model of cosmopolitan democracy is underpinned by the principle of autonomy – the opportunity of individuals to fully participate in both private and public aspects of social and political life.² Therefore the principal concerns of the EU gender equality regime seem to reflect key aspects of Held's model of cosmopolitan democracy, suggesting that we may gather a better insight into the democratic properties of the regime by viewing it through the cosmopolitan model of democracy. The overarching legal framework and positive interpretation of the gender provisions by the ECJ have been crucial in constituting input and output-oriented legitimacy in the EU gender regime. This proposition - that input and output-oriented legitimacy are primarily provided by a cluster of enabling rights embedded across multiple levels of governance, i.e. through a cosmopolitan law is, evaluated in this chapter.

In order to pursue this argument the first section of this chapter (section 5.2.) recapitulates the main features of the cosmopolitan model, paying particular attention to: the need to extend

democracy beyond the state under conditions of economic globalisation and Europeanisation; the principle of democratic autonomy; and the notion of a cosmopolitan democratic law. It is argued that these three 'core pillars' are institutionalised within the EU gender regime and thus that it reflects the cosmopolitan mode's normative and institutional prerequisites (section 3.3.). The substantive developments of the regime are outlined in section 5.4.; from its inception as a single treaty article (119) on equal pay in the 1957 Treaty of Rome, to the far more expansive provisions adopted under the Treaty of Amsterdam, enshrining the principle of gender mainstreaming. This historical narrative reflects on the regime's development as an interpretation of democratic autonomy and the specification of its condition in the contemporary EU. The following sections, (5.5. and 5.6.), evaluate the channels of democratic input and output-oriented legitimacy embedded within the EU gender regime at the present time. It is argued that input-oriented legitimacy is provided through a complex web of networks providing political and especially legal opportunity for civil society voice and representation.³ Output-oriented legitimacy is achieved through the accommodation of the principles of centralisation and decentralisation, specified by the subsidiarity rule, which favours decision-making at the lowest possible level of governance. These opposing principles have been reconciled in the gender rights regime through the adoption of framework directives which are implemented at the national level despite their supranational effect. Both the Commission and the ECJ have actively ensured the entrenchment of a cluster of European-wide gender rights which have contributed towards the development of a common structure of political action. Thus output oriented legitimacy is dispersed across multiple levels of governance: supranational (ECJ, EP enforcement of provision); national (state implementation of directives) and local (individual claims through courts and tribunals).

5.2. *Cosmopolitan Model of Democracy.*

The Cosmopolitan Model of Democracy is premised on the assertion that the congruent and symmetrical relationship between the state and citizens assumed by orthodox democratic theory is increasingly problematic. This symmetry is assumed at two points. The first is between

the citizen-voters and the decision makers, whereby channels are institutionalised through which voter preferences are articulated to the decision makers. The second is between the decision makers and their constituents, whereby the generated policy output affects a territorially bounded citizenry.⁴ This symmetrical democratic relationship, summarised below (figure 5.1) incorporates both input and an output-oriented dimensions of legitimacy.

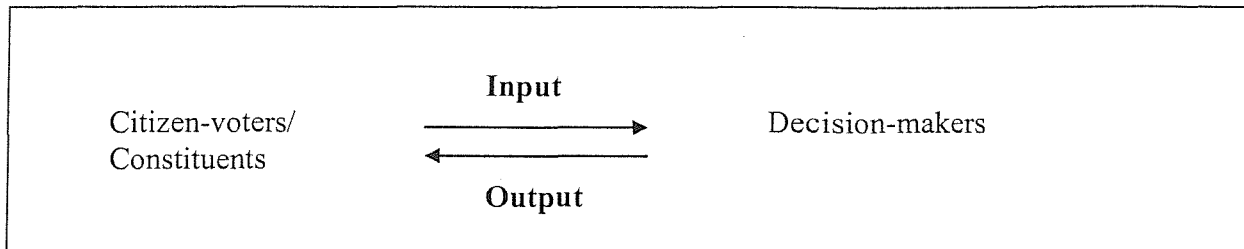


Figure 5.1. Territorially bounded model of democracy.

The symmetry between the political authority of the modern state and its national constituency is problematised by processes of globalisation Europeanisation which are bringing about ‘the growing interconnectedness, and intensification of relations, among states and societies.’⁵ Increasingly forces outside of the territorially delimited state are impacting on its citizens whilst simultaneously reducing its capacity to enact policies on their behalf. In order to re-establish democratic legitimacy, Held advocates a programme of ‘double democratization’; ‘the deepening of democracy within a national community ... combined with the extension of democratic forms and processes across territorial borders.’⁶ This requires that the principle of autonomy - the equal opportunity for access and participation by all persons in the structures which determine the conditions of their association⁷ - must be entrenched within the multiple sites of power which operate both within and across the modern state structure.⁸ This entails the development of a cosmopolitan democratic law and transnationally representative institutions.

5.2.1. *Cosmopolitan Democratic Law.*

Held maintains that in order for citizens to equally benefit from democracy it requires the entrenchment of the principle of democratic autonomy – the equal experience amongst individuals of the right to self determination. If citizens are subject to nautonomy⁹ - that is their opportunities are constrained because of ‘unacceptable structures of difference’ - they are restricted from ‘fully participating in the determination of their own lives.’¹⁰ Held specifies these unacceptable structures of difference in terms of sites of power, which are:

an interaction context or institutional milieu in and through which power operates to shape the capacities of people; that is, to mould and circumscribe their life chances, effective participation and share in public decision-making.¹¹

Held identifies seven distinct sites of power in which nautonomous forces operate to exclude and marginalise particular groups of people, whilst benefiting others. These sites of power are: the body; welfare; culture; civic associations; the economy; coercive and organised violence; and legal and political institutions.¹² In order to ensure citizens are able to fully participate in the determination of their own lives, Held argues that a bundle of corresponding enabling rights – health, social, cultural, civic, economic, pacific, and political - are required.¹³ These rights, which guarantee a shared structure of political participation, constitute a democratic public law, which lays down a set of criteria by which the democratic quality of laws, institutions, organisations and practices can be evaluated and adapted accordingly.¹⁴

However, as noted above, increasing global interconnectedness challenges the assumed symmetry between the territorial state and its national citizenry, thus undermining a state-centric democratic solution. Where contemporary sites of power are both transnational as well as national, democracy needs to be transnationalised as well via a process of double-democratisation:¹⁵

[d]emocratic law needs to be buttressed and supported by an international structure of such law or by what I should rather simply call ‘cosmopolitan democratic law’.

By cosmopolitan democratic law I mean, in the first instance, a democratic public law entrenched within and across borders.¹⁶

This cosmopolitan democratic order involves the democratisation within and across the multiple levels of governance. Held identifies a number of institutionalised levels of governance and power which he believes offer the basis for developing a fully fledged cosmopolitan order. This includes the role of an enhanced UN providing the basis of a global parliament, the creation of an interconnecting legal system and international court with compulsory jurisdiction and the enhanced role of regional institutions such as the EU.¹⁷ Cosmopolitanism envisages instituting input and output-oriented legitimacy through global, regional, national and sub-national parliaments which are entrenched in an overarching and binding cosmopolitan law. A graphic summary of this cosmopolitan model of democracy is illustrated below in figure 5.2.

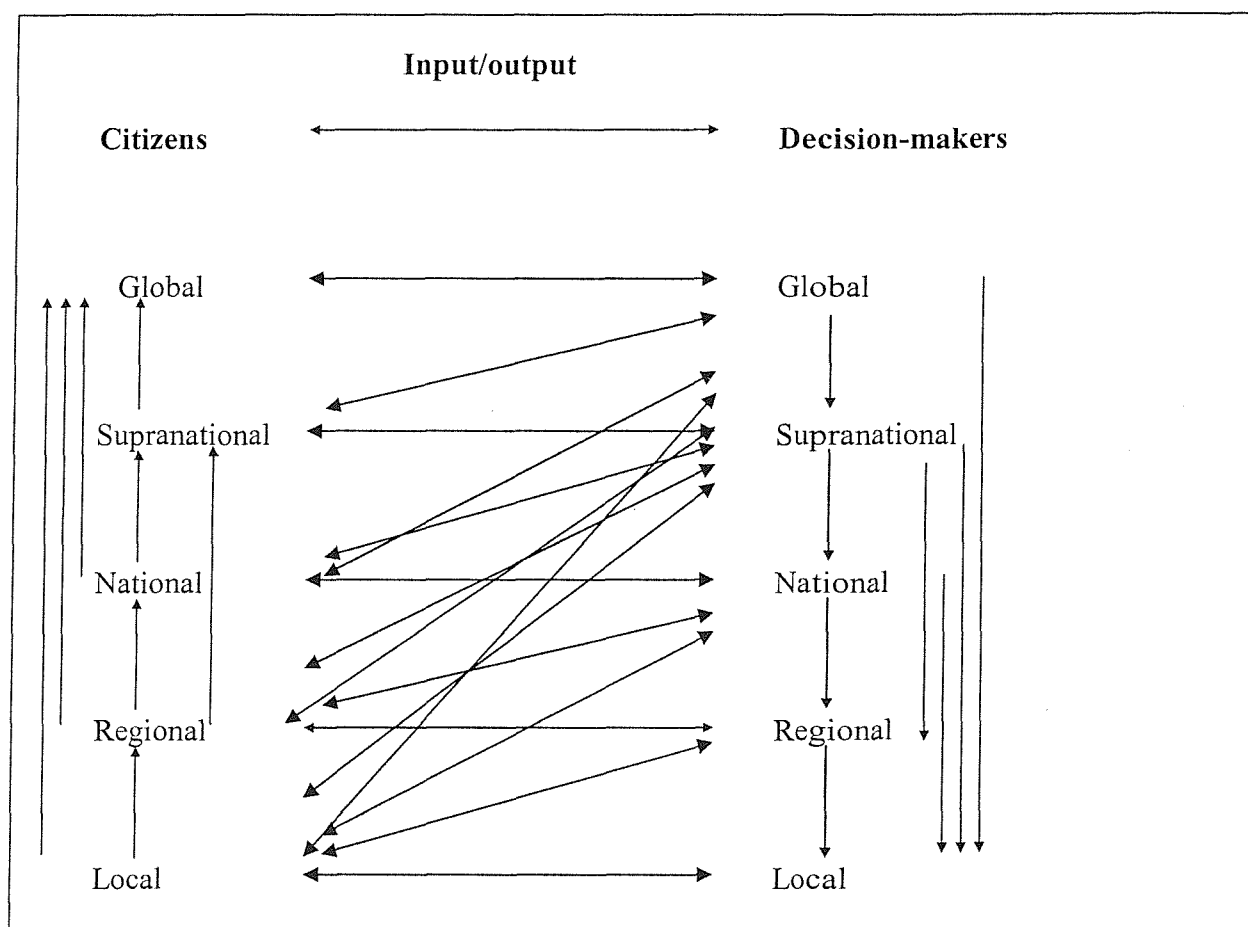


Figure 5.2. Cosmopolitan Model of Democracy.

The next section (section 5.3.) analyses aspects of the EU's political and legal framework, interpreting them in relation to the cosmopolitan democratic prescriptions outlined above.

5.3. EU structure as a cosmopolitan democratic framework.

The aspects of the cosmopolitan democratic framework outlined above may be grouped into three core pillars. These are: (1) a commitment to double democratisation - that is the deepening of democracy within existing territorial boundaries and their extension beyond these borders; (2) a commitment to the principle of autonomy – the full and equal participation of all citizens in determining the terms of their association; and (3) the realisation of these commitments through the development of a common structure of political action - that is through a cosmopolitan democratic law. The following section evaluates the extent to which these core pillars are articulated in the EU.

5.3.1. Pillar 1: Commitment to double democratisation.

A recognition that autonomous forces operate both within and across the territorially-bounded state, thus giving rise to multiple communities of fate, problematises maintaining an a priori commitment to nationally constituted democracy. Where communities are affected by overlapping sites of power, which are not wholly located within the territorial confines of the state, a clear case exists for alternative conceptions of political community which reflect the overlapping sites of power, and their variable geometry. Thus, the cosmopolitan model advocates re-conceptualising notions of community and citizenship in multiple forms other than solely with reference to the national state. In an established cosmopolitan order:

[p]eople can enjoy membership in the diverse communities which significantly affect them and, accordingly, access to a variety of forms of political participation.

Citizenship would be extended, in principle, to membership in all cross-cutting political communities, from the local to the global.¹⁸

Notions of multiple citizenship have been established in the EU by the TEU and Treaty of Amsterdam, reflecting the cosmopolitan prescription for the extension of citizenship rights beyond the state. Following the ratification of the Treaty of Amsterdam, all EU Member State citizens are now also citizens of the European Union. Importantly the EU Treaty specifies that '[c]itizenship of the Union shall complement and not replace national citizenship.'¹⁹ Whilst EU citizenship is dependent upon national citizenship, and hence does not completely sever the link between national and European citizenship, the exercise of EU citizenship rights is not exclusively mediated through the national state. For instance in some instances - where the condition of 'direct effect' applies - individuals can pursue legal claims before national courts citing European legislation.²⁰ Moreover since 1979 MEPs have been directly elected by EU citizens rather than being appointed by the member-states. However, the state is not entirely bypassed and a considerable amount of EU policy is still interpreted and implemented by the national state. Thus, citizenship is framed with reference to multiple levels of governance – subnational, national and supranational - within the EU, which interconnect in a variety of ways according to the definition of the policy issue, the procedural and legal provisions, the aims and strategies of civil society actors and so forth.

The existence of overlapping and interconnected levels of governance at a variety of levels, both within and beyond the state, requires deciding upon the most appropriate level of governance in relation to any particular issue. Moreover, where multiple levels of governance overlap, it is not immediately apparent which level of governance is most appropriate. Indeed, Held warns us that there is a clear danger 'that political authority and decision-making capacity will be 'sucked' upwards in any new cross-border democratic settlement. In response he prescribes adopting the lowest possible level of governance in any given situation, according to the principle of subsidiarity.²¹ In terms of regional level governance - the level of governance directly applicable to the EU - he asserts that, 'decision-making and implementation belong to the regional level if, and only if, the common interest self-determination can only be achieved effectively through regional governance.'²²

The EU adopted the subsidiarity principle in the TEU, committing the EU, in principal at least, to bringing decision-making 'as closely as possible to the citizen.' In Føllesdal's words, [s]ubsidiarity, on this view, may go 'all the way down'.²³ This interpretation of subsidiarity is consistent with cosmopolitanism's commitment to decentralised decision-making, thus, 'maximising each person's opportunity to influence the social conditions that shape his or her life.'²⁴ Similarly in keeping with cosmopolitanism's emphasis in relation to multiple-communities of fate and the ultimate withering away of the state, (see section 3.4.2.), subsidiarity may be 'invoked against Member States by their regions, draining nation state powers from within.'²⁵ However, the TEU also expresses an alternative view of subsidiarity simply as a means of interpreting the division of competence between the member states and the EU; an interpretation which has been reinforced by the protocol on the Amsterdam Treaty.²⁶ As Føllesdal comments, 'this conception of subsidiarity seems to grant unwarranted powers to Member States', and is so doing 'embeds states even further, together with any injustice that exists between them'.²⁷

5.3.2. Pillar 2: Commitment to the principle of autonomy.

The principle of autonomy – the equal opportunity for all citizens to participate in determining the terms of their association - requires the institutionalisation of bundles of empowering rights in order to create a common structure of political action. EU policy interventions do seem to be directed towards reducing social inequality, exclusion and marginalisation in a number of policy areas including, environmental regulation, health and safety and gender equality, through the provisions of constitutionally based empowering rights.²⁸ This is not to suggest that the EU fulfils the ideal requirements of cosmopolitan law, nor should we expect it to do so. As Held notes the anticipation of ideal autonomy remains a regulative principle which desirable though it may be is unlikely to ever be fuller realised.²⁹ More restricted improvements in the conditions of autonomy are likely to be realised in the near future. Indeed headway made by the EU is likely to be modest; in view that it does not articulate a

general equality principle but rather protection against discrimination in a limited number of areas.³⁰ However, given the existing commitment to various types of equality, which have been given effect through a range of political and legal provisions, does suggest the EU's potential for further instituting the principle of autonomy in Europe.

5.3.3. Pillar 3: A cosmopolitan democratic law.

In order for the principle of autonomy to be realised the cosmopolitan model of democracy prescribes that it is necessary to entrench it within a cosmopolitan legal framework constituted by an overlapping cluster of empowering rights within and across the full range sites of power which give rise to autonomy. This legal framework is distinguished from simple legislation. Rather it is a 'constitutional structure',³¹ and provides the basis for testing whether proposed legislation conforms with the principle of autonomy, 'opening up the possibility of a judicial review or hearing before a constitutional court should clashes occur between the former and the latter.'³² The constitutional nature of a cosmopolitan democratic law means that it is, 'most appropriately conceived as a domain of law different in kind of the law of states and the law made between one state and another, that is, international law,' both of which would be required to conform to cosmopolitan prescriptions.³³

A number of aspects of EU law resonate with these requirements of a cosmopolitan law. Whether or not the Treaty basis of the EU fulfils the requirements of a constitution is a moot point.³⁴ Nevertheless, they do provide a *de facto* constitution.³⁵ Although the founding Treaties of the EU are the outcome of international agreements - that is a creation of international law, there has been a tendency amongst lawyers to detach it from its international sources and emphasise its *sui generis* nature.³⁶ This supranational quality of EU law requires that an amendment to the Treaties can only be 'enacted in conformity with the specific procedures provided by the Community Treaties themselves.'³⁷ This interpretation has been reinforced by the rulings of the ECJ. Through its rulings the ECJ has 'tried to ensure and protect the autonomy of European Community law both vis-à-vis national law and international law.'³⁸ To ascribe it

autonomy from both national and international law is not to argue that it is entirely detached from them. In this respect it is suggested that EU law:

may be explained with apparently equal persuasiveness in very different terms: whether as a (semi) autonomous supranational legal order separate from both national and international law or as an alternative or additional but interdependent dimension of either national public law or international law.³⁹

Using the cosmopolitan lens, we may view these developments as contributing towards establishing EU law as the normative guide through which to judge the other levels of law; that is as a cosmopolitan law. The role of the ECJ has been central in this formulation. Through its rulings it has established the concept of direct effect and the principle of the supremacy of EU law.⁴⁰ The supremacy of EU law means that, in those areas in which the EU has competence, national law must conform to EU law, and the rulings of the ECJ are binding on the national courts. The concept of direct effect means that an individual can directly claim rights under the provisions of EU legislation.

With respect to international law, the ECJ has increasingly 'shown a more open attitude to using international law as a source for the interpretation of Community law.'⁴¹ This has not only been in respect of the interpretation of external community action - such as treaty making but also in the interpretation of internal community rules. For instance, even prior to the TEU making explicit reference to the European Convention of Human Rights, the ECJ increasingly used it to identify fundamental rights within the EU.⁴² However, whether or not the increasing enmeshment of EU supranational law with international law strengthens or undermines the cosmopolitan qualities of EU law is unclear. As Crawford and Marks note the main tenets of international democratic law, in particular the notions of self-determination and electoral oversight remain state-centric, and therefore they 'sound a note of caution with respect to international law's role in the project of cosmopolitan democracy.'⁴³

For its part, the ECJ, in its capacity as the authoritative interpreter of European law, wields considerable power in relation to the contextual relationship between national, EU and international law in any given instance; and whether the nature of the obligations take direct or indirect effect. These decisions made by the ECJ are of great consequence in that they shape the nature of the channels of policy input-oriented legitimacy and interpret the nature and extent of

citizens' rights and thus have a direct bearing on their capacity to shape the conditions of their association.⁴⁴ Thus, whilst, conceptually, the EU supranational legal framework resonates with aspects of cosmopolitan law, this on its own is not sufficient to establish that the EU constitutes a cosmopolitan order. In addition it is necessary to show the extent which it generates an overarching cluster of substantive empowering rights.

The key features of Held's Cosmopolitan Model of Democracy and the comparable features of the EU are summarised in table 5.1, below. These features will be considered in greater depth in relation to their articulation in the EU gender equality regime. The following section, (section 5.4.) offering an historical summary of the regime's development, outlines the progressive extension of the range and depth of empowering gender rights and evaluates their contribution towards a cosmopolitan trajectory. The following sections evaluate the channels of input-oriented legitimacy, (section 5.5.), and output-oriented legitimacy, (section 5.6), institutionalised within the contemporary gender rights regime.

Core pillar of Model of Cosmopolitan Democracy	Comparable EU pillars
De-nationalised sites of power generate overlapping communities of fate requiring the extension of citizenship rights below and beyond the state	Introduction of EU citizenship by TEU. Multiple demoi - European as well as national - depending on policy issue.
Commitment to double democratisation within and beyond state borders extending democratic accountability	Multiple sites of democracy providing voice and representation (input) and legally enforceable rights (output) at various levels of governance (local, national supranational)
Commitment to providing governance at the lowest possible level as appropriate for the policy issue in question.	Principle of subsidiarity - to guide decision regarding the lowest appropriate level of governance.
Commitment to principle of autonomy - equality of access and participation of all citizens in determining the terms of their associations.	Specification of principle of non-discrimination in relation to an increasing number of issues which marginalise and exclude EU citizens.
Overarching cosmopolitan democratic law – constitutional structure guaranteeing a range of empowering rights to underpinning the principle of democratic autonomy.	EU treaties - create de facto constitution. Supremacy of EU law over national law means the empowering rights it enshrines are enforceable across member states.
Legitimacy of institutions of governance distinguished by their adherence to cosmopolitan law. Intervention in the economy guided by principle of democratic autonomy.	Institutions of governance and businesses legally required to respect the principles of equality upheld by EU law.

Table 5.1. Cosmopolitan principles and corresponding aspects of EU.

5.4. Evolution of the EU Gender Regime: A Cosmopolitan Trajectory?

The principle of gender equality was alluded to in the founding treaty of the European Community in 1957. Article 119 guaranteed the ‘principle that men and women should receive equal pay for equal work.’⁴⁵ Its inclusion was principally the result of pressure exerted by the French government and textile industry as equal pay measures had already been obtained in France and there was concern to avoid social dumping and market distortions.⁴⁶ Moreover, in 1951 ILO Convention (100) on equal pay between male and female workers for work of equal value had been adopted,⁴⁷ and subsequently ratified by Belgium, France, Germany, and Italy by 1957.⁴⁸ The existence of this convention and the debates surrounding it had ensured that prior to the adoption of Article 119, the issue of equal pay between men and women was ‘already a legitimate issue and in the public domain’.⁴⁹ Accordingly, the article was adopted not as a reflection of socially progressive aspirations by the founding states, but rather concerns with, ‘the extent to which the creation of the common market required the harmonisation of social costs to the employer in terms of fair competition.’⁵⁰ Indeed the economic nature of the provisions was indicated by their original inclusion in a section of the Treaty which dealt with distortions to competition, before being transferred to the provisions dealing with social policy.⁵¹ However despite its inclusion in the original treaty, Article 119 remained ‘a dead letter’⁵² until the ECJ seminal rulings in ‘Defrenne vs. Sabena’ the 1970s.

5.4.1. Defrenne vs. Sabena.

Gabrielle Defrenne worked as an air stewardess for Sabena airline from 1951- 68, until her employment was terminated under a clause which provided that female employees should cease to be members of the cabin crew on reaching the age of 40. Whilst working for Sabena she had received a lower salary than male stewards.⁵³ At the request of Belgian lawyers Marie-Thérèse Cuvelliez and Eliane Vogel-Polsky she allowed her treatment by Sabena to form the basis of a case against the airline, citing Article 119.⁵⁴ In all, three rulings were made by the ECJ, only one of which was upheld - *Defrenne II*.⁵⁵ The successful claim concerned the lower salary she had

received during her employment with Sabena.⁵⁶ The ruling of the court was highly significant because it upheld that Article 119 had direct vertical and horizontal effects, meaning it could be invoked both against private employers as well as the state, even in the absence of national legislation.⁵⁷ This has opened the way for a stream of new cases,⁵⁸ - by 1999 roughly a third of the 120 ECJ equality rulings dealt with pay inequality under article 119.⁵⁹ Despite the *Defrenne II* ruling only advancing the principle of equal pay in the workplace, the case raised awareness of gender discrimination and contributed towards developing a political context for the extension of EC legislation on women's rights.⁶⁰

5.4.2. Legislation in the 1970s.

The 1970s were the most conducive period for advancing the EC's social policy competence thanks to the concurrent presence of a number of mutually reinforcing factors. These included the prosperous economic times and the political pressure of second wave feminism.⁶¹ In particular, Hoskyns emphasises the importance of the external pressure created by second wave feminism and its ability to empower 'lone women' - that is individuals committed to women's equality within the EC institutions and national delegations - to make practical gains.⁶² That two directives concerning women's equality were introduced in the second half of the 1970s following the OPEC oil crisis and subsequent economic downturn, would seem to support the positive contribution lone women and the feminist movement.⁶³ However other political events were also relevant, such as the retirement of de Gaulle in 1969 and the subsequent entry of Denmark, Britain and Ireland in 1973. The inclusion of the new states' representatives in the Commission - including the Social Affairs DG - introduced new ideas and fresh thinking for advancing social policy.⁶⁴ More broadly the majority of the EU member governments at this time were Social Democratic who recalled the social unrest of the 1960s.⁶⁵

Three directives were passed during the 1970s whose origins were in the first Social Action Program (SAP) adopted in 1974.⁶⁶ These were the 1975 Equal Pay Directive (EPD)⁶⁷; the 1976

Equal Treatment Directive (ETD)⁶⁸; and, the 1978 Social Security Directive (SSD).⁶⁹ All three directives were ostensibly 'liberal' in their purpose. This is to say that they aimed at ensuring the equal treatment of men and women. This formal reading of equality did little to challenge the historical discrimination against women or redress the gender imbalance through developing the principle of equality of opportunity. However in the discussions leading up to the adoption of both the ETD and the SSD the issues of reconciling work and home life - women's double burden of labour - and the role of positive action were considered. During discussions held in the *ad hoc group on women's work*,⁷⁰ the need to incorporate a commitment to equal opportunities as well as equal treatment was recognised, and despite considerable revision within the Commission, the draft directive was forwarded to the Council retaining a commitment to equal opportunities. This was subsequently removed by the Council and the final version of the directive only permitted such measures by the member states rather than committing them to positive action.⁷¹

5.4.3. Legislation and promotional policies the 1980s.

The decline of the economic prosperity which had helped carry the equality legislation of the 1970s meant that, '[b]y the early 1980s, the EC's vision of social policy entirely vanished.'⁷² The presence of prolonged economic recession and unemployment prompted EU national governments to reconsider the relationship between economic and social policy in the context of the urgent need to increase the competitiveness of the European economies vis-à-vis the United States and Japan. Two distinct policy frames emerged within Europe - those that advocated deregulation and the reduction of labour market costs - exemplified by the UK Conservative government under Margaret Thatcher from 1979, and a 'European middle way' - favoured by France, Germany and the TUs - which would balance the need to improve economic competitiveness with the provision of a minimum set of rights for workers encouraging solidarity through European society.⁷³ Increasingly the former became the dominant policy frame, or discourse, and 'market liberalization and deregulation ... acquired the status of a new

orthodoxy.⁷⁴ The hegemony of the deregulatory position was symbolised and assured by the member states decision in 1985 to complete EU market liberalisation and adopt the Single European Act.⁷⁵ The environment of European economic recession and the rise of a principally neo-liberal discourse help explain the EU's weak legislative programme during the 1980s, during which only two directives were adopted. The first of these extended the application of the SSD to private occupational pension schemes also, as had originally been envisaged in the SSD.⁷⁶ The Self Employed Directive (SED)⁷⁷ required, 'in a very weak form', the application of the principle of equal treatment to self-employed occupations including agriculture.⁷⁸

Partially redressing the limited legislative achievements of the 1980s were the Commission's 1st and 2nd Action Programs. Each of these programs was adopted by the Council in the form of a Resolution⁷⁹ - a weak non-binding legislative instrument.⁸⁰ The first program was based on the dual principles of strengthening individual rights to achieve equal treatment and the promotion of equal opportunities through positive discrimination.⁸¹ Therefore alongside the equal treatment provisions the program outlined legislative proposals that would provide parental leave and access to child care services for working women and an expansion of vocational education opportunities.⁸² The Second program 'built upon the momentum of the momentum of the First Action Programme'.⁸³ It retained similar initiatives to the first program such as an emphasis on improving women's status as workers through the expansion of vocational training.

These 1980s Action Programs sanctioned a broader approach to women's relations to the labour market despite the salience of market liberalisation as the means to achieve much needed improvements in economic competitiveness. A similarly broad approach was incorporated in the Commission's proposal of the Social Charter in 1989, subsequently adopted by the Council later that year. The section on gender equality noted the need, '[t]o ensure the implementation of the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development.'⁸⁴ It also confirmed that '[m]easures should also be developed enabling men and women to reconcile their occupational and family obligations.'⁸⁵

5.4.4. Legislation and mainstreaming in the 1990s.

In the early 1990s legislation concerning equality issues was passed by the EU, strengthening the equal treatment of women in the workplace and extending the EU's competence into the domestic realm - specifically with respect to childcare. The Commission issued a Recommendation and an accompanying code of practice on Sexual Harassment in 1990 in response to a Council Resolution earlier in the year. Two principle aims were contained in the Recommendation. The first was to 'encourage the promotion of awareness that sexual harassment is contrary to the principle of equal treatment in the Equal Treatment Directive of 1976'.⁸⁶ The second was, 'to provide the basis for a definition to be used in the Member States to determine what conduct constitutes sexual harassment in the workplace.'⁸⁷ The use of a Recommendation continued the trend to adopt non-binding 'soft-law'. However an ECJ ruling in 1990 concerning a Commission health and safety recommendation⁸⁸ stated that 'while not of binding nature such as a directive [recommendations] can not be considered as lacking in legal effect.'⁸⁹ In respect of the sexual harassment legislation, since the code of practice is annexed to the recommendation, which, in turn supplements the binding 1976 ETD, it follows that national courts are required to take into account the provisions of the recommendation and the code where relevant.⁹⁰ Between 1992 and 1995 three pieces of legislation were adopted concerning issues of maternity and parenting - quite explicitly transcending the public/private sphere division upheld by much of the earlier policy provisions - although maintaining the link with the workplace through the reconciliation of work and family responsibilities. The impact of these provisions has been varied however. The Commission introduced the 1992 Maternity Directive⁹¹ under the Health and Safety provisions of the EC Treaty therefore bringing it under Qualified Majority Voting (QMV) in the Council.⁹² The directive provided for fourteen weeks maternity leave of which two weeks are compulsory. In respect of the compulsory element this represented only an improvement in Portugal and the UK.⁹³ In the same year a recommendation on childcare was adopted,⁹⁴ which according to Rossilli has remained a 'dead letter for member governments'.⁹⁵ The initiation of the 1995 Framework Agreement on Parental Leave, which was later transformed into a directive,⁹⁶ owes its existence, as in the case of the Maternity Leave Directive, to the Commission's creative entrepreneurship in utilising alternative institutional venue's in

which to develop policy.⁹⁷ In the case of the Maternity Leave Directive the Commission avoided the obstacle of unanimity in the Council by treating maternity as a 'sickness'.⁹⁸ The Parental Leave Agreement was adopted using the Social Dialogue procedure formalised by the Social Policy Agreement (SPA) of the TEU, incorporating the Commission and European Social Partners, whilst for the most part sidelining the Council and the influence of the member states.⁹⁹ However the provisions of the directive are weak, leaving the gender allocation of parental leave to the national governments, and do not challenge any of the existing national rules.¹⁰⁰

Alongside these specific legislative measures, one of the most significant developments in the 1990s - the notion of gender mainstreaming - was introduced in the Community's third Action Program 1991-6, although it remained an undeveloped area until the formulation of the fourth Action Program 1996-2000.¹⁰¹ The concept of gender mainstreaming has been described as, 'deceptively simple'; merely involving, 'a commitment to incorporate gender into all areas of public policy, rather than considering women's issues a discrete policy problem.'¹⁰² The idea of mainstreaming is articulated in the EC Treaty, as amended by the 1997 Treaty of Amsterdam, in particular in the revised articles 2 and 3, which commit the EU to equal opportunities for women and men - not simply equal pay or equal treatment in the workplace - but in all its areas of competence.¹⁰³ Pollack's and Hafner-Burton's analysis of the success of gender-mainstreaming across five issue areas within the EU reveals mixed results.¹⁰⁴ Indicating the influence of discourse; the Commission's success of encouraging mainstreaming within the diverse regimes seems to relate, in part, to its ability to, 'strategically frame the issue in order to fit with the dominant frame of a given DG, most often by emphasizing the gains in *efficiency* (as opposed to equality) that are likely to be realized if and when gender is taken into account across the policy process.'¹⁰⁵

The Treaty of Amsterdam extends the range of the EU's equal rights competencies. The single paragraph Article 119 was replaced with four paragraphs of provisions; strengthening the original language on equal pay; providing for QMV in the Council and co-decision making with the EP for future equal opportunities legislation; and permitting states to maintain positive discrimination following the ECJ's Kalanke and Marschall rulings.¹⁰⁶ In addition the revised Treaty incorporates provisions, under Article 13, allowing the Commission to propose measures to combat discrimination based on *inter alia* sex and sexual orientation. The inclusion of sexual

orientation is a significant step in view of its historical reticence to involve itself in this issue, normally justifying its inaction on the basis of the absence of any Treaty competence to legislate on anti-homosexual discrimination.¹⁰⁷ The Commission referred to these new competencies in its proposal for a new directive amending the 1976 ETD¹⁰⁸, which incorporates a binding definition of sexual harassment and will establish that discrimination on the grounds of sexual orientation constitutes a form of gender discrimination.¹⁰⁹

The distinction between discrimination based on sex and that based on sexual orientation is for Elman worrying, who quoting Harrison explains, 'discrimination against a person having a partner of the same sex is discrimination on the grounds of gender'.¹¹⁰ Indeed for a lesbian in the workplace discrimination is experienced both on the grounds of their sexual orientation as well as for being a woman. This takes many forms including sexual harassment through the cultural heterosexualisation of the workplace, or differentiated treatment of mixed sex and same sex family units.¹¹¹ This occurs particularly where derived benefits are made available to spouses but not cohabiting couples due to the exclusion of same-sex couples from the institution of matrimony. Moreover discrimination continues to occur even when derived benefits are extended to the unmarried partners because the ECJ has ruled that businesses are not obliged to extend the same benefits to same sex partners as mixed sex partners.¹¹²

Since the first reference to the principle of equal pay in Article 119 of the 1957 Treaty of Rome, the EU's competence in gender equality has extended in breadth and depth considerably. Whilst its primary competence concerns equality in the workplace in terms of equal pay, equal treatment, pension entitlements, sexual harassment in the workplace and so forth, EU policy has transcended the boundaries of the workplace. Maternity/paternity and childcare provisions have been developed which begin to address the gendered division of labour. Moreover, the policy of gender mainstreaming, enshrined in the Treaty of Amsterdam, extends the issue of equality between the sexes to all spheres of interaction and not just the workplace, and relates sexual orientation to gender. However a note of caution must be sounded in relation to the continued salience of a neoliberal discourse which encourages the interpretation of social policy primarily by reference to efficiency gains rather than explicit values of social justice.

5.5. Input Legitimacy: Voice and representation.

A key dimension of democratic autonomy is active citizenship, associated with the Athenian polis, and then later with Renaissance Republican thought.¹¹³ The notion of the active citizen connotes someone who participates in public affairs.¹¹⁴ It is through their active citizenship that people are able to determine the conditions of their association and thus fulfil the condition of democratic autonomy. Whereas the ancient Republics were small enough to function on the direct participation of all citizens in the matters of government, in view of their geographical size, modern democratic states require representative democracy. Does this mean, as Schumpeter suggested, that citizens have to content themselves with, 'the right periodically to choose and authorize governments to act on their behalf'?¹¹⁵ Whilst voting is a central tenet of liberal democracy, the cosmopolitan model of democracy encapsulates far richer modes of citizenship alongside periodic elections:

if democracy is understood as a double sided process, this state of affairs might be redressed by creating opportunities for people to establish themselves 'in their capacities of being citizens'. The 'active citizen' could once again return to the centre of public life, involving him-or-herself in the realms of both state and civil society.¹¹⁶

Unlike the ancient conceptions of active citizenship, participation in political matters remains voluntary in a cosmopolitan order. 'What is at issue is the citizen's rightful share of the power of governance - the right and opportunity to act in public life.'¹¹⁷ Thus, in relation to the EU gender equality regime a central issue is whether an active gendered constituency exists - both in the state and civil society, and the extent to which this is facilitated by the regime's legal and political institutions.

Charlotte Bretherton and Liz Sperling identify an extensive European-wide women's network which focuses lobbying inputs towards the EU on a range of policy issues: employment and training; maternity; equal rights; pay/pension; race/immigration; health and safety; childcare/parental leave; violence/harassment.¹¹⁸ This network incorporates a range of civil society and institutional actors. The principal EU institutions are the Commission's Equal Opportunities Unit, (EOU), and the EP's Women's Committee. Alongside these political

institutions the ECJ has provided women voice and representation through its legal proceedings. At the sub-national level, local authority equality units and European Officer's are involved. The key non-state actors are women's voluntary organisations and the Trades Unions. As Bretherton and Sperling note, 'at each level, and between levels, there exists facility for networks to develop, merge, share expertise and, thus, strengthen the potential to effect influence.'¹¹⁹ However their findings also show differentiated experiences between the various groups in terms of the extent of their inclusion in the network and their relations to the European power centres.¹²⁰

Civil society.

The voluntary groups are organised at the European level - in some instances with national intermediaries - within a number of umbrella organisations including the European Network of Women (ENOW) and the European Women's Lobby (EWL). However, Bretherton and Sperling's findings indicated that the links between the grass roots movements and national representative groups like the UK National Alliance of Women's Organisations, (NAWO), who sit on European level fora like the EWL, remained weak in some instances.¹²¹ These channels are further criticised for 'not representing the diversity of women's groups'.¹²² Whilst groups can lobby the EU directly, resource constraints raise obstacles to such activities.¹²³ Bretherton and Sperling's findings indicate that the local authorities woman's committees were the most marginalised from the network.¹²⁴ In particular this was because, 'local authorities, unlike the other organization studied, have no direct route into the EU policy-making process.'¹²⁵ This is because their associate status within NAWO does not give them voting rights in the EWL.¹²⁶ Out of the three groups considered by Bretherton and Sperling, the Trades Unions seemed to 'enjoy rather better access to the EU policy process than the other types of organization studied.'¹²⁷ The Trades Unions' European fora is the European Trades Union Congress, (ETUC), whose privileged access to the EU policy process is due, in part, to the development of the European Social Dialogue between the social partners and the Commission from the mid 1980s and formally endorsed by the TEU in 1992.¹²⁸ This process has also occurred below this

‘interprofessional’ European level, involving European industrial sectors and European works councils.¹²⁹ This leads Cockburn to comment that ‘the processes of the European Social Dialogue comprise a *multilevel* and multiphase set of interactions.’¹³⁰ However whilst the Trades Unions may enjoy privileged access to the EU policy making fora, women’s policy have not automatically fared so well. Indeed, Hoskyns notes the Trades Unions have, ‘opposed autonomous organisation and activities for women at the European level of the ground that these would be dominated by professional women.’¹³¹ Moreover the Unions themselves are historically gendered organisations in which women have been, ‘as much engaged with struggle inside the trade unions as with action outside.’¹³² The gendered hierarchy of the trade union organisations is indicated by the poor representation of women in the decision-making bodies. In its recent report ‘The “Second Sex” of European Trade Unionism’, ETUC note that whilst on average their affiliated unions membership is on average 40 percent¹³³, the representation of women in positions of leadership remains less than 25 percent.¹³⁴ In order to address the gender bias ETUC has created women’s structures ‘specifically *to speak for the members of a disadvantaged social group: women*’,¹³⁵ a strategy that has proved easier than increasing women’s representation through the normal procedures of delegation.¹³⁶ At the 1991 Luxembourg Congress the constitution was amended to provide for the representation of the Women’s Committee throughout the various levels of the hierarchy - reserving 10 seats in the Congress, 3 seats on the Executive, and 1 on the Steering Committee.¹³⁷ Nevertheless their representation continues to remains low.

Institutional representation.

Let us now turn to the EU state actors. As noted above, (section 3.2.1.), the EP is the only directly elected EU institution. This seems to have benefited the representation of women. Prior to the first directly elected EP in 1979 the proportion of women members was only 5 percent.¹³⁸ In 1979 the elected female membership rose to 17 percent, and following the 1999 election now stands at 30 percent of total membership.¹³⁹ Whilst this falls far short of gender parity, female representation is still higher in the EP than in all but four of the member states national

legislatures.¹⁴⁰ Reflecting on Anne Philips', 'the politics of presence', Hoskyns notes that 'the presence of women, however, does not necessarily imply change.'¹⁴¹ For instance women MEPs may not necessarily prioritise any sort of 'women's policy'. However, Freedman's research indicates a subjective view amongst women MEPs that their share of the seats constitutes 'a 'critical mass' which allows gender differences in policy-making to emerge'.¹⁴²

Alongside the issue of the 'representation of women as individuals in a gender category', we must also consider, 'the representation of women as a social group'.¹⁴³ This role has been pursued by the Women's Rights Committee, which has been a permanent standing committee of the EP since 1984. It provides a central focus for lobbying groups - the EWL having observer status on the Committee. It also liaises closely with the Commission's Equal Opportunities Unit.¹⁴⁴ Whilst the channels of input into the EP may be numerous and fairly open the overall influence of the EP on EU policy making requires consideration. Elman notes that the 'EP is not a typical legislative body; it does not make laws. It is, instead, a body that influences budgetary decisions and elaborates on EU policy directions through power of amendment and veto on select bills.'¹⁴⁵ The combination of direct elections by universal suffrage and limited powers leads Elman to conclude that 'the EP is the most democratic and least powerful'.¹⁴⁶

A number of authors have considered whether a relationship exists between the EP's relative powerlessness, its high representation of women, and its progressive attitude towards gender issues. In terms of representation, Freedman poses suggests, '[i]t could be then argued that, 'where there is power there are no women; and where there is no power there are women'.¹⁴⁷ In the context of the EP's standpoint on pornography compared to the other EU and member state institutions, Baer comments that:

[t]he Parliament is an exception to European ignorance, yet it is relatively powerless. This powerlessness might, on some level, contribute to its exceptional ability to comprehend the reality of women's lives.¹⁴⁸

In a similar vein, this time however in the context of sex trafficking of human beings, Leidholdt links its, 'sophisticated and feminist understandings of the problems and well-reasoned strategies for addressing it', at least in part with its, 'lack of power to implement its more progressive agenda'.¹⁴⁹

Evaluations of the EP's contribution towards input-oriented legitimacy in relation to the EU gender regime would seem to be mixed. Whilst undoubtedly the 'most democratic' of EU institutions, offering multiple points of access for policy input, able to boast a high representation of women MEPs, and a proactive position in gender issues, it is tainted by an apparent weakness in influencing policy. However, following the ratification of the Treaty of Amsterdam, the EP now shares co-decision making with the Council in relation to workplace gender issues, thereby enhancing its role in the legislative process.¹⁵⁰

The Commission, unlike the EP it is arguably the most undemocratic EU institution - the Commissioners being appointed by their member state governments for renewable 5 year terms. Also contrasting with the EP, the representation of women in the upper ranks of the Commission is very low.¹⁵¹ Between 1995 and 1999 only 5 out of the 20 commissioners were women, whilst on 1994 figures, only 13.5 percent of administrative and management ranks were filled by women even though they amounted to 45.4 percent of the total staff. Out of the very highest 52 A1 grades only 1 was filled by a woman.¹⁵² An outcome of the low representation of women is the charge that the Commission (along with the ECJ and Council) 'have proved not only resistant to change themselves but reluctant to promulgate measures which have this direct aim.'¹⁵³ This claim is partially borne out by Pollack's and Hafner-Burton's findings in relation to the mixed uptake of gender mainstreaming between the various DGs (see section 5.4.4.).¹⁵⁴ This said, since 1976 women have been represented as a social group within the Commission by the Women's Bureau, (renamed the Equal Opportunities Unit) within the Social Affairs Division. Whilst the Unit appears to have remained marginalised within the Commission - its work receiving ignorance or indifference from other DGs¹⁵⁵ - it 'is open to direct from women's groups in member states' thus providing an important node of contact within the European women's network.¹⁵⁶ Moreover it has played an important, albeit uneven role in generating research, coordinating conferences and providing policy initiatives aimed at tackling gender equality in relation to gender and migration for instance.¹⁵⁷ Accordingly it has proved an important institution in representing gendered persons alongside the EP. As a spokesperson for the EWL commented, '[l]obbying is most successful when the EWL, the Equal Opportunities Unit and the European Parliament Women's Committee join forces'.¹⁵⁸

Alongside the 'political opportunity' provided by the Commission and the ECJ has provided important institutional channels for representing women's voices and extending the definition of accepted gender issues; i.e. 'legal opportunity'.¹⁵⁹ As noted above, (section 5.4.), the ECJ's expansive interpretations of Article 119 and derived legislation have extended the EU's gender provisions considerably beyond their initial scope. However, 'the nature of case law implies that there is no systematic and continuous development',¹⁶⁰ and in this respect Wendon notes that, 'outcomes are unpredictable and may produce unanticipated negative consequences.'¹⁶¹

In addition it is important to recognise the impact of the prevailing political environment on the ECJ's interpretation of its role in the political process. Thus, Hoskyns asserts that, '[r]ather than generating a bold move of its own, the Court was responding to political activism among women' when it made its 'audacious' *Defrenne II* ruling in 1976.¹⁶² Similarly Egan notes that, '[r]eflecting the rising sentiments against increased integration after Maastricht, the Court has shifted toward a policy of judicial restraint ...so the prospects for a more active judicial role in promoting women's rights appear slim.'¹⁶³ Interpreting its own judicial role in light of the subsidiarity principle the ECJ has emphasised member states principal responsibilities in social policy issues, thereby constraining its own authority in this policy area.¹⁶⁴ However, despite the ECJ's political embeddedness, De Búrca asserts that:

[u]ltimately it cannot be denied that the ECJ is an institutional actor with a considerable degree of autonomy and normative influence, which plays a significant role in the Community's policy-making process.¹⁶⁵

These political and legal institutions provide multiple dynamic channels of input articulation within and between the various levels of governance from the local to the supranational. The gender regime is characterised by a complex network of non-state and state actors who provide nodes of policy formulation and transference. Umbrella organisations such as the EWL provide European fora for policy articulation; direct policy input from national institutions and indirect representation of grass roots movements. The EP Women's Rights Committee and the Commission's EOU provide important channels of voice and representation, in addition to contributing to research, policy initiatives, and monitoring existing gender equality

policy. In addition the EP has facilitated the promotion of gender issues as a consequence of the high presence of women MEPs. The ECJ has extended the accepted definitions of gender and provided voice and representation to gendered individuals, especially through its preliminary judgements.

5.6. Output legitimacy: Development of positive enabling rights.

The cosmopolitan model of democracy anchors output-oriented legitimacy to the principle of inclusiveness. Thus, 'if the decisions at issue are translocal, transnational, or transregional, then political institutions need ... also to have a wider scope and framework of operation.'¹⁶⁶ The decision to develop an EU competence in relation to gender issues has stimulated by an appreciation of the transnational implications of creating a single market and the consequent ineffectiveness of national regulation. However this tendency towards centralisation (output-oriented legitimacy) is tempered by an equal but opposite commitment towards decentralisation (input-oriented legitimacy), as specified by the principle of subsidiarity (section 5.3.1.).¹⁶⁷ These paradoxical emphases on centralisation and decentralisation are partially reconciled through the specification of cosmopolitan law in 'sufficiently abstract and general terms', rather than 'a detailed regulative framework'.¹⁶⁸ Similarly all binding gender equality legislation adopted by the EU has been in the form of directives - broad framework legislation - rather than detailed regulations, thereby leaving their detailed implementation at the lower levels of governance.¹⁶⁹

A directive, unlike a regulation is not directly applicable requiring that states adopt the necessary measures to implement the terms of the directive. The deadline for the implementation of the directive's provision depends on terms of the particular directive in question. For instance states were given one year to comply with the EPD¹⁷⁰, nearly three years in the case of the ETD¹⁷¹, and a record six years for the SSD.¹⁷² Until domestic law is harmonised with the requirements of a directive its provisions are not available to the citizen's of the recalcitrant state.¹⁷³ Therefore it is clearly very important that the required action is taken to implement the provisions in full and on time. In pursuance of this aim, both the Commission and the member states are entitled to initiate infringement proceedings against a state for non-compliance with the

provisions of a directive.¹⁷⁴ This may involve bringing the case before the ECJ; if the Commission issues a 'reasoned opinion' that the state has not complied with the directive, and then fails to take rectifying action. Although infringement proceedings account for only a relatively small share of the ECJ's case law, their political impact is important.'¹⁷⁵ In 1999 the Commission instigated infringement proceedings against France for not amending its national law concerning the prohibition of women from night work, and sought the imposition of daily fine for the non-implementation of its decision.¹⁷⁶ Decisions have also been brought against Belgium, Denmark, Germany, Greece, Italy, Luxembourg and the United Kingdom.¹⁷⁷ It was only through recourse to infringement proceedings that the EPD, ETD and SSD - cornerstone pieces of gender equality legislation - were fully implemented across the EU.¹⁷⁸

Whilst cosmopolitan law entrenches general rights, leaving their specific implementation to lower levels of governance 'the latter must constitute arrangements which are not open to arbitrary abuse and alteration.' In order to be more than simply rhetorical and have a constitutive core cosmopolitan law must provide, 'a non-negotiable set of orientation points', which provide enforceable rights.¹⁷⁹ The pattern of EU gender equality legislation was established by the EPD, which, along with requiring states to harmonise national law with EU law, also provided that individuals could make direct legal claims, when their rights had been violated. In a 1986 ruling concerning an individual's right to judicial recourse under the ETD, the ECJ upheld the principle that all persons must have recourse and effective remedy in a court or tribunal¹⁸⁰

Directives are not directly applicable - that is to say they do not necessarily create individual rights which may be upheld in national courts. For a directive to have direct effect - that is for it to bestow individual rights which may be upheld in court - the directive must have been transposed into national law and the provisions must be clear, unambiguous and unconditional. Whether a directive satisfies these criteria is a matter for the ECJ's interpretation. In relation to the issue of equal pay the ECJ ruled that Article 119/141 has direct vertical and horizontal effect and thus, 'could be invoked for claims against private employers before the national courts as well as against the State'.¹⁸¹ In its subsequent rulings the ECJ has cited the EPD as implementing Article 119/141 and thus sharing its direct effect, neatly side-stepping the issue that directives do not automatically have direct effect.¹⁸²

Thus the EU legal framework provides a cluster of general gender rights which states and corporations are bound to adopt – that is they provide ‘a non-negotiable set of orientation points’. The progressive orientation of economic and political activity around these standards contributes towards the negation of unacceptable structures of fate constituted by gender discrimination. Despite the rights general nature, and the discretion delegated states in relation to their implementation, attempts at ‘arbitrary abuse and alteration’ have been addressed through the use of Commission reasoned opinions and EP’s infringement proceedings. Furthermore, the direct effect of the provisions has meant that individuals have successfully directly claimed these rights against discriminating states and employers.

5.7. Conclusions.

This chapter has argued that a greater understanding of the democratic legitimacy of the EU gender equality regime can be obtained by analysing it through the model of cosmopolitan democracy. Three core pillars of the model have been specified. (1) A commitment to double democratisation - that is the deepening of democracy within existing territorial boundaries and their extension beyond these borders; (2) a commitment to the principle of autonomy - that is a commitment to equality of access and participation of all citizens in determining the conditions of their association; and (3) the realisation of these commitments through the development of a common structure of political action; an institutionalised cosmopolitan law. Having initially related these pillars to comparable aspects of the EU, the chapter proceeded to evaluate the extent to which the gender equality regime resonates with the cosmopolitan model’s institutional features and normative principles. In order to do so the historical development of the regime was analysed in terms of a cosmopolitan trajectory, followed by an evaluation of the manifestation of input and output oriented legitimacy in the contemporary regime.

Alongside the principally economic provisions of the 1957 Treaty of Rome a social chapter was adopted which contained a commitment to equality of pay between the men and women. Its inclusion was undoubtedly related to economic and political considerations, rather than an overt commitment to the principle of gender equality as a dimension of social justice. Regardless of

the reasons for its inclusion Article 119 contained a *de facto* commitment to an aspect of gender equality in the workplace. Its inclusion provided a focus for second wave feminism in the 1970s, and provided the Commission with a Treaty basis on which to propose further legislation concerning gender equality in the workplace. Through the following decades a wide variety of legislation and political commitments have been adopted extending and deepening the EU's competence in aspects of gender equality. In view of the economic underpinnings of the EU a large portion of the provisions have been directed at the field of employment and cover *inter alia* equal pay for work of equal value; the elimination of direct and indirect discrimination in eligibility for statutory and occupational pensions; protection during maternity; and equal treatment in the workplace including freedom from sexual harassment. Not all provisions are exclusively related to the workplace however. Certain policies bridge the workplace-home boundary through their concern for maternity/paternity issues and childcare for working parents. More recently the adoption of gender mainstreaming has indicated a serious commitment to extend gender equality into all areas of EU policy competence, and gender categories have been extended through the inclusion of provisions on sexual orientation. These policies are an explicit commitment by the EU to eradicate gender inequalities which operate to marginalise or exclude women and other gendered individuals from participation in certain areas of public life. This is to say that they incorporate a commitment to extending the principle of autonomy.

The EU gender equality regime is constituted by, and constitutive of, multiple dynamic channels of voice and representation within and between the various levels of governance from the local to the supranational, thus contributing towards input-oriented legitimacy. A complex network of non-state and state actors at all levels from the individual to the supranational are intertwined in shaping the gender equality agenda, policy framing, adoption and implementation. Significant supranational non-state actors include women's organisations such as the EWL and representatives of the social partners. These highly incorporated actors provide channels of voice and representation from national and grassroots movements. The EP and the Commission provide nodes of representation for these civil society actors, in particular through the Committee on Women's Rights and the Equal Opportunities Unit. In addition the EP as a whole has been committed to women's rights, and, whilst historically, it has been relatively powerless to shape policy, its policy powers have been enhanced by obtaining rights of co-decision with the Council

in all matters of social policy, including gender equality. Alongside these political institutions the ECJ has provided a significant contribution towards the development of the EU's competence in gender equality and the opportunity for voice and representation through its powers of judicial interpretation. Particularly important in this respect have been its preliminary rulings arising from referrals from national courts in relation to the interpretation of EU gender equality provisions, brought by institutional and individual actors.

Output-oriented legitimacy is achieved through the accommodation of the principles of centralisation and decentralisation, specified by the subsidiarity rule, which favours decision-making at the lowest possible level of governance. These opposing principles have been reconciled in the gender rights regime through the adoption of framework directives which are implemented at the national level despite their supranational effect. Non-compliance with the directives has been addressed by the Commission and EP resulting in the successful adoption of principal aspects of the gender legislation. The effectiveness of the rights has been advanced by the ECJ's expansive interpretations, which have extended the scope of the provisions, and established the principle of direct effect in relation to gender provisions under article 119/141.

Despite the impressive level of fit between aspects of the cosmopolitan model of democracy and the features of the EU gender regime, a number of points of caution can be drawn in relation to substantive, institutional and normative features.

Firstly, despite the regime's recent extension beyond the workplace, a high proportion of its policy competence remains firmly entrenched in employment relations. Moreover, even in relation to well established aspects of EU competence such as equal pay, inequalities are still apparent; women accounting for 77 percent of low-income employees.¹⁸³ In order for women to truly enjoy the principle of autonomy it is widely argued that the double burden of labour endured by women must be properly addressed; requiring a 'treaty guarantee of 'women's fundamental rights to reproductive freedom and sexual and reproductive health.'¹⁸⁴

Secondly, despite the existence of a complex network offering multiple dynamic channels for voice and representation, the regime remains hierarchical. Whilst certain actors are highly incorporated such as the social partners and the EWL, other groups with more radical agendas, or which are organised at grass roots levels, experience marginalisation from the key nodes of power. Moreover key actors within the regime such as the Commission, the Council and the ECJ

remain unelected and subject to only limited if any accountability. Whilst the EP is directly elected, the second order nature of the elections and the issue of low voter turnout raise issues concerning its representativeness. Similarly, its limited powers of consultancy under article 13 on issues concerning sex and sexual orientation prescribe strict limits upon the formal influence of its voice in shaping policy.

Normative commitments to gender equality and social justice have proved to be a second consideration to efficiency and competition and the successful adoption of gender initiatives have required framing policy in terms of the dominant neoliberal deregulatory discourse. Accordingly justifications for gender equality remain linked to economic principles rather than principles of social justice per se.

These limitations in relation to input and output-oriented legitimacy are considered more extensively in the conclusion (section 7.2.2.). The continued resilience of substantive inequalities is related to the narrowness of the regime and the absence of a general commitment to equality and more broadly to tensions concerning law and power, especially from gender perspectives. These insights provide a basis for a critique of top-down constitutional approaches to democracy advocated by the cosmopolitan model.

Notes for Chapter 5. Case study 2: Cosmopolitan Democracy and Gender Policy.

¹ Sex and gender are viewed as related but not synonymous terms, where gender refers to the social construction of sexual identities.

² The most extended articulation of which is in David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge, Polity, 1995. For Held's recent thoughts concerning cosmopolitan democracy see David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty', *Legal Theory*, 2002, vol. 8, no. 1, pp. 1-44.

³ Chris Hilson, 'New social movements: the role of legal opportunity', *Journal of European Public Policy*, 2002, vol. 9, no. 2, pp. 244-5.

⁴ Held, 1995, pp. 16-17 and 224-5.

⁵ Held, 1999, p. 84. For an extended discussion of the disjunctures unsettling the congruence and symmetry between state and community see Held, 1995, chs. 4-6.

⁶ Held, 2000, p. 402.

⁷ Held, 1995, p. 7 and ch. 7.

⁸ Held specifies 7 sites of power which undermine people's interest in the principle of autonomy: body; welfare; culture; civic associations; economy; organisation of coercive relations and violence and legal and political regulatory institutions. See Held, 1995, pp. 176-185 and this thesis section 3.4.2.

⁹ See Held, 1995, pp. 167- 172 for a full specification of autonomy.

¹⁰ Held, 2002, p. 26.

¹¹ Held, 1995, p. 173.

¹² Ibid, pp. 176-185.

¹³ Ibid, pp. 191-201.

¹⁴ Ibid, p. 205.

¹⁵ David Held, 'Regulating Globalization? The Reinvention of Politics', *International Sociology*, 2000, vol. 15, no. 2, p. 402, David Held, 1996, *Models of Democracy*, (2nd Ed.), Cambridge, Polity Press, p. 354.

¹⁶ Held, 1995, p. 227.

¹⁷ See Ibid, pp. 227-9 for a summary of these short and long-term institutional reforms.

¹⁸ Held, 1995, p. 272, table 12.1(8).

¹⁹ Article 17(1), (ex Article 8), EC Treaty. See J. H. H. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', *European Law Journal*, 1995, vol. 1, no. 3, pp. 219-258, esp. pp. 252-258 and Joseph Weiler, 'To be a European citizen - Eros and civilization' *Journal of European Public Policy*, 1997, vol. 4, no. 4, pp 495-519 for an extended discussion of supranationalism and its relation to possibilities of multiple democracy and citizenship based on a distinction between inward looking organic national identity and outward looking civic supranational identity.

²⁰ For a more extended discussion of the principle of direct effect see section 5.6 on output-oriented legitimacy.

²¹ Held, 1995, p. 235; Held, 2002, pp. 28-9.

²² Ibid.

²³ Andreas Føllesdal, 'Subsidiarity and democratic deliberation', in Erik Oddvar Eriksen and John Erik Fossum, Eds., *Democracy in the European Union: Integration through deliberation?*, London and New York, Routledge, 2000, p. 96.

²⁴ Held, 2002, p. 28.

²⁵ Føllesdal, 2000, p. 87.

²⁶ Gráinne De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', *Journal of Common Market Studies*, 1998, vol. 36, no. 2, pp. 218-9

²⁷ Føllesdal, 2000, pp. 85, 105.

²⁸ Sylvia Walby, 'The new regulatory state: the social powers of the European Union', *British Journal of Sociology*, March 1999, vol. 50, no. 1, pp. 118-140.

²⁹ Held, 1995, pp. 206-209. See pp. 206-216 for a discussion of the distinctions between ideal, attainable and urgent notions of autonomy.

³⁰ Alexander Somek, 'A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law', *European Law Journal*, 1999, vol. 5, no. 3, pp. 244-5.

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- ³¹ Held, 1995, p. 200.
- ³² Ibid, p. 205.
- ³³ Ibid, p. 227.
- ³⁴ Both Grim and Weiler indicate the EU Treaties constitute the requirements of a constitution in that their provisions legally bind or constitutionalise public power although lacking an explicit normative basis. See Dieter Grimm, 'Does Europe Need a Constitution?', European Law Journal, 1995, vol. 1, no. 3, pp. 282-302, and Weiler 1996, pp. 219-258.
- ³⁵ Walby, 1999, p. 120.
- ³⁶ Christiaan Timmermans, 'The EU and Public International Law', European Foreign Affairs Review, 1999, vol. 4, no. 2, p. 181.
- ³⁷ Ibid, p. 182.
- ³⁸ Ibid.
- ³⁹ Jo Shaw, 'Importing gender: the challenge of feminism and the analysis of the EU legal order', Journal of European Public Policy, 2000, Special Issue, vol. 7, no. 3, p. 407.
- ⁴⁰ Timmermans, 1999, p. 182.
- ⁴¹ Ibid, p. 185.
- ⁴² Ibid, p. 186.
- ⁴³ James Crawford and Susan Marks, 'The Global Democracy Deficit: an Essay in International Law and its Limits', in Daniele Archibugi, David Held and Martin Köhler, Re-imagining Political Community: Studies in Cosmopolitan Democracy, Cambridge, Polity, 1998, p. 85.
- ⁴⁴ In view of the cautious assessment of the democratic qualities of international law offered by Crawford and Marks, the ECJ's interpretations of the relationship between the two forms of law are crucial.
- ⁴⁵ Founding Treaty, cited in Hoskyns, 1996, Appendix 1, p. 212.
- ⁴⁶ Mariagrazia Rossilli, 'The European Community's Policy on the Equality of Women: From the Treaty of Rome to the Present', The European Journal of Women's Studies, 1997, vol. 4, p. 64.
- ⁴⁷ Ingeborg Heide, 'Supranational action against sex discrimination: Equal pay and equal treatment in the European Union', International Labour Review, 1999, vol. 138, no. 4, p. 384.
- ⁴⁸ Ibid, n.112.
- ⁴⁹ Catherine Hoskyns, Integrating Gender: Women, Law and Politics in the European Union, London, Verso, 1996, p. 54.
- ⁵⁰ Ibid, p. 49.
- ⁵¹ Ibid, p. 57.
- ⁵² Simon Duncan, 'Obstacles to a Successful Equal Opportunities Policy in the European Union', The European Journal of Women's Studies, 1996, vol. 3, no. 4, p. 399; M. Grazia Rossilli, 'The European Union's Policy on the Equality of Women', Feminist Studies, 1999, vol. 25, no. 1, p.173.
- ⁵³ Heide, 1999, p. 392.
- ⁵⁴ Hoskyns, 1996, p. 70.
- ⁵⁵ Case C-80/70 Defrenne v. Belgian State (*Defrenne II*) [1974] ECR - 445; Case 43/74 Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (*Defrenne II*) [1976] ECR - 455; Case C149/77 Defrenne v. Société Anonyme Belge de navigation Aérienne Sabena (*Defrenne III*) [1978] EDR - 1365.
- ⁵⁶ Heide, 1999, p. 392.
- ⁵⁷ Ibid, p. 393. See section 5.6. on the significance of this ruling in relation to output-oriented legitimacy.
- ⁵⁸ Hoskyns, 1996, p. 74,
- ⁵⁹ Heide, 1999, pp. 391-2.
- ⁶⁰ Hoskyns, 1996, pp. 73-4.
- ⁶¹ Rossilli, 1997, p. 66; Rossilli, 1999, p. 173.
- ⁶² Hoskyns, 1996, p. 78. Sonia Mazey also emphasises the importance of second wave European feminists as an 'advocacy coalition' campaigning for equal rights legislation. See Sonia Mazey, 'The European Union and women's rights: from the Europeanization of national agendas to the nationalization of a European agenda?', Journal of European Public Policy, 1998, vol. 5, no. 1, pp. 131-2.
- ⁶³ Hoskyns, 1996, pp. 82-3, 97.
- ⁶⁴ Ibid, pp. 79, 81.
- ⁶⁵ Ibid, p. 89.
- ⁶⁶ Rossilli, 1999, p. 173.

- ⁶⁷ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ L45 19.2.1975.
- ⁶⁸ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L39 14.2. 1976.
- ⁶⁹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 10.1.1979.
- ⁷⁰ A consultative group consisting of mainly female member state representative's instigated by Jacqueline Nonon, a French official in the Commission. Elaine Vogel-Polsky, one of the lawyers involved in the Defrenne case was one of the representatives. Hoskyns, 1996, p. 101.
- ⁷¹ Ibid, p. 102-4.
- ⁷² Rossilli, 1999, p. 175.
- ⁷³ Hoskyns, 1996, pp. 140-141; Mazey 1998, p. 147.
- ⁷⁴ Mazey, 1998, p. 147.
- ⁷⁵ Hoskyns, 1996, p. 141.
- ⁷⁶ Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes OJ L225 12.8.1986. The original draft of the SSD applied to both statutory and occupational schemes, but in the process of the negotiations occupational schemes were dropped from the text. Hoskyns, 1996, p. 110.
- ⁷⁷ Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self employed capacity, and on the protection of self-employed women during pregnancy and motherhood OJ L359, 19.12.1986.
- ⁷⁸ Rossilli, 1997, p. 67.
- ⁷⁹ Council Resolution of 12 July 1982 on the promotion of equal opportunities for women, OJ C186, 21.7.82, p. 3; Second Council Resolution of 24 July 1986 on the promotion of equal opportunities for women OJ C203, 12.8.86, p. 2.
- ⁸⁰ Resolutions did not feature in either the ECSC or EEC Treaties, and were first officially used in the Acts of Accession of the three new member states in 1972. Primarily they are manifestations of a commonly held political will, and thus, 'they should remain a flexible tool and not be tied down by too many legal requirements and obligations.' See June Neilson, 'Equal Opportunities for Women in the European Union: Success or Failure?', Journal of European Social Policy, 1998, vol. 8, no. 8, p. 76, n. 4, and Europa Website, http://www.europa.eu.int/eur-lex/en/about/abc/abc_20.html, cited 5 June 2002.
- ⁸¹ Neilson, 1998, p. 69.
- ⁸² Michelle Egan, 'Gendered Integration: Social Policies and the European Market', Women and Politics, 1998, vol. 19, no. 4, pp. 30-31.
- ⁸³ Ibid, p. 31.
- ⁸⁴ Neilson, 1998, p. 72.
- ⁸⁵ Ibid.
- ⁸⁶ Evelyn Collins, 'European Union Sexual Harassment Policy', in R. Amy Elman, Ed., Sexual Politics and the European Union: The New Feminist Challenge, Providence and Oxford, Berghahn Books, 1996, p. 29.
- ⁸⁷ Ibid.
- ⁸⁸ European Court of Justice, Case 322/88 Grimaldi v. Fonds de Maladies [1990] ECR I-4407.
- ⁸⁹ Ibid.
- ⁹⁰ Ibid.
- ⁹¹ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding OJ L348, 28.11.92, p. 1.
- ⁹² Egan, 1998, p. 35. Both the British and Italians abstained from voting.
- ⁹³ Rossilli, 1997, p. 93, Rossilli, 1999, p. 73.
- ⁹⁴ Council Recommendation 92/241/EEC of 31 March 1992 on childcare OJ L123, 8.5.92, p. 16.
- ⁹⁵ Rossilli, 1999, p. 179.
- ⁹⁶ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNCIE, CEEP and the ETUC OJ L445, 19.6.1996, p. 4.

- ⁹⁷ Bryan Wendon, 'The Commission as image-venue entrepreneur in EU social policy', Journal of European Public Policy, 1998, vol. 5, no. 2, pp. 343-4.
- ⁹⁸ Egan, 1998, p. 34.
- ⁹⁹ Wendon, 1998, pp. 343-4.
- ¹⁰⁰ Rossilli, 1999, p. 177.
- ¹⁰¹ Rossilli, 1997, p. 72; Mark A. Pollack and Emilie Hafner-Burton, 'Mainstreaming gender in the European Union', Journal of European Public Policy, Special Issue, 2000, vol. 7, no. 3, pp. 435-6.
- ¹⁰² Sonia Mazey, 'Introduction: Integrating gender - intellectual and 'real world' mainstreaming', Journal of European Public Policy, Special Issue, 2000, vol. 7, no. 3, p. 341. The Commission's definition of the term, although typically more convoluted, correlates with this 'simple commitment': The systematic integration of the respective situations, priorities and needs of women and men in all policies and with a view to promoting equality between women and men and mobilizing all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring and evaluation. Commission of the European Communities (1996) 'Communication from the Commission: Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities', COM(96)67 final of 21 February.
- ¹⁰³ Pollack and Hafner-Burton, 2000, p. 437.
- ¹⁰⁴ The five issue areas are: Structural Funds; Employment policy; Development; Competition policy; and Science, research and development. Ibid, pp. 439ff.
- ¹⁰⁵ Ibid, p. 440. *Original emphasis*. Wendon, 1998, makes a similar argument using the notion of policy framing suggesting that the Commission was able to revitalise social policy in the second half of the 1990s by adopting a strategy of framing social policy as a productive dimension. See, esp. 355ff.
- ¹⁰⁶ Ibid. Case C-480/93 Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3051; Case 409/95 Marschall v. Land Nordrhein-Westfalen [1997] ECR I-6363. Both of these cases concerned the legality of affirmative action policies that gave preference to women in recruitment procedures. Whereas in Kalanke the ECJ ruled that the positive action was discriminatory against men and therefore illegal, in the Marschall ruling the ECJ upheld positive action policies provided men were not excluded from the outset. See Heide, 1999, pp. 402-6.
- ¹⁰⁷ Gill Valentine, 'An Equal Place to Work? Anti-Lesbian Discrimination and Sexual Citizenship in the European Union', in Maria Dolores García-Ramón and Janice Monk, Women of the European Union: The Politics of Work and Daily Life, London and New York, Routledge, 1996, pp. 115-116; R. Amy Elman, 'The Limits of Citizenship: Migration, Sex Discrimination and Same-Sex Partners in EU Law', Journal of Common Market Studies 2000, vol. 38, no. 5, p. 741.
- ¹⁰⁸ COM (2000)334 final: Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
- ¹⁰⁹ The directive enters force in 2005. See Press Release, 'Anna Diamantopoulou welcomes tough new EU rules against sexual harassment at work, Brussels, April 18, 2002.
- ¹¹⁰ V. Harrison, 'Using EC Law to Challenge Sexual Orientation Discrimination at Work', in T. Hervey and D. O'Keefe, Eds., Sex Equality Law in the European Union, New York, Wiley, 1996, p. 275, cited in Elman, 2000, p. 742.
- ¹¹¹ See Valentine, 1996, pp. 114-5.
- ¹¹² European Court of Justice, Case C-249/96, Grant v. South-West Trains Ltd [1998] ECR I-00621.
- ¹¹³ Held, 1995, pp. 5-8.
- ¹¹⁴ Ibid, p. 7.
- ¹¹⁵ David Held, 1996 p. 179.
- ¹¹⁶ David Held, 'Democracy: From City-states to a Cosmopolitan Order?' Political Studies, 1992, XL, Special Issue, p. 20.
- ¹¹⁷ Held, 1995, p. 212.
- ¹¹⁸ Charlotte Bretherton and Liz Sperling, 'Women's Networks and the European Union: Towards an Inclusive Approach?', Journal of Common Market Studies, 1996, vol. 34, no 4, p. 495; Liz Sperling and Charlotte Bretherton, 'Women's Policy Networks and the European Union', Women's Studies International Forum, vol. 19, no. 3., p. 309.
- ¹¹⁹ Sperling and Bretherton, 1996, p. 311.
- ¹²⁰ Hoskyns identifies a similar network which she refers to as the women's European policy network, incorporating the Advisory Committee on Equal Opportunities, the EOU expert committees, the EP Women's Rights Committee,

- women's organisations and feminist groupings, and umbrella organisations such as the EWL, and more recently Trades Union representatives. See Hoskyns, 1996, exp. Chs 7-8 and pp. 202-205.
- ¹²¹ Bretherton and Sperling, 1996, p. 496; Sperling and Bretherton, 1996, p. 312.
- ¹²² Sperling and Bretherton, 1996, p. 310.
- ¹²³ Ibid.
- ¹²⁴ Bretherton and Spelling, 1996, p. 496; Spelling and Bretherton, 1996, p. 310.
- ¹²⁵ Bretherton and Spelling, 1996, p. 496.
- ¹²⁶ p. 496; p. 310.
- ¹²⁷ Sperling and Bretherton, 1996, p. 310.
- ¹²⁸ Cynthia Cockburn, 'Strategies for Gender Democracy: Strengthening the Representation of Trade Union Women in the European Social Dialogue', The European Journal of Women's Studies, 1996, vol. 3, no. 1, p. 8; Cynthia Cockburn, 'Gender in an international space: Trade Union Women as European Social Actor', Women's Studies International Forum, 1997, vol. 20, no. 4, p. 460. See section 5.4.4. on the use of the Social Dialogue procedure by the Commission to advance gender policy.
- ¹²⁹ Cockburn, 1996, p. 9, Cockburn, 1997, p. 460.
- ¹³⁰ Cockburn, 1997, p. 460. *Emphasis added.*
- ¹³¹ Hoskyns, 1996, p. 204.
- ¹³² Ibid.
- ¹³³ 'The "Second Sex" of European Trade Unionism: Research into women and decision-making in Trade Union Organisations. A study of the existing literature and a survey carried out among organisations affiliated to the European Trade Union Confederation, section 2.1, p. 15. http://www.etuc.org/EN/Dossiers/Equality/Women_in_trade_unions/The_Second_Sex_Study.cfm, cited 10/6/02.
- ¹³⁴ Ibid, section 2.2.2, p. 24.
- ¹³⁵ Cockburn, 1996, p. 20. *Original emphasis.*
- ¹³⁶ Cockburn, 1997, p. 464.
- ¹³⁷ Keith Abbott, 'The European Trade Union Confederation: Its Organization and Objectives in Transition', Journal of Common Market Studies, 1997, vol. 35, no. 3, pp. 468-471; Cockburn, 1997, pp. 463-4.
- ¹³⁸ Hoskyns, 1996, p. 127.
- ¹³⁹ Jane Freedman, Parliamentary Affairs, 2002, vol. 55, no. 1, p. 179.
- ¹⁴⁰ Denmark, Italy, the Netherlands and Portugal. National figures refer to the lower house. Ibid, p. 180.
- ¹⁴¹ Hoskyns, 1996, p. 10.
- ¹⁴² Freedman, 2002, p. 184.
- ¹⁴³ Cockburn, 1996, p. 19-20.
- ¹⁴⁴ Bretherton and Sperling, 1996, p. 491.
- ¹⁴⁵ R. Amy Elman, 'Introduction: The EU from Feminist Perspectives', in R. Amy Elman, Ed., Sexual Politics and the European Union: The New Feminist Challenge, Providence and Oxford, Berghahn Books, 1996, p. 71.
- ¹⁴⁶ Ibid.
- ¹⁴⁷ Freedman, 2002, p. 179.
- ¹⁴⁸ Susanne Baer, 'Pornography and Sexual Harassment in the EU', in Elman, 1996, p. 58.
- ¹⁴⁹ Dorchon Leidholdt, 'Sexual Trafficking of Women in Europe: A Human Rights Crisis for the European Union', Ibid, p. 91.
- ¹⁵⁰ EC Treaty, Article 175
- ¹⁵¹ Hoskyns, 1996, p. 12.
- ¹⁵² Ibid, Appendix 5, pp. 224-5.
- ¹⁵³ Ibid, p. 200.
- ¹⁵⁴ Pollack and Hafner Burton, 2000.
- ¹⁵⁵ Hoskyns, 1996, p. 151.
- ¹⁵⁶ Sperling and Bretherton, 1996, p. 311.
- ¹⁵⁷ Hoskyns, 1996, ch. 9.
- ¹⁵⁸ Bretherton and Sperling, 1996, p. 491.
- ¹⁵⁹ Hilson, 2002, p. 244-5.
- ¹⁶⁰ Heide, 1999, p. 391.
- ¹⁶¹ Wendon, 1998, p. 342.

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- ¹⁶² Catherine Hoskyns, 'European Union and the Women Within: An Overview of Women's Rights Policy' in Elman, 1996a, p. 17.
- ¹⁶³ Egan, 1998, p. 38.
- ¹⁶⁴ Egan, 1998, p. 38, See Gráinne de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', *Journal of Common Market Studies*, 1998, vol. 36, no. 2, for an extended discussion of the principle of subsidiarity and the ECJ and exp. pp. 226-229 in respect of subsidiarity and the Court's own interpretative role.
- ¹⁶⁵ De Búrca, 1998, p. 231.
- ¹⁶⁶ Held, 2002, p. 28.
- ¹⁶⁷ Ibid, pp. 28-9.
- ¹⁶⁸ Held, 1995, pp. 200, 233.
- ¹⁶⁹ Ibid, p. 255; Heide, 1999, p. 387.
- ¹⁷⁰ Hoskyns, 1996, p. 90.
- ¹⁷¹ Ibid, p. 105.
- ¹⁷² Ibid, p. 111.
- ¹⁷³ Heide, 1999, p. 387. Although the ECJ has ruled that the state is at fault for transposing the directive, and thus liable to pay compensation.
- ¹⁷⁴ Article 226 (ex Article 169) EC Treaty.; Article 227 (ex Article 170) EC Treaty.
- ¹⁷⁵ Heide, 1999, p. 390.
- ¹⁷⁶ Ibid, p. 408.
- ¹⁷⁷ Ibid, p. 390.
- ¹⁷⁸ Neilson, 1998, pp. 66-69.
- ¹⁷⁹ Held, 1995, p. 201.
- ¹⁸⁰ European Court of Justice, Case 2222/84 Johnson v. Chief Constable of the Royal Ulster Constabulary, [1986] ECR I-1651.
- ¹⁸¹ Heide, 1999, p. 393.
- ¹⁸² Ibid.
- ¹⁸³ European Commission, *Equal Opportunities for women and men in the European Union: Annual Report 2000*, p. 14.
- ¹⁸⁴ Rossilli, 1999, p. 181

6. Case study 3. Deliberative Democracy and Agro-food biotechnologies

6.1. Introduction.

The European Union commenced developing its regulatory competence in relation to agro-food biotechnologies in 1990. Over the past decade the framework has been extended considerably and now incorporates a variety of detailed directives and regulations covering the development, application, marketing and labelling of agro-food biotechnologies. Despite the extension of the regime the underlying orientation of the framework remains twofold: the protection of the environment and human health, and the promotion of a globally competitive European-wide biotechnology industry – the precautionary principle versus the competition state.¹ These themes continue to delineate the outer boundaries of the regime. The requirement that acceptable arguments are guided by the principles of economic rationality versus human health and environmental protection serves to, ‘narrow down the range of arguments that are admissible within debate so that only generally reproducible and justifiable grounds or concerns, and not mere protection interests’, can be used by actors to justify their position with respect to regulatory decisions.² Initially these principles were interpreted and applied through the discourse molecular biology and environmental science. However from 1996 onwards civil society voices began to challenge the salience of scientific principles as the bases of the regulatory regime and as the principal means of generating knowledge about risk issues. It is argued that this discursive politicisation has had a powerful transformatory impact on the regime: specifically that the contestation of discourses has altered their respective balance leading to a modification in the regime. This has led to the incorporation of new regulatory principles and alternative modes of knowledge generation beyond the purely scientific. At the same time the regime has been increasingly contested by voices from outside of the EU – primarily by the United States, on behalf of its agro-food biotechnology industries. This contestation between the EU and the US demonstrates both the presence of strategic bargaining – in terms of the threats to

overturn the EU position through the WTO and the influence of deliberative principles - the requirement to present generalised and convincing arguments in relation to the principles of free trade versus environmental protection and risks to human health.

The chapter begins by recapitulating the model of deliberative democracy, developed earlier in the thesis (section 6.2.). It proceeds to review the evolution of the EU regulatory regime in agro-food biotechnologies in order to evaluate the development of a deliberate framework. This study is guided by the proposition that democratic legitimacy is primarily provided by both non-institutionalised and institutionalised discursive practices providing channels for preference articulation, reflection and modification (*input*) and the generation of superior policy (*output*) which is reflective of the preceding deliberation.

The narrative divides the evolution of the regime into two broad periods. During the first period, (up until 1996), the trajectory of the regulatory framework was dominated by institutionalised voices, particularly within the Commission and the Council. Despite the limited number of institutional participants during this phase of development it is nonetheless argued that the policy context favoured deliberative modes of policy making above simple bargaining practices (section 6.3.1). In the later period from 1996 onwards it is contended that civil society voices became increasingly prevalent across the EU and led to direct contestations with the hegemonic official discourses, the outcome of which has been a shift in the balance of discourses within the regime. This shift has led to the inclusion of a wider range of voices outside of molecular biology and environmental science, thus enhancing input-oriented legitimacy within the regime. At the same time however voices from outside the EU – primarily emanating from the US - have contested the regulatory principles institutionalised within the regime – in particular the precautionary principle – advocating the primacy of the principle of free trade (section 6.3.2.).

In order to examine the extent to which deliberative practices actually operate within the regime and to assess their contribution towards constituting input-oriented legitimacy the events surrounding the application made in 1994 by the agro-chemical multinational Novartis to market its Modified Maize Bt 176 is reviewed in detail. This moment in the history of the regime is especially useful in providing insights into its deliberative qualities because it comprises both the operation of the narrow institutionalised deliberative practices and the increasing prominence of

civil society voices. The initial stages of the event (section 6.4.1) illustrate the obligation placed on the policy actors to present their cases within the terms of established scientific principles rather than by recourse to overt bargaining or compromises. In this regard attention is drawn to the ways in which member states formed principled and generalised arguments in order to justify their refusal to allow EU authorised agro-food biotechnologies within their national territories. The argument does rely upon member states genuine commitment to authentic deliberation - although this may be the case - rather it is claimed that the institutional context prompted behaviour in keeping with the 'civilising force of hypocrisy'.³ By this it is meant that whilst the member states may have remained motivated by strategic action they were at least required to hide their selfish motives and argue in terms of the generalised other.

Despite the positive features provided by the institutional setting, in particular the constraints placed upon processes of bargaining, it is recognised that the narrow range of regime sanctioned principles restricted relevant voices to the detriment of input-oriented legitimacy. Accordingly the increasing prominence of civil society voices during the later phase of the application process is viewed as a positive development in terms of improving input-oriented legitimacy by expanding a range of arguments incorporated into the policymaking process. (6.4.2.). It is contended that the engagement between civil society and the institutionalised actors illustrates the ability of civil society voices to bring about modifications of the regime. These included the institutionalisation of a wider range of normative principles and extended forms of knowledge within the regime. However, a note of caution is sounded in relation the continued salience of bureaucratic infighting within the EU and increasingly overt confrontation with the USA over national trade interests (6.4.3).

Whilst the model of deliberative democracy is primarily input oriented it does incorporate output-oriented legitimacy - as reflected by the guiding proposition. It specifies four ways in which the quality of decision-making is improved by deliberation: (1) the generation of Pareto superior decisions; (2) the production of fairer decisions; (3) the achievement of a larger consensus; and (4) conferring decisions with greater legitimacy (section 3.4.3.). These aspects of output-oriented legitimacy are evaluated in relation to the development of the regulatory regime for agro-food biotechnologies (section 6.5). The findings generated by the case study are negative overall. The inability to establish an effective regulatory regime are related to the indeterminacy

and polarisation of the institutional and non-institutional debates, and the continued salience of national interest power politics emanating from both within and outside of the EU.

6.2. Model of Deliberative Democracy.

Dryzek stipulates that the condition for authentic deliberation is, 'the requirement that communication induce reflection upon preferences in a non coercive fashion' and that authentic democracy 'can then be said to exist to the degree that reflective preferences influence collective outcomes.'⁴ Therefore in order for democratic legitimacy to obtain it is not necessary that the opinions of all are reflected in all policy decisions (as specified by aggregative approaches) but merely the *deliberation of all* prevails, where 'the minority understands and respects the reasons provided by the majority and accepts the result because of a fair process.'⁵ Specified in these terms deliberation is essentially input-oriented democracy: [i]t aims to give everyone (or alternatively, every distinct affected interest) a 'voice' - that, rather than necessarily an equal (understood as 'equally effective') 'say' over the ultimate outcome.'⁶ This should not be confused with the statement that the model does not incorporate output-oriented democracy. In this respect Goodin himself notes that, '[o]f course input and output democracy *are* causally connected', and in this respect the model of deliberative democracy adopted by this thesis suggests that deliberation generates superior policy (*output*) which is reflective of the preceding deliberation.⁷

The model incorporates two key sites in which public opinions may be voiced. The first is the public sphere – that is the 'politicized aspects of civil society'; the second are the institutions of governance themselves.⁸ The virtue of the public sphere is that communication is relatively unconstrained and freed from the imperatives of the state.⁹ Although the public sphere is self-limiting in that it remains solely the realm of opinion formation this does not mean that it remains powerless.¹⁰ Its power rests in its ability to change the terms of political discourse and so affect the content of public policy through the exercise of communicative power.¹¹ Ultimately however the requirements of decision-making entail that a process of will formation occurs. This is the realm of governance. Whilst decision-making necessarily requires narrowing the number

of options the operation of deliberative settings can also contribute 'to refine and enlarge opinions by passing them through the deliberate concern of chosen members of the *demos*'.¹² The relationship between the wider discourses in the public sphere and the institutionalised discourses depends in part on the constitution of interaction modes.¹³ In this respect the receptivity of the institutions of governance to civil society voices will be shaped by institutional incentives, such as conditions of unanimity or the presence of established legal norms and procedures which set standards of admissibility.¹⁴ Reflecting on the twin sites for opinion and will formation Eriksen comments:

it is the interplay between free and open debate in non institutionalized (weak) publics and institutionalized debates – strong publics – in the political system that together secures the presumption of rational opinion and will formation.¹⁵

Both contexts of deliberation provide opportunities for generating debate beyond fixed territorial boundaries. With respect to the realm of civil society or the public sphere Dryzek notes that they exist in the international system as well as within national boundaries.¹⁶ It is by prioritising the discursive 'essence of democratic legitimacy' that deliberative democracy is eminently adapted to the transnational context. This is because, as Dryzek stresses, the model of deliberative democracy 'can cope with fluid boundaries, and the production of outcomes across boundaries.'¹⁷ Thus deliberation is not anchored to national identities. Instead it may occur within transnational discursive networks, through the recognition of moral as well as electoral constituencies, or the inclusion of non-citizens by imagining ourselves in their place. As Eriksen points out there are multiple contexts for deliberation both within and beyond the territorially bounded state in which interlocutors can meet face to face and engage with distanced others:

There are many public spheres in modern states and they are not confined to national borders. There are subaltern, counterpublics and there are overarching publics transcending limitations of time and space made possible by new media technologies and audio-visual spaces. There are local publics, regional, national and international publics, and there are general publics, intermediate and semi- and quasi publics, smaller ones nested into larger ones.¹⁸

Turning to the output dimension of legitimacy the model of deliberative democracy adopted by this thesis suggests that deliberation generates superior policy (*output*) which is reflective of the preceding deliberation. It is suggested that deliberation improves the quality of the decision-making in four ways: (1) the generation of Pareto superior decisions; (2) the production of fairer decisions; (3) the achievement of a larger consensus; and (4) conferring decisions with greater legitimacy.¹⁹ Superior decisions are obtainable as a result of collective arguing because it helps transcend the limits of individual bounded rationality – the limited and fallible imaginations and calculating abilities of individuals.²⁰ Decisions are fairer in that they are the outcome of arguments which reflect on the views of others, rather than the will of the majority or bargains reflecting the most powerful voices.²¹ Modes of arguing which facilitate reflection and the modification of views in the process of arguing generate the potential for wider agreement to be found. A rational consensus – where people agree not only on a course of action but the reasons for doing so – is not necessarily obtainable, however the possibility for a qualified consensus and working agreement are alternative possibilities.²² At the very least a better understanding of the points of difference are obtainable. Finally even where consensus is not obtainable, the decision is bestowed with greater legitimacy because it was the outcome of the *deliberation of all*.²³

6.3. Evolution of the regime: A Deliberative Trajectory?

Biotechnology became an increasingly salient issue on the EU policy agenda in the mid 1980s. Although the first policy proposal was introduced by the Commission in 1978 in the form of a Council Directive in respect of notifying and authorising all work involving recombinant DNA (rDNA), it was adopted in the form of a non-binding recommendation concerning notification only.²⁴ EU regulatory action was slow to develop earlier on in the technology's development, 'because integration of the common market was proceeding slowly, there was widespread disagreement about whether regulation was needed, and there was no legal basis for European regulation.'²⁵

The eventual formulation of principal Directives on the regulation of the contained use and deliberate release of GMOs²⁶ were based on two communications issued by the Commission in the 1980s.²⁷ These communications were important because they set out the broad principles which have subsequently guided the ensuing policy deliberations and contestations. Two key principles were emphasised in these policy documents – increasing the competitiveness of the European market in biotechnologies, and the maintenance of rational standards of public safety, although with different emphasises on the primary rationale. The Commission's communication in 1983, emphasising the market aspects of regulation, proposed the creation of 'a regulatory framework suitable for the development of the activities of the bioindustries and for the free circulation of goods produced by biotechnology.'²⁸ In contrast in 1986, prioritising health and environmental considerations the Commission indicated its intention to, 'introduce proposals for Community regulation of biotechnology ... with a view to providing a high and common level of human and environmental protection throughout the Community, and so as to prevent market fragmentation by separate unilateral actions by Member States.'²⁹ These principles have become entrenched in the regulatory debate and their incorporation is highly significant because as Gent notes it is unlikely that a regulatory solution 'can be capable of always satisfactorily meeting both aims of protecting the market and the public health.'³⁰ In this regard they represent conflicting principles around which discursive contestation has occurred and have provided the terms of justification in relation to which the regime has developed

6.3.1. EU institutionalised deliberation: 1990-96.

The major locus of institutional contestation was the Commission, incorporating multiple Directorates Generals with policy interests in the development of a regulatory framework for biotechnologies, in view of the sector transcending characteristics of the technology. Four DGs in particular were involved in the policy-making process: DG III Industrial Affairs; DG VI Agriculture; DG XI Environment, Nuclear Safety, and Civil Protection; and DG XII Science, Research, and Development.³¹ Commenting in relation to their respective perspectives Patterson comments that:

[t]hese DGs have widely differing beliefs and perceptions about biotechnology and the extent to which biotechnological products and processes require regulation. The process by which these various sub-cultures were merged (or not merged, as the case may be) is critical to understanding the development of biotechnology regulations.³²

Patterson's notion of differing cultural beliefs and perceptions closely overlap with Dryzek's notion of discourses, which he defines as:

a shared means of making sense of the world embedded in language ... [which] ... enable those who subscribe to a particular discourse to perceive and compile bits of sensory information into coherent stories or accounts that can be communicated in intersubjectively meaningful ways.³³

Both 'cultural beliefs' and 'discourse' are used to denote the arrangement of shared beliefs, contentions, judgements and so forth that give rise to a particular understanding of the world about. Summarising their respective perspectives around three core regulatory questions: (1) the basis of regulation; (2) the type of regulation; (3) the philosophy of regulation, Patterson outlines the points of conflict and agreement amongst the four DGs.³⁴ Broadly speaking she identifies three different policy frames. The first adopted by DG XII Science reflects the views of a scientific policy community composed primarily of biologists and microbiologists who argued that the GMOs should be regulated on the basis of the quality of the product not the process of production; that existing sectoral legislation was adequate; and that a preventative approach towards risk assessment and management based on accumulated knowledge was most appropriate. The second policy frame adopted by DGs III Industry and DGVI Agriculture overlapped considerably with that of DG XII. Adopting an instrumental perspective on the role of biotechnology they argued that regulation should reflect the product and not the application of technology per se; that existing sectoral regulations were adequate; and advocated a preventative approach towards risk procedures with a view to minimising the regulatory burden on business. The policy frame adopted by DG XI environment conflicted with the former perspectives. Where DG XII Science is embedded in a scientific network composed of microbiologists, and DG III Industry and DG VI Agriculture operate in the context of agronomic competitiveness, DGXI Environment is located in a network composed of ecologists and environmental groups

who emphasise the significance of the process of modification and the creation of unique organisms. Accordingly its regulatory position emphasised the importance of the process of modification as well as the final product, and consequently argued for a horizontal rather than sectoral mode of legislation. As a consequence of its more cautious assessment of the risks posed by GMOs it advocated a precautionary rather than preventative philosophy towards risk regulation.

These three policy frames are constitutive of two broad but conflicting discourses of biotechnology which I shall label Scientific/Environmentalism and Scientific/Agronomicism. The former contends that the process of genetic modification is significant because it creates a unique organism by artificial means, believes that the technology poses environmental and health risks and on this basis advocates a precautionary approach towards regulation. In comparison, the latter discourse argues that GMO products do not differ significantly from non-GMO products, maintains that the health and environmental benefits considerably outweigh the (non)-risks of the modified products and thus argues that a preventative regulatory approach is justified. The ensuing policy arguments revolved around these discursive positions. Commenting on the conflict between the discourses Patterson comments:

[t]here was little room for compromise, trade-offs, and side-payments because of the existence of very strong and widely divergent world-views about the potential harm that biotechnology posed for humankind and the environment in general.³⁵

Patterson's comments underline the difficulty under such conditions of disagreement of pursuing 'logic of bargaining' under conditions of fundamental ideational disagreement and the restrictions placed upon engaging in the associated strategic processes of 'give –and take, pork-barrelling, logrolling etc.'³⁶ From a perspective of democratic deliberation this is encouraging because strategic bargaining does not necessitate 'learning or enlargement or refinements of perspectives' – exactly those characteristics whose presence indicates a logic of arguing.³⁷ Whilst the conditions within the Commission were not apposite to a logic of bargaining this does not mean it was positively conducive to logic of arguing though. Indeed in this regard Patterson notes that, 'superimposed upon these philosophical differences was an old-fashioned bureaucratic politics fight.'³⁸ However restricted space for bargaining and entrenched but

disputed principles ensured that the bureaucratic infighting proceeded via discursive contestation. The policy process was still driven by strategic considerations, but in a context which required that arguments were couched in generalised principles. Thus, whilst not eliminating 'base motives', the 'civilising force of hypocrisy' at least encouraged participants to hide them.³⁹ Despite the presence of the 'civilising' logic of argumentation, institutionalised bargaining practices ultimately reflected the distribution of resources and power amongst the relevant DGs. In particular, the dominance of the environmental discourse in the adopted Directives reflected DG XII's position as chief de file in respect of Directive 90/220 and co-chief de file with DG III regarding Directive 90/219.⁴⁰ This enabled it to ignore the alternative proposal put forward by DG XII Science. Moreover whilst DG III was co-chief de file in respect of Directive 90/219, its participation was restricted because of limited resources and only 'agreed under pressure from DGXI, to the terms of the Communication to the Council which said that the Commission was going to develop horizontal directives.'⁴¹

Although the formulation of Directives 90/219 and 90/220 did not proceed wholly according to deliberative principles and instead were partly shaped by bureaucratic power politics (e.g. alternative discourses were ignored and suppressed rather than argumentatively engaged with), the entrenchment of the scientific/environmental discourse firmly within the EU's regulatory regime was still an important development in relation to instituting deliberative principles.

Regarding the primary rationale of the regulatory framework, Directive 90/219 took the EU's environmental competence as its basis,⁴² whereas Directive 90/220 was adopted as a single-market measure.⁴³ Even so, both pieces of legislation stressed an environmental rationale reflecting the scientific/environmental discourse. This was achieved through linking the regulatory provisions to the specification of the techniques of genetic modification.⁴⁴ By emphasising the process of genetic modification rather than the final product both directives were adopted as horizontal instruments which, 'took into account the protection of both human health and the environment across relevant sectors.'⁴⁵ In addition the text of the directives expressed the cautious, precautionary approach towards interpreting and managing risk environments. In this respect the preamble to Directive 90/219 noted that 'the precise nature and scale of risks associated with genetically modified micro-organisms are not yet fully known and

the risk must be assessed case by case'; acknowledged the risk of GMOs 'crossing national frontiers and thereby affecting other Member States'; and affirmed the requirement for 'due attention being given to the prevention of accidents and the control of wastes'.⁴⁶ In a similar vein Directive 90/220 stated that the regulatory provisions 'inasmuch as they concern health, safety, environmental and consumer protection, be based on a high level of protection throughout the Community'; acknowledged the cross-national frontier nature of the technology and that 'the effects of such releases on the environment may be irreversible'; and affirmed that, 'under the Treaty', action by the Community relating to the environment should be based on the principle that preventative action should be taken' in which releases 'should be carried out according to the 'step by step' principle'.⁴⁷

The entrenchment of the scientific/environmental discourse within the adopted regulatory framework required that actors construct their arguments in terms of these central principles. The regime locked the principal regime actors – the Commission; the GMO producers – primarily multinational biotechnology corporations, and member states into a logic of argumentation, which required, they frame their policy positions in the terms of the scientific/environmental discourse, despite their particular strategic interests. Thus when Austria et al. decided to restrict the commercial release of Bt 146 it could not simply invoke protectionist interests as a valid justification for its action because the terms of the regulatory regime required that it give justifiable scientific reasons concerning the dangers to human health and the environment for its actions.⁴⁸

Alongside the regulatory entrenchment of the environmental discourse a second and equally important deliberation-promoting characteristic of the regime is the institutionalised promotion of a pluralist discourse through the requirements of comitology.⁴⁹ In this respect Joerges and Everson comment:

such pluralism ...arises since *all* of the varied national, supranational and private actors involved within the comitology system are forced to generalize their arguments, thus not merely pursuing their own interests but also tackling problems with an eye to the legitimate (under EC principles of discourse) concerns and interests of those who do not directly participate within the committee system.⁵⁰

This requirement is particularly strong when the committee of the member state representatives operates as a regulatory committee, which requires the Commission obtain the support of a qualified majority of member state representatives. These conditions pertain to the approval of commercial releases under Directive 90/220 whereby any member state objections to a GMO marketing application are referred to the Article 21 regulatory committee for resolution. The obligation placed on the Commission to secure a qualified majority of members requires that, 'proposals not only reflect the Commission's interests but also what it assumes to be in the interests of *more than a qualified majority* of the other parities involved.'⁵¹ This is crucial if the Commission want to avoid member states subsequent invocation of safeguard procedures.⁵² Under the provisions of 90/220 where a member state does invoke the safeguard clause, thereby permitting it to temporarily restrict the circulation of a GMO within its territory, again the matter is referred to the Article 21 regulatory committee for resolution, thereby placing the same obligations on the Commission. The Article 21 procedure is summarised below in figure 6.1.

These two central features of the regime: the entrenchment of a discourse which requires participants frame their arguments in terms of generalised arguments which are likely to be acceptable to the other participants; *and* the institutionalisation of consensus building devices requires the, 'development of co-ordination capacities between the Commission and member state administrations', promoting a context of deliberative problem-solving rather a logic of, 'command control and strategic interaction' expressed by Intergovernmentalist and Supranationalist approaches.⁵³

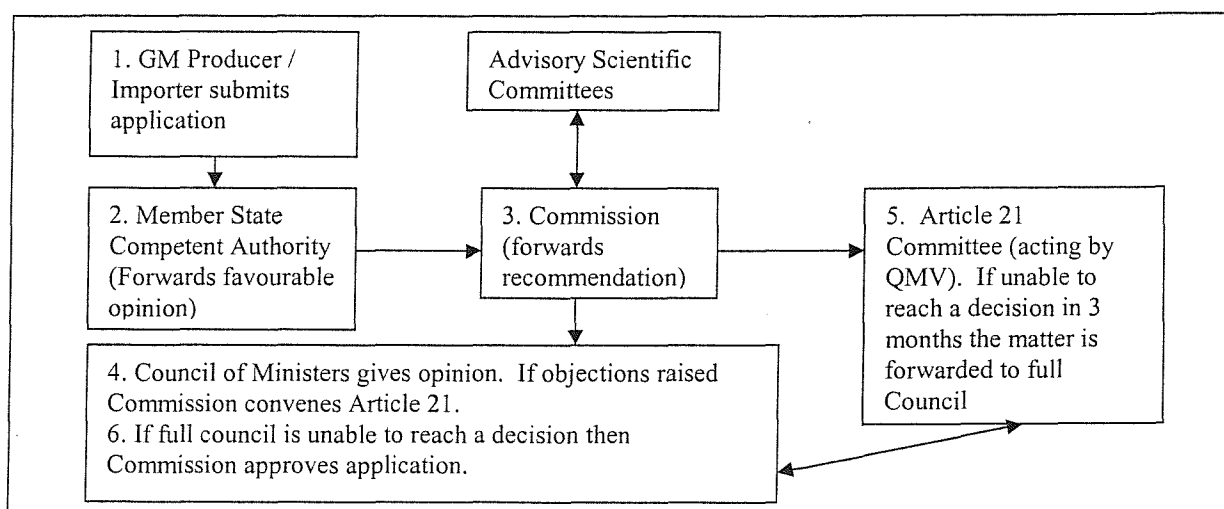


Figure 6.1. Article 21 Procedure for commercial release of GMOs .

6.3.2. EU Civil society: 1996 onwards.

The preceding section considers the positive features associated with the technocratic framing of a policy issue. In particular it was noted that the entrenchment of key principles such as the precautionary principle, and the requirement to provide justifiable reasons based on scientific evidence in EU primary and secondary law, promotes generalised argumentation and reason giving for a proposed course of action. Anchoring the terms of legitimacy to logic of argumentation requires that actors modify their behaviour so far as strategic behaviour is framed within generalised and justifiable arguments. Under these circumstances '[m]aximum importance is assigned to the power internal to communication, to the force of the argument that shows the most efficient application of a technique or proposes the most elegant solution to a theoretical problem.'⁵⁴ However it also 'hinges on the creation of boundaries, the distinction between expert and laymen, professional and amateur, member or non-member of a specific community.'⁵⁵ These boundaries are constituted both by power over communication – that is 'who may speak', and power in communication – that is 'how they may speak', fixing parameters on inclusion and authenticity respectively.⁵⁶ Thus whilst encouraging deliberation and a logic of argumentation, the salience of a technocratic and scientific discourse restricts the range of effective arguments '[s]ince science acts a filter, participants who cannot present generally acceptable arguments will find their submissions easily delegitimated.'⁵⁷ Nor can we simply justify excluding these voices on the grounds that their viewpoints are not relevant, for as Pellizzoni notes these who are excluded are often '[t]hose most affected by a problem.'⁵⁸ Accordingly doubts must be raised in relation to the input-oriented legitimacy of the technocratic aspects of the regime.

Under these conditions the question we must ask, poses Habermas, is 'how can the power of technical control be brought within the range of the consensus of acting and transacting citizens?'⁵⁹ To escape the domination of technology requires, in Habermas's opinion, nothing less than 'the development of a political decision-making process tied to the principle of general discussion free from domination.'⁶⁰ What are required are processes of (re)politicisation through which boundaries are contested, broken-down and reconstituted via the admittance of other forms of communication. In considering the relationship between politics and expertise Radaelli

presents a sophisticated typology which proposes four modes of policy-making in an 'ideal typical fashion' which differentiated configuration of uncertainty political salience.⁶¹ Four modes of decision-making are offered: bureaucratic politics, politicisation, technocracy and epistemic communities/social policy entrepreneurship.⁶² The crucial insight of Radaelli's analysis for our purposes here regards the dynamic character of the mode of policy making. In this respect Radaelli comments:

The policy-making logic is not inherently political or technocratic. An important part of the conflict over policy problems is all about those who argue that there are technical solutions and those who push for a more political debate. Consequently, politicization is often the result of a successful attempt to break the walls of technocratic discussions.⁶³

It is suggested that around 1996 the EU Agro-food biotechnology regime experienced just such processes of politicisation challenging the technocratic boundaries within which policy making occurred. The process was characterised by an intense interaction between the institutionalised technocratic discourses and the socio-political discourses of civil society. The outcome of this contestation, it is suggested, was a shift in the balance of discourses in the regime, resulting in the greater inclusion of socio-economic and ethical principles within the regulatory environment.⁶⁴

6.4. Input oriented legitimacy: voice.

So far two aspects of the regime's evolution have been emphasised in the context of the development of deliberative principles: institutionalised discursive practices and the increasing salience of civil society voices. It is contended that these characteristics of the regime contribute towards the regime's input-oriented legitimacy. In order to further consider these claims and to evaluate whether the regimes practices accord with these prescriptions this section focuses upon the events surrounding the application submitted by Novartis in 1994, for the commercial release of its Modified Maize Bt 176.⁶⁵ This episode is especially useful in providing insights into the

regime's deliberative qualities because it comprised extended deliberation within the formal institutions of the EU and drew in highly publicised civil society voices.

6.4.1. Novartis application: Institutionalised deliberation.

Novartis initially submitted their application with France whose competent authority forwarded a favourable opinion to the Commission based upon the advice of their scientific advisory committee, the Comité de Génie Biomoléculaire (CGB).⁶⁶ The Commission forwarded the application to the other member states as required by Directive 90/220. Seven member states: Austria, Belgium, Germany, Denmark, Italy, Sweden and the UK raised objections to the proposal. Accordingly, in line with Articles 13.3 and 21 of Directive 90/220 the matter was referred by the Commission to the Article 21 Regulatory Committee with a draft decision to place the maize on the market for all uses.⁶⁷ As noted above, (section 6.3.1), the Commission requires the support of a qualified majority of the committee members in order for its proposal to be adopted. In the vote held on 11 April 1996 the proposal passed with 34 votes in favour; falling short of the 62 votes required under the qualified majority voting procedure.⁶⁸ Opposition to the Commissions proposal focused on its 'failure to provide for labelling of the product as a GMO and the long-term environmental risks that the GMOs maize might pose.'⁶⁹ Accordingly, in accordance with Article 21 the matter was referred to the Council for consideration. The Commission's proposal stated that 'the GMO posed no threats to humans and the environment, that a label was not required due to this lack of threat, and that the product should be approved for unrestricted use, including as food for humans and animals.'⁷⁰ The Council met on 26 June 1996, but were unable to resolve the conflict with 13 out of the 15 states opposing the proposal. During the three month period granted the Council to deliberate the issue (which expired on 31 August 1996) Austria presented new information that it claimed raised questions concerning the safety of the maize.⁷¹ In response the Commission referred the proposal to three scientific committees – the Scientific Committee for Food, the Scientific Committee for Animal Nutrition, and the Scientific Committee for Pesticides, all of which concluded that the maize would have no known adverse effects on human health or the

environment.⁷² Following the favourable opinion of the scientific committees the Commission adopted the proposal permitting France to authorise the commercial release of Novartis' Bt Maize 176 in January 1997, despite the considerable opposition from within the Council.⁷³

The Commission's decision to approve the commercial release of the Maize prompted a number of Member States to place immediate bans on its authorisation within their territories. During February and March Austria, Luxembourg and Italy invoked the derogation procedure permitted under article 16 of Directive 90/220.⁷⁴ The article provided that:

[w]here a Member State has *justifiable reasons* to consider that a product which has been properly notified and has received written consent under this Directive constitutes a risk to human health or the environment, it may provisionally restrict or prohibit the use and/or sale of that product on its territory.⁷⁵

All three countries based their decision to restrict the Bt maize on 'research that indicated that an antibiotic-resistant gene, ampicillin, could be passed to humans and animals through GMO maize.'⁷⁶ The Commission referred the matter to the three scientific committees which had initially considered the application. Following a review of the new evidence submitted by Austria (which also formed the basis for justification in Italy and Luxembourg), the scientific committees concluded that the submissions made by Austria did not constitute new evidence on which to review their original opinions.⁷⁷ Accordingly the Commission approved the application to market the Bt Maize.⁷⁸

The events surrounding the application to release Bt 176 Maize illustrate deliberative practices within the regime. The original application was subject to a lengthy deliberative procedure involving the Commission, the Council and a variety of scientific committees. The debate between the actors was framed around the established regulatory principle concerning the scientific assessment of risks posed by GMOs to human health and the environment. According to Joerges and Neyer, the advantage of operating within a scientific discourse is rather less to do with the objectivity of the scientific opinions than their use in 'overcoming politically constituted preferences by relying on the fiction of objective science.'⁷⁹ However there is clear evidence that the politically constituted preferences were not modified and instead the deliberative process broke down when the Commission imposed its decision to approve the variety against the overwhelming majority of the Council. This is a clear instance in which the Commission failed

to reflect 'the interests of *more than a qualified majority* of the other parties involved.'⁸⁰ The Commission's decision provoked opposition within EP who adopted a resolution, which condemned the Commission's failure to respect the entrenched deliberative norms. Amongst other things the text adopted by the EP:

[condemned] the lack of responsibility of the Commission in unilaterally taking a decision to authorize the marketing of genetically modified maize in spite of the negative positions of most Member States and the European Parliament ...[and deplored] particularly the fact that the Commission did not take sufficient account of the precautionary principle with regard to the health of consumers, the protection of the environment and the concerns of producers; [and] ... also the lack of clear and precise information on the reasons why the Commission took a decision which has such implications for each and every EU citizen ...⁸¹

Each of these aspects on which the EP rebukes the Commission are key elements of deliberative problem solving: the requirement to incorporate widely representative views within the process; the obligation to frame positions in terms of accepted generalised principles; and the need to give reasons justifying why a decision has been taken. In each of these instances the resolution laments the perceived abuse of rule based deliberation.⁸²

Joerges and Neyer note the presence of both strategic bargaining and deliberative problem solving in international negotiations and suggest that 'it is important to realize that the relative intensity of both modes may vary, and influence the conditions which influence them.'⁸³ In this instance strategic behaviour on the part of the Commission – 'perhaps seeking to send a message to European industry and the rest of the world that Europe was becoming more receptive to biotechnology',⁸⁴ linked to pressure from the USA seems to have provided the salient mode of decision making.⁸⁵ Judged according to the criteria that input-oriented legitimacy is based upon every distinct affected interest being given a 'voice', in the process of opinion formation, the regulatory procedures fell well short of any reasonable notion of inclusion. The Commission chose to ignore the voices of the Council members and the MEPs whose views 'seemed to mirror those of the populations they represented who were wary of biotechnology ...' and in so doing excluded relevant voices.⁸⁶

6.4.2. Response to Novartis approval: Rise of civil society voices.

Geoffrey Lomax poses the question: 'How do technological risks move to center stage of the political arena?'⁸⁷ He responds by proposing a general sequence in which debate is initiated 'by a risk event where threats are defined in scientific terms.'⁸⁸ The identified or 'tagged' risk is then 'amplified through social networks' involving 'advocacy groups, opinion leaders, public agencies, and elected officials ...[who] attach values to information in order to amplify specific management and policy implications.'⁸⁹ He goes on to suggest that we should view these policy debates as contests between distinct metaphors, where:

[i]n political discourse, metaphors become embedded in narratives, stories that express different sets of core values and assumptions, leading to different sets of goals and criteria for determining favourable outcomes.⁹⁰

The dynamic underpinning the movement between technocracy and politicisation is located in the interaction and contestation between different discursive metaphors, which are embedded in institutionalised and non-institutionalised contexts. Transposing this conception of issue politicisation to the EU biotechnology regime the following observations can be made. Firstly, that in the regulatory regime prior to 1996 the various primary and secondary legal instruments defined risk through the entrenchment of scientific risk principles and risk assessment procedures in. Secondly, the principles and procedures used to assess the risks of GMOs were increasingly subject to disagreement and that these disagreements were been amplified through a series of publicly occurring discursive contests. Thirdly, the metaphors and narratives articulated through these discourses linked specific and narrow regulatory issues with wider policy debates; challenging the established regulatory boundaries and norms regarding 'whose expertise is considered relevant to the decision' and 'whose interests ought to be served?'⁹¹ Finally, the politicisation of these questions resulted in modifications in the regulatory regime in line with the new balance of discourses, their values and principles. This general sequence is outlined and considered with respect to the discursive contests in the EU regime from 1996, around which time the regime became increasingly politicised and the existing boundaries were subject to challenge and criticism. Particular reference is made to events in France and the UK and linked

to the modifications both within the national contexts and the overarching EU regulatory regime.⁹²

Following the Commission's approval of the Bt 176 Maize variety the French Agriculture Minister approved the consent, authorising the commercial release of the maize throughout the EU; but only if the product was labelled as a GMO which was not provided for in the Commission's decision.⁹³ Moreover, in an even more unexpected turn of events the French Prime Minister Alain Juppé announced the government's decision not to add the seed varieties to the national register thus proscribing the cultivation of the maize in France.⁹⁴ This was despite the initial application having been forwarded with a favourable opinion by the French competent authority. Although the decision not to authorise the cultivation of the maize varieties was not explained, it is generally accepted that it was influenced by the Minister of the Environment, supported by other dissenting expert voices concerning the safety of GMOs.⁹⁵

With respect to this decision Marris remarks that it, 'was the one vent which most catalysed the ensuing controversy on GM crops.'⁹⁶ Post 1996 what had been 'a previously technical-agricultural debate ... turned into a public controversy.'⁹⁷ The politicisation of the GM issue - its 'amplification' - came about as the result of the contestation between institutionalised and non institutionalised discourses. Non-Governmental Organisations (NGOs) such as Greenpeace and Confédération Paysanne (Left-wing Farmers) engaged in argumentation which challenged not only the results of the scientific risk evaluations but the wider socio-political assumptions such as the belief in agricultural productivism which they asserted implicitly underpinned the development of plant biotechnology.⁹⁸ NGOs which had been excluded from the institutionalised decision-making fora actively engaged in the public sphere, most noticeably by engaging in direct action such as destroying GM crops.

Alongside the discursive contestation within the public sphere institutionalised opportunities for civil society participation were organised by the government through the organisation of a Citizen's conference in June 1998, whose recommendations were largely reflected in the governments recommendations issued the following month.⁹⁹ A danger of participating in government sponsored fora is inclusion on a symbolic rather than truly authentic basis, and the loss of a truly critical voice in the public sphere.¹⁰⁰ (See section 3.4.3.) Perceiving themselves to be in just such a position, the environmental NGOs participating in the German

sponsored technology assessment exercise on herbicide-tolerant crops in the 1990s withdrew before the report was published, and in doing so 'they could devote greater resources to public protest and preserve their credibility with NGO members.'¹⁰¹

The contestation between the non-institutionalised and institutionalised discourses also occurred through 'the intrusion of actors in arenas ... in which they are not usually resident'.¹⁰² Significant in this respect were the use of court proceedings by NGOs to publicise their arguments and challenge the institutionalised discourse. During their prosecution for destroying stocks of Novartis Bt maize members of the Confédération Paysanne used their trials for this very purpose.¹⁰³ Moreover in the wake of the new socialist government's decision to authorise the cultivation of the Bt maize varieties in February 1998, Greenpeace, Ecoropa, Friends of the Earth and the Confédération Paysanne lodged appeals with the Conseil D'état arguing that the French government had not properly applied the precautionary principle.¹⁰⁴ Equally unusually, following its controversial decision to support the NGOs appeal in December 1998 the Conseil D'état moved outside of its usual institutional setting into the public sphere by issuing a press release outlining its decision.¹⁰⁵

The contestation and interaction of discourses from 1996 onwards has lead to a modification in the regime. In this respect Marris notes that 'a very different general philosophy compared to that which had dominated from 1986 to 1996, began to emerge with regard to decision making on risk issues.'¹⁰⁶ In particular this involved a broader reinterpretation of the precautionary principle with regards to risk assessment and management. Whilst the precautionary principle had previously formed the basis of the risk assessment procedure it had been interpreted very narrowly. In this regard criticisms were made by NGOs towards the Comité d'expertise scientifique indépendante (CGB) for assessing the safety of commercial releases 'on the basis of their molecular aspects only.'¹⁰⁷ This reflected the French regulatory system's science base¹⁰⁸ and the origins of the 'new biotechnology' in the 1930s science of molecular biotechnology.¹⁰⁹ The commitment to a broader interpretation of the precautionary principle was effected through opening participation in the regime to a broader range of actors in the institutional fora. The CGB's composition was diversified in July 1998 to include scientists with expertise in toxicology, pests, population genetics, and scientists who had opposed the release of GMOs into the environment, and a more active NGO presence.¹¹⁰ Moreover, 'more radical reform of the

CGB has been proposed',¹¹¹ involving its division into a scientific committee and a general committee where the remit of the latter would be to 'advise on the social and economic impacts of biotechnology products.'¹¹² However the proposal has proved controversial on the basis that '[s]ome scientists and even some NGOs do not believe that a scientific advisory committee open to non-scientists would work because non-scientists do not share the same knowledge base and do not ask the same questions.'¹¹³ This opinion concerning the proper place for scientists may be interpreted in two ways. It may be viewed as (partially) reifying the boundary between science and society thereby consolidating science's hegemony. Alternatively it could be interpreted as a strong commitment to institutionally entrench alternative modes of knowledge generation in their own right.

Around the same time the UK experienced a similar movement of the debate from its initial location within the institutionalised discourses into the wider public sphere. This proceeded along similar lines to the French experience with the contestation of the existing institutionalised regulatory principles, ultimately leading to modifications in the regime, despite differences in their initial regulatory cultures.

Focusing on 'national regulatory styles' Levidow et al., 'investigate how a decision-making procedure structures the policy role of science, while providing specific channels for various constituencies to influence or challenge regulatory policies.'¹¹⁴ Whilst the original French regulatory style was based upon the incorporation of a narrow scientific base, the British regulatory system has been characterised as 'consultative' or 'consensual' incorporating outsiders into official deliberations.¹¹⁵ This style was reflected in the broad composition of the government's Advisory Committee on Releases to the Environment (ACRE) including an environmentalist member to implicitly represent the public interest.¹¹⁶ The broader public was also incorporated within the decision making fora through extensive disclosure of the risk-assessment documents and the opportunity for public comment. Nevertheless, the purpose of the consultative style was primarily to retain scientific expertise at the centre of risk assessments rather than to extend the criteria upon which decisions were based.¹¹⁷ The symbolic nature of inclusion in ACRE is reflected in the failed attempts by the environmental member to address wider issues beyond the committee's immediate narrow competence.¹¹⁸ Thus we may conclude that historically the inclusion of other voices has been more symbolic than authentic.

Indeed this perception of regime cooption has led ENGOS to engage in discursive contestation within the public sphere rather than through active participation in the regime's opinion seeking fora.¹¹⁹ The boundary tension finally spilled over into controversy following Monsanto's refusal to segregate GM and non-GM Soya beans in late 1996. In response to growing opposition Monsanto engaged in an expensive advertising campaign to persuade the British public of the safety and benefits of GM products. The campaign did not increase public support but did increase the public's awareness of Monsanto.¹²⁰ In this regard Levidow et al. note that '[t]he food protests offered opportunities for broadening opposition to GM crops among wider constituencies, beyond Greenpeace and small NGOs.'¹²¹ As in France, NGOs engaged in direct action destroying GM crops. Subsequent court action against the protestors offered the opportunities to publicly oppose the narrow regulatory criteria. The use of the legal-deliberative fora by NGOs has proved highly successful. For instance, by persuasively arguing that the preventing environmental contamination by GMOs constituted a principle of public interest Greenpeace were able to justify their GM crop destruction activities sufficiently that the jury was unable to reach a verdict against them in April 2000.¹²²

The interaction between institutionalised and non-institutionalised discourses has also occurred as a result of intra-institutionalised contestations spilling over into the public sphere. Thus when Dr Arpad Pusztai suggested his research indicated that GM potatoes were capable of affecting the organs and immune system of rats on a British television documentary, 'it dragged science out of the laboratory and into the arena of public contestation.'¹²³ The media responded with a vigorous campaign on the issue of GM food drawing in a wide variety of actors - politicians, regulators, scientific institutions and NGOs.¹²⁴ Although the British Prime Minister Tony Blair accused the media of 'whipping up hysteria' about GM foods, Simmons and Weldon argue to the contrary that the, 'media put the *range* of issues before the public' and 'contributed to the escalation of activity by different actors and the proliferation of arenas within which issues related to GM food were contested.'¹²⁵ Indeed, in response to the level of contestation amongst the diversity of opinions the British Prime Minister adjusted his position regarding the benefits and safety GM foods, commenting that '[t]here is no doubt that there is potential harm, both in terms of human safety and in the diversity of our environment, from GM foods and crops.'¹²⁶ The Prime Minister's change in attitude towards GM technology was reflective of the broader

changes within the regime and calls for a moratorium on commercial uses of GM products. Included amongst these actors were a number of institutionalised voices including English Nature and the Environment Minister.¹²⁷

Modifications to the regulatory regime have been introduced in response to the controversy; in particular efforts to include a wider variety of voices and the extension of the regulatory criteria. In this respect a public interest member was included on all key food safety advisory committees.¹²⁸ ACRE's remit was extended beyond its narrow concern with whether the GMOs 'are at least as safe as the parents from which they are derived' to also consider wider implications of the technology on biodiversity.¹²⁹ To this effect the Subgroup on Wider Biodiversity Issues was set up to consider how best to evaluate the wider indirect impacts of releasing genetically modified crops in February 1999.¹³⁰ Addressing the first meeting of the subgroup, the Chair:

outlined the role of the ACRE sub-group, stating that whilst the primary remit of the group is to discuss wider biodiversity impacts of GM crops, the group should not feel that the scope of discussions need be limited by particular legislation. Discussion on a wide range of issues would be necessary and the chairman encouraged members to put forward their views to discussion even if they were contrary to existing policy and regulations.¹³¹

In addition, in order to promote wider membership, it was suggested that the sub-group should seek to include an ecologist from academia and to have two people with farming experience on the group.¹³² Following this trend, in May 1999 two new advisory commissions were set up – the Agriculture and Environment Biotechnology Commission (AEBC) and the Human Genetics Commission (HGC) to 'consider crosscutting issues outside the remit of existing advisory committees', and the appointments to AEBC have been wide-ranging including the chairman of Greenpeace UK.¹³³

These local and national controversies generated in response to exposure to an increasingly globalised market for GMOs have been projected onto the EU level through the existing regulatory framework. The outcome has been the adoption of a de-facto moratorium following two separate declarations made at the Council of Ministers' meeting in June 1999. These

declarations raised concerns about the health and safety implications of GMOs and the application of the precautionary principle, which, 'read together indicated that a majority of States would block further GMO consents.'¹³⁴ Any resolution of the moratorium was linked to modifications of the EU regulatory regime, in particular the revision of Directive 90/220 to reflect more saliently the principles of transparency, traceability and the specificity of the European Ecosystem.¹³⁵

In response Directive 90/220/EC has been replaced by Directive 2001/18/EC which came into force in April 2001.¹³⁶ The objectives of the new instrument provide continuity with the earlier Directive in terms of the development of the single European market and the protection of human health and the environment.¹³⁷ Moreover scientific expertise and modes of knowledge generation maintain a central position within the regulatory process. In this respect the Directive's provisions explicitly anchor the environmental risk assessment (ERA) to scientific principles. Accordingly the preamble asserts that the ERA must be 'based on independent scientific advice' and requires provision is made for consultation with 'the relevant Scientific Committee(s) on matters which are likely to have an impact on human health and/or the environment.'¹³⁸ This is reinforced in the annex dedicated to outlining the principles for the ERA which stipulates that it 'should be carried out in a scientifically sound and transparent manner based on available scientific and technical data.'¹³⁹ Large portions of the instrument are devoted to outlining the required technical and scientific procedures for obtaining permission to release or market GMO products. Perhaps most crucially the safeguard clause or derogation procedure by which a member state may temporarily prohibit the GMO from its territory is still firmly rooted to the submission of arguments based on 'new or additional scientific knowledge'; the veracity of which are judged by the Commission after consultation with the relevant scientific committees.¹⁴⁰

Nevertheless the provisions of the new directive do constitute a modification of the dominant policy discourse by providing for the extension of the principles of legitimate argumentation; in particular by the incorporation of ethical and socio-economic principles as legitimate regulatory criteria. These principles are referred to fairly extensively throughout both the preamble and substantive articles of the Directive and make it clear that scientific considerations are to be complemented by their inclusion. In this regard the preamble asserts that

'[r]espect for ethical principles recognised in a Member State is particularly important. Member States may take into consideration ethical aspects when GMOs are deliberately released or placed on the market as or in products.'¹⁴¹ What is more the three yearly report issued by the Commission on the measures taken to implement the provisions of the Directive¹⁴² 'should contain a separate chapter regarding the socioeconomic advantages and disadvantages of each category of GMOs authorised for placing on the market, which will take due account of the interest of farmers and consumers.'¹⁴³ In addition, whilst the ERA remains anchored to scientific principles the definition of risk has been widened thus altering the existing knowledge-relations to risk assessment and providing the possibility for the genuine inclusion of a wider variety of expert voices. Directive 90/220/EC specified the ERA's concerns as the 'evaluation of the risk to human health and the environment ... connected with the release of GMOs or products containing GMOs.'¹⁴⁴ The risk boundaries are widened under Directive 2001/18/EC where the ERA in respect of risks to human health and the environment requires their evaluation 'whether direct or indirect, immediate or delayed'.¹⁴⁵ This move is important because where the boundary is placed determines 'whose expertise is considered relevant to the decision.'¹⁴⁶ The incorporation of indirect and delayed effects on an equal parity with immediate and direct effects promotes the inclusion of a wider group of experts such as ecologists and environmental scientists whose concerns transcend the molecular biologists primary concern with the direct and immediate effects of the technology.

The move to extend the issue boundary constituted by Directive 2001/18/EC is reflective of the wider policy changes at the European level. In its White Paper in European Governance, and reaffirmed in its consultation document on biotechnology the Commission asserts that '[t]he advent of biotechnologies is highlighting the unprecedented moral and ethical issues thrown up by technology. This underlines the need for a wide range of disciplines and experience beyond the purely scientific.'¹⁴⁷ In this vein the Commission 'welcomes the key role played by the European Group on Ethics in Science and New Technologies.'¹⁴⁸ Reflecting on the legitimate need to consider ethical and societal implications raised by the new biotechnology, the Commission posits that 'these issues should be addressed proactively and with a broad perspective, taking into account the moral obligations towards present and future generations and the rest of the world.'¹⁴⁹ The reference to 'moral obligations' evokes the deliberative principle of

incorporating 'the other' either by engaging with Thompson's wider moral constituency, or Goodin's process of deliberation within, in order to internalise the interests of the other by imagining yourself in their place.¹⁵⁰ Moreover in considering the relationship between expertise and civil society the Commission suggests that '[t]hese issues cannot be adequately addressed within the narrow context of regulatory product approvals'¹⁵¹ and highlights 'a need to open up the process by providing opportunities for the voicing of alternative views ('a competition of ideas'), for scrutiny and for constructive debate.'¹⁵²

This commitment to providing opportunities for alternative voices and a competition of ideas again seems to echo deliberative principles and in particular appears to appeal to Dryzek's notion of a democratic contestation of discourses. The European Round Table on GMO Safety Research provides an example of a recent initiative to engage with alternative discourses. It is a discussion forum which aims to widen the discussion of the risks and benefits of GMOs to 'a broad range of European Stakeholders.' The purpose of the forum is stated to be:

to establish true dialogue where an informal and structured debate takes place leading at a minimum, to all parties being better informed of each other's views and values. At a maximum, it should provide a way forward from the current polarisation of opinions by using research to address the concerns and issues raised by stakeholders.¹⁵³

The mode of interaction ascribed to the Roundtable adheres to a number of the key principles of deliberative democracy. In input terms it encourages the reflexive deliberation amongst the competing and conflicting views. In output terms it offers the possibility of reaching a more legitimate decision based on the construction of a consensus or at the least a better understanding of the points of difference.¹⁵⁴

6.4.3. *Voices outside the EU.*

The operation and interaction of institutionalised and non institutionalised debates within the EU need to be situated in the context of an increasingly globalised economy in agro-food biotechnologies (see section 2.5.2.) Whilst the technology is becoming increasingly globalised,

regulatory regimes remain regionalised increasing the potential for international regulatory disputes, as the differences can have significant impacts on domestic markets and the effectiveness of the competition state.¹⁵⁵ Such differences are reflected in the regulatory principles applied by the US and the EU; where 'the former are organised primarily around scientific methods of risk assessment by independent regulatory agencies, while the latter feature regulations by governments that often take into account 'social factors,' as well as scientific assessments, in decisions on food safety.'¹⁵⁶ It is within such a context that we can understand the increasing frustration of the US and its biotechnology industry towards the EU both in terms of the moratorium of foreign GM imports and the adoption of a regulatory framework which places considerable emphasis on the precautionary principle.

In May 2003 the USA submitted the dispute to the World Trade Organisation (WTO) for resolution on the basis that the restriction on US imports contravened the EU's commitments to the WTO.¹⁵⁷ New regulatory provisions approved by the EP on 2 July 2003 on the labelling and monitoring of GMOs may satisfy member states sufficiently that the EU moratorium may be lifted thus avoiding a WTO ruling on the legality of the moratorium. However 'it is unlikely to end the bitter rift the issue has caused between the EU and the US.'¹⁵⁸ This is because the trade dispute is rooted in far deeper cultural and normative disagreements.¹⁵⁹ The latest modifications of the regime to incorporate socio-economic and ethical principles more centrally is likely to increase the difference between the two regulatory approaches. Summarising the US position on the EU moratorium, Ambassador William Farish comments that: '[s]imply put, the EU moratorium has no scientific basis.'¹⁶⁰ There remains a real possibility that the US will take a similar stance with respect to the new EU regime if it is perceived that the inclusion of socio-economic and ethical considerations means its application is not based on proper scientific principles. However, despite the clear presence of interstate power politics the institutional context constituted by the international regulatory regime means that the parties to the dispute are required to pursue their interests according to deliberative principles of generalised argumentation within and across the institutionalised discourses.

The US challenge to the EU moratorium lodged with the WTO cited a variety of relevant provisions including the Sanitary and Phytosanitary (SPS) agreement and the Technical Barriers to Trade (TBT) provisions. Both sets of provisions are relevant to the regulation of agricultural

GMOs although neither directly addresses the issue of biotechnology products.¹⁶¹ The SPS provisions are concerned specifically with health and safety issues and allow a state to adopt appropriate measures to protect their citizens' welfare.¹⁶² However the agreement 'places the onus on a state that would restrict trade through national regulations to demonstrate that such regulations are based on scientific risk assessments and are not otherwise disguised restrictions on trade.'¹⁶³ The TBT agreement provides that technical regulations, including labelling requirements, do not have the 'effect of creating unnecessary obstacles to international trade.'¹⁶⁴ Legitimate objectives of technical regulations may include the protection of human health and environmental protection and can be enforced with testing procedures.¹⁶⁵ These provisions provide the principles around which the EU and US must construct their arguments.

Clearly there is a strong element of strategic behaviour underpinning the dispute both on the part of the EU and the US in relation to their trade interests. Nonetheless the WTO provisions require that the national actors deploy generalised and principled arguments in order to pursue their national trade interests. These requirements made by the WTO are compounded by additional international agreements - notably the Cartagena protocol on Biodiversity adopted in February 1999. This agreement establishes a broader range of legitimate criteria in the trade regulation of agro-food GMOs. Whilst it maintains that risk assessments must be based on scientific principles, in line with the WTO/SPS agreement, it also allows recourse to environmental and health concerns and endorses use of the precautionary principle by state actors.¹⁶⁶ Its equal standing with the WTO/SPS agreement means that actors can use a range of socio-economic as well as scientific criteria as the bases of arguments for the restriction or liberalisation of trade in any particular agro-food GMO.¹⁶⁷

6.5. Output oriented legitimacy.

The model of deliberative democracy developed in this thesis specifies four ways in which the quality of decision-making is improved by deliberation: (1) the generation of Pareto superior decisions; (2) the production of fairer decisions; (3) the achievement of a larger consensus; and (4) conferring decisions with greater legitimacy. This section evaluates the contribution of these

aspects of output-oriented legitimacy in relation to the development of an effective regulatory regime.

The preceding discussion outlines the politicisation of the European regulatory regime for GMOs, in the context of local, national supranational and global voices from a range of actors in institutions of governance and civil society. The interactions and contestations between the non-institutionalised and institutionalised discourses are mapped out to indicate where the discursive contestations unsettled the regime boundaries through challenging the hegemony of a scientific/environmental discourse. The contestation of these issues by civil society and certain institutionalised actors has led to the increased salience of alternative voices promoting wider ecological, socio-economic and ethical issues alongside the narrow concern of scientific risks and economic benefits. The outcome of the increased salience in alternative discourses has been a modification of the European regulatory regime for GMOs both in terms of specific regulatory provisions such as the adoption of Directive 2001/18/EC and broader policy shifts towards a more open and genuinely inclusive regime. This in turn has prompted criticisms from outside of the EU regarding its regulation of a globalising industry.

Following its politicisation since 1996 the regime remains in flux reflecting the absence of a general consensus between actors in relation to the benefits or acceptability of agro-food biotechnologies and the appropriate form of regulation both within the EU and beyond its borders. The difficulty of building a consensus seems to be related to two features of the discursive contest around the issue of GM technology: (1) the indeterminacy of the debate; and (2) the polarisation of the debate. With respect to the first feature Gambetta comments that:

The subtlety that deliberation may bring to a discussion can have a paralysing effect. Deliberation may subvert the preference ranking of deliberators, and thus can be a good thing. But rather than going all the way and persuading them of a different ranking, it can simply make the choice indeterminate.¹⁶⁸

This notion of indeterminacy does seem to be reflected in the modified EU regime to an extent. Whilst the extension of the regime's boundaries, to include ethical and social issues more centrally alongside scientifically grounded principles, can be reasonably interpreted as improving the deliberative quality of the regime it remains an incomplete transformation resulting in the awkward incorporation of potentially conflicting regulatory principles. The incorporation of

ethical, socio-economic and scientific principles raises the very real possibility of ever diverging disagreement and contestation around the appropriate importance, relevance and ranking of these principles in regulatory decisions and policy development more broadly. This has implications for output-oriented legitimacy which requires that policy decisions are taken and implemented at some point.

Regarding the polarisation of the debate, Fearon suggests that whilst consensus may develop *within* communities it may increasingly polarise views *between* them.¹⁶⁹ Sunstein associates such polarisation with repeated deliberation amongst persons with antecedent similar positions; an occurrence he terms 'enclave deliberation'.¹⁷⁰ Under these conditions he suggests that exposure to 'a limited argument pool' amongst like minded individuals will tend encourage the adoption of the more extreme dispositions prevalent within the community.¹⁷¹ On this basis he hypothesises that 'if a group of citizens is thinking about genetic engineering of food ... the consequence of their discussions, over time, should be to lead in quite extreme directions.'¹⁷² Indeed commentators have explicitly characterised the GM debate as having adhered to the 'polarising principle'.¹⁷³ The Commission's adopts just such a representation of the 'intensive public debate' commenting that 'it has ...focused narrowly on genetically modified organism (GMOs) and specific ethical questions, on which public opinion has become polarised.'¹⁷⁴

These interpretations in relation to the absence of consensus around GM issues would seem to be contradictory and conflicting. Characterisations of public opinion as both indeterminate and polarised sit uneasily with each other. However the tension is less pronounced if we recognise the 'virtual' representation of the public, which Simmons and Weldon contend 'have been a vital resource for key actors on both sides of the debate as they have invoked different constructions of 'the public' in support of their arguments.'¹⁷⁵ The polarisation of opinion is constituted largely between the key stakeholders in the discourse - the biotechnology firms, governmental scientific regulatory institutions who can be, 'characterised to some extent as the promoters of GMOs and of public and private policy decisions related to GMOs' - on the one hand and the anti-GMO lobby - environmental and consumer NGOs, farmers unions and so forth on the other.¹⁷⁶ Although there are instances of these polarised actors coming together in deliberative fora such as the European Roundtable or transcending their usual arenas, such as when scientists have entered the media debate, for the most part these actors are more commonly

engaged in 'enclave deliberation' amongst themselves, and thus it is unsurprising that divergence of opinions rather than any moves towards consensus are apparent. In turn these polarised groups project and construct virtual representations of public opinion which are 'myths' to the extent which they oversimplify and distort public perceptions and which are unsupported by empirical findings.¹⁷⁷ Thus the myth concerning the polarisation of public opinion as either for or against GMOs emerges from the discourses of the key institutional actors and NGOs who represented the public in these 'uni-dimensional' terms.¹⁷⁸ The construction of a bifurcated debate tends to dismiss those voices who offer more sophisticated or ambivalent responses to the issue. They are represented as 'undecided' or as having 'no opinion' in research surveys.¹⁷⁹ In this sense indeterminate views are marginalised from the public debate although indeterminacy and ambivalence does seem to pervade public perceptions regarding GMOs.¹⁸⁰

The level of ambivalence and polarisation within civil society and amongst scientists means that any form of consensus remains elusive. However, even in the absence of a consensus the model of deliberative democracy adopted in this thesis suggests that a policy may enjoy greater legitimacy because it is the outcome of the deliberation of all. Again, this does not seem to have come about as a result of the discursive contestations. In this regard Fearon reflects on the plausibility of the statement that 'being able to have one's say in a discussion implies, in all cultures and contexts, that one will feel more inclined to support the outcome of discussion regardless of what it is.'¹⁸¹ If we accept the view that there is 'a plurality of ultimate values' there is no reason we should expect agreement to be reached.

However if we consider the characteristics of the debate that has taken place, there is a real sense in which everyone *has not* had one's say. In this regard we may point to the ways in which the 'virtual' voice of the public in the institutionalised debate's and in civil society organisations has failed to reflect the range of distinct positions sufficiently. Even if we agree that the networks constituted both by civil society and within the institutions of governance promise enormous democratising potential through the diffusion of information and control, we should recall that '[b]ecause they institutionalise differential access to decision-making, policy networks clearly can function as power relationships, rather than representative mechanism in which the preference of all citizens count equally.'¹⁸²

Even in the absence of a consensus, justified doubts regarding the fairness of the decisions and the marginalisation of relevant voices from the processes of opinion formation it is still possible to argue that the adopted policy is superior because it is the outcome of collective arguing. This poses the question as to whether the processes of deliberation have in any way helped to transcend the limits of individual bounded rationality – the limited and fallible imaginations and calculating abilities of individuals.¹⁸³ In order to consider the issue of bounded rationality and the ability to transcend it requires that we ask two questions: how is rationality transcended, and perhaps more importantly who's rationality? These questions are considered in turn.

In the context of the EU Agro-food biotechnology regulatory environment the issue of bounded rationality directly impacts upon the issue of risk assessment and is articulated in types of questions such as how safe is the technology and how do we know it is safe? Knowledge and risk are connected, although the relationship is characterised by ambivalence. Authors engaged in scholarship on the sociology of knowledge have reflected on this relationship under the conditions of late or reflexive modernity. Under conditions of reflexive modernity Beck suggests that there is an increasing awareness that those scientific modes of knowledge production, application and control which have emancipated humans from a context of external determination by supposedly reducing risks have in turn been responsible for the creation of new 'manufactured risks'.¹⁸⁴ This cognitive awareness is the outcome of both the expansion of science – in particular through the specialisation of sub-disciplines which generates a context where 'science is encountering science, and hence all the scepticism and contempt one science is capable of showing towards another' - and the discipline's interaction with society at large, through a 'tense interplay of science, scientific practice and the public sphere ...'¹⁸⁵ Beck suggests that the outcome of this reflexivity has been to undermine the absoluteness of the knowledge claims asserted by science thereby empowering alternative modes of knowledge generation.¹⁸⁶ However this relationship between expert scientists and lay person/new experts is premised primarily upon ambivalence. For whilst science's monopoly on knowledge generation is challenged through an extension of scepticism beyond science's borders and is exposed as fallible within this process, those groups who challenge its power, despite agitating the transfer of knowledge, themselves become '*coproducers* of socially valid knowledge.'¹⁸⁷ Beck expresses

this ambivalence so: '[i]n the course of the *triumph* and generalization of the norms of scientific argument, a completely different situation arises. Science becomes *indispensable* and at the same time *devoid* of its original validity claims.'¹⁸⁸ Whilst I would question the absolute terms in which Beck expresses this claim it is surely the case that despite their continued dominance in framing the discourses surrounding the production and regulation of agro-food biotechnologies, the production, reproduction and dissemination of scientific claims are increasingly subject to conjecture, doubt and criticism both from within scientific communities and without.¹⁸⁹

It is suggested that the two regulatory principles considered earlier in the chapter – the principles of prevention and precaution are reflective of an ambivalent attitude towards science as a mode of knowledge generation whereby science is constituted as necessary but not sufficient.¹⁹⁰ Science - *as an indispensable mode of knowledge generation* - is constituted by and constitutive of the preventative philosophy of risk regulation which advocates responding to proven adverse risks that have been encountered in earlier products or have been identified in the course of scientific research. The influence of this principle has been reflected in the gradual development of the regulatory system in line with new scientific evidence and reflection on the identified benefits and costs of GMOs.¹⁹¹ In contrast the *insufficiency and fallibility of science* is acknowledged and reflected in the precautionary principle which is constitutive of and constituted by a more radical approach to risk evaluation which considers *possible*, but as yet undocumented risk issues.

The regulatory framework itself incorporates to modify the provisions in order to reflect technical advances.¹⁹² The revisions made to Directive 90/219 were justified in terms of the need to adapt to just such technical progress¹⁹³ and the acquired 'considerable experience and knowledge of the risks associated with the contained use of GMMs'.¹⁹⁴ Commenting on this relationship between regulatory requirements, technical progress and the generation of new scientific knowledge the Commission commented that '[t]he development of future Community legislation should remain consistent with the major objective of protecting human health and the environment *and of being revised according to technical progress and new scientific findings*'.¹⁹⁵ Therefore, whilst undoubtedly the precautionary principle is enshrined within the regime, it is necessary to recognise that the commitment is tempered by and interpreted through a deep commitment to scientific knowledge generation and risk assessment procedures. Such

recognition is significant because it acknowledges the boundaries set with respect to the types of knowledge that may be admitted into the regulatory regime and their ascribed relative positions on the 'gradient of rationality between experts and lay people.'¹⁹⁶ This very point was raised during the EP's debate on its resolution concerning the authorisation of Bt 176 maize in which it was suggested that the Commission's decision to approve the product against the wishes of the Council, was 'not fortuitous' but the outcome of 'the institutional structure itself of Europe today, dominated by a technocratic structure ... which, because it is so far removed from them, ends up losing all reference to ... the needs of people.'¹⁹⁷

This evaluation of the four dimensions through which deliberation enhances output legitimacy indicates that the connection between input oriented legitimacy and output oriented legitimacy as constituted by the model of deliberative democracy has a number of limitations. The politicisation of the regime and its subsequent modification, in response to critical civil society voices has not resulted in a policy which garners consensus or enjoys legitimacy. Furthermore the policy positions adopted by the EU are not superior in the sense of reflecting a communicative rationality accepted by all but remain entrenched in expert discourses for their justification. In addition interpretations of output-oriented legitimacy in terms of the competition state are increasingly influential. This discourse is perpetuated principally by the exercise of state based power politics both within the EU and increasingly from beyond its border as the USA brings trade dispute actions against the EU.

6.6. Conclusion.

The model of deliberative democracy articulated in this chapter submits that democratic legitimacy is constituted primarily in the processes of opinion formation rather than the aggregation of preferences; where opinion formation itself is constituted by non-coercive communication between all the persons who would be affected by a public decision. This is to say that in order to obtain democratic legitimacy it is not necessary that the opinions of all are reflected in the decision but rather that all are entitled to participate in the process of opinion formation. Accordingly Goodin remarks that '[i]t aims to give everyone (or, alternatively, every

distinct affected interest) a 'voice' - that, rather than necessarily an equal (understood as 'equally effective') 'say' over the ultimate outcome.¹⁹⁸ Opinion formation occurs both in the non institutionalised discourses of civil society and the institutionalised discourses of governance. Institutionalised deliberation occurs to the extent that the norms of the regime encourage argumentation above bargaining as the primary mode of interaction. In the context of the EU the potential of legal commitments to promote deliberative problem solving is emphasised in that they require arguments are formed in generalised terms and encourage the presentation of all relevant viewpoints in the debate.¹⁹⁹ However it is acknowledged that the requirement to present generalised arguments 'narrow[s] down the range of arguments that are admissible within debate'²⁰⁰ and in so doing constitutes power in communication by establishing how interlocutors may speak.²⁰¹ Accordingly, certain participants may well find themselves marginalised from the opinion formation process because they are unable to present their arguments within the established discourse.²⁰² The technocratic framing of an issue constitutes just such an exercise of power in which a boundary is drawn between expert and lay person on the basis of the expert use of 'specialised languages and conceptual apparatuses.'²⁰³

However the institutionalised discourses of governance are only one of the sites in which public opinions may be voiced; the other being public spheres. The virtue of this space is that communication is relatively unconstrained promoting the generation of multiple different discourses which compete with each other within a variety of public spheres.²⁰⁴ Discourse within the public sphere is relatively unconstrained because it is free from the imperatives of state.²⁰⁵ Nonetheless public opinion is able to influence the terms of the policy discourse through the exercise of communicative power by shaping 'the ways terms are defined and issues are framed'.²⁰⁶ Accordingly 'the relative weight of competing discourse in civil society can have major implication for the content of public policy.'²⁰⁷

The analysis of the EU regulatory regime for agro-food biotechnologies reveals that the interplay within and between these two sites of opinion formation has been important in shaping the regulative principles which govern the use and marketing of GMOs. This argument is upheld by reference to the formulation of the regulatory framework which was contested through and between the competing discourses I have labelled Scientific/Environmentalism and Scientific/Agronomicism. In formulating the regulatory provisions a discursive rather than

bargaining mode of policy formulation was adopted because the relevant Commission DGs held very different world views with respect to the costs and benefits of GMOs which limited bargaining opportunities.²⁰⁸ Strategic motives were not eradicated by the need to adopt an argumentative as opposed to bargaining mode of interaction, but required institutional actors couch their positions in terms of generalised principles. Thus whilst not eliminating 'base motives' the 'civilising force of hypocrisy' at least encouraged participants to hide them.²⁰⁹ However despite the 'civilising' operation of a logic of argumentation within the Commission the adoption of the Scientific/Environmental framing was not purely the outcome of the 'forceless force of the better argument' but reflected the distribution of resources and powers amongst the relevant DGs.

Two central features are attributed to the first phase of the regime until around 1996: the entrenchment of a discourse which required participants frame their policy decisions in terms of generalised arguments; *and* the institutionalisation of a variety of actors within the regime, requiring the 'development of co-ordination capacities between the Commission and member state administrations' thus promoting a context of deliberative problem-solving.²¹⁰ This chapter considers these claims with respect to an application submitted by Novartis in 1994 for the commercial release of its Modified Maize Bt 176 within the regulatory framework established by Directive 90/220. This framework required actors considering authorisations of GMOs framed their arguments in terms which reflect the principles of risk to human health versus economic competitiveness.

The boundaries of inclusion and exclusion were constituted by the requirement that arguments satisfied the standards of scientific proof concerning the health and environmental risks of the process and product thereby establishing the primacy of scientific discourses over and above alternative socio-ethical discourses. Thus whilst the regime clearly demonstrated adherence to the principle of deliberation the exclusion of wider voices must raise questions regarding the input-oriented legitimacy of this aspect of the regime.

Moreover, in relation to the approval of the Bt Maize variety there is clear evidence that the deliberative process broke down with the Commission imposing its draft decision against the overwhelming majority of the Council. This is a clear instance in which the Commission failed to reflect 'the interests of *more than a qualified majority* of the other parties involved.'²¹¹

Evaluating these events in terms of the principle of input-oriented legitimacy the regulatory procedures fell well short of any reasonable notion of inclusion. The Commission chose to ignore the representative voices of the Council members and the MEPs.

From 1996 onwards it is suggested that the regime experienced a process of politicisation which has challenged and continues to challenge the technocratic boundaries within which policy making occurs. The process is characterised by an intense interaction between the institutionalised technocratic discourses and alternative socio-economic and ethical discourses in civil society. It is suggested the outcome of this contestation has been a shift in the balance of discourses in the regime resulting in the greater inclusion of alternative forms of socially valid knowledge alongside the already established scientific and technocratic approaches to risk assessment. The adoption of Directive 2001/18/EC reflects the new balance of social, ethical and scientific discourses. These principles are referred to fairly extensively throughout both the preamble and substantive articles of the Directive and make it clear that scientific considerations are to be complemented by the inclusion of socio-economic and ethical principles. The move to extend the issue boundary, regulatory principles and relevant voices constituted by Directive 2001/18/EC is reflective of the wider discourse modification at the European level outlined in a variety of recent strategic policy documents including the White Paper on European Governance.

Moreover in the context of interactions with voices outside of the EU it is argued that the international institutional setting demands that the mode of interaction is framed in deliberative terms. The mediatory institutions such as the WTO/SPS and WTO/TBT agreements and the Cartagena protocol on Biodiversity stipulate a range of socio-economic and scientific regulatory principles within which strategic action has to be framed thereby necessitating the generation of generalised arguments rather than overt references to national trade interests.

A number of limitations of the model of deliberative democracy need to be considered both in terms of the model's own prescriptions and its usefulness in providing insights in relation to the regime's actual practices. Principally these limitations converge around the simultaneous operation of both strategic and deliberative behaviour in the processes of opinion formation, which requires, as noted by Joerges and Neyer, reflection on the relative strength of their respective influences in any instance.²¹² This raises the serious challenge of determining when deliberation has occurred. Concepts such as the 'civilisation of hypocrisy' highlight deliberation

may merely disguise strategic behaviour. Whether this actually changes anything is another matter. There remains the profound point that it may simply be power politics by another name.

Identifying the operation of power in relation to judging between the various claims made by the competing voices is equally problematic. Dryzek maintains that '[c]ontestation is democratic to the extent that it is engaged by a broad variety of competent actors under unconstrained conditions ...'²¹³ It is in the potential of such contestation to inducing reflection on the best solution that its democratic potential lies, thus resolving the problem of judging between various claims. Though not explicitly stated, the emphasis placed on unconstrained reflection echoes arguments concerning the forceless force of the better argument. In relation to whether these conditions pertain in the EU Agro-Food biotechnology regime, serious doubts must be raised. The privileged position the member state actors in the regime highlighted through their pivotal role in bringing about the Moratorium in 1996 raises the spectre of power politics in general and the intergovernmental characteristics in particular. The overwhelmingly intergovernmental developments illustrated in the politicisation of the regime from 1996 are reflected upon at more length in the concluding chapter, through the insights provided by the model of democratic intergovernmentalism.

Nevertheless the model of deliberative democracy does provide key insights in relation to the role of discourse within the context of the EU regulatory regime for Agro-Food Biotechnologies. Specifically it highlights the constraints and opportunities constituted by the hegemonic discourse for the deployment of various arguments both within the institutions of governance and civil society. Moreover, it illuminates the ways in which local, national and supranational voices may be connected through the terms of their discourse across borders and the possibilities created for engaging with and influencing by communicative power transnational institutions of governance. These mixed findings are summarised in table 6.1 below.

	Deliberative Interaction	Strategic Interaction
Institutions of Governance	<p>Institutional framework developed through discursive argumentation rather than bargaining practices</p> <p>Institutions of preference adjustment (e.g. generalised principles and comitology) encourage broader range of voices and justified reasons</p>	<p>Generalised principles reflect bargaining practices of institutional actors.</p> <p>Institutions of preference adjustment (e.g. civilising force of hypocrisy) are not sufficiently powerful – actors merely encouraged to hide their selfish motives</p>
Civil society	Civil society. Relatively unconstrained deliberation: communicative empowerment of marginalised alternative discourses	Partial representation of civil society reflecting uneven distribution of resources: continued marginalisation of relevant voices.
Contestation of institutionalised and civil society discourses	Interaction between institutionalised discourses and civil society voices leads to a new discursive balance thereby generating a modification in the regime reflective	National States remain principal actors in key institutions (e.g. EU Council and Article 21 Committee, WTO). Regime reflects the distribution of intergovernmental resources

Table 6.1. Deliberative and Strategic elements of agro-food biotechnology regime.

Notes for Chapter 6. Case study 3. Deliberative Democracy and Agro-food biotechnologies

- ¹ Hugh Dyer, 'Biotechnology and international relations: the normative dimensions', in Alan Russell and John Vogler, Eds., The international politics of biotechnology: Investigating global futures, Manchester and New York, Manchester University Press, 2000, p. 40
- ² Christian Joerges and Michelle Everson, 'Challenging the bureaucratic challenge', in Erik Oddvar Eriksen, and John Erik Fossum, Eds., Democracy in the European Union: Integration through deliberation? London and New York, Routledge, 2000, p. 182.
- ³ Jon Elster, Ed., Deliberative Democracy, Cambridge, Cambridge University Press, 1998, p. 111.
- ⁴ John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations, Oxford, Oxford University Press, 2000, p. 2.
- ⁵ Erik Oddvar Eriksen and John Erik Fossum, 'Post-national integration, in Eriksen and Fossum, Eds., 2000, p. 18; Erik Oddvar Eriksen, 'Deliberative supranationalism in the EU', in Eriksen and Fossum, Eds., p. 59.
- ⁶ Robert E. Goodin, Reflexive Democracy, New York, Oxford University Press, 2003, p. 150.
- ⁷ Ibid.
- ⁸ Dryzek, 2000, p. 23.
- ⁹ Ibid, p. 103.
- ¹⁰ Eriksen, 2000, p. 54.
- ¹¹ Dryzek, 2000, p. 101.
- ¹² Eriksen, 2000, pp. 55-6. *Original emphasis*.
- ¹³ Ibid, p. 57.
- ¹⁴ Eriksen, 2000, p. 57; Joerges and Everson, 2000, p. 182.
- ¹⁵ Eriksen, 2000, p. 55.
- ¹⁶ Dryzek, 2000, p. 130.
- ¹⁷ John S. Dryzek, 'Transnational Democracy', The Journal of Political Philosophy, 1999, vol. 7, no. 1, pp. 44.
- ¹⁸ Eriksen, 2000, p. 54.
- ¹⁹ Diego Gambetta, "'Claro': An Essay on Discursive Machismo", in Elster, Ed., 1998, p. 24.
- ²⁰ James Fearon, 'Deliberation as Discussion', in Elster, Ed., 1998, p. 49.
- ²¹ Eriksen, 2000, p. 48.
- ²² Ibid, p. 59
- ²³ Eriksen and Fossum, 2000, p. 18, Eriksen, 2000, p. 59.
- ²⁴ Lee Ann Patterson, 'Biotechnology Policy: Regulating Risks and Risking Regulation', in Helen Wallace and William Wallace, Eds., Policy-Making in the European Union, 4th Edition, Oxford, Oxford University Press, 2000, pp. 319-20.
- ²⁵ Ibid, p. 320.
- ²⁶ Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms OJ L117, 8.5.1990; Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms OJ L117 8.5.1990.
- ²⁷ Commission of the European Communities, 'Communication from the Commission to the Council, Biotechnology in the Community, 1983, COM (83) 672, final (29.9.1983) and Commission of the European Communities, 'Communication from the Commission to the Council, A Community Framework for the Regulation of Biotechnology, 1986, COM (86) 573, final (4.11.1986).
- ²⁸ COM (83) 672, final (29.9.1983), p. 11.
- ²⁹ COM (86) 573, final (4.11.1986), p. 4.
- ³⁰ R. N. Gent, 'Genetically modified organisms: an analysis of the regulatory framework currently employed within the European Union', Journal of Public Health Medicine, 1999, vol. 21, no. 3, p. 280.
- ³¹ Patterson, 2000, pp. 326-8
- ³² Ibid, p. 324.
- ³³ Dryzek, 2000, p. 18.
- ³⁴ Patterson, 2000, pp. 326-8.
- ³⁵ Ibid, p. 328.
- ³⁶ Eriksen 2000, pp. 60-1.

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- ³⁷ Ibid.
- ³⁸ Patterson, 2000, p. 328.
- ³⁹ Elster, 1998, p. 111.
- ⁴⁰ Patterson, 2000, p. 331.
- ⁴¹ Ibid.
- ⁴² Article 175 (ex Article 130s), EC Treaty.
- ⁴³ Article 95 (ex Article 100a), EC Treaty.
- ⁴⁴ Directive 90/219, Article 2(a)(i); Directive 90/220 Article 2(2)i.
- ⁴⁵ Commission of the European Communities, 'Communication from the Commission: Towards a Strategic vision of life sciences and biotechnology: Consultation Document', 2001, COM (2001) 454, final (4.9.2001), p. 18.
- ⁴⁶ Preamble, Directive 90/219.
- ⁴⁷ Preamble, Directive 90/220. Regarding the directives reference to a principal of 'prevention', Patterson, 2000, notes that this is to be interpreted as a commitment to a precautionary risk philosophy (p. 327) and accordingly it should not be confused with the 'preventative' philosophy constitutive of the Scientific/Agronomicism discourse. Indeed the close association between the two principles is indicated by their incorporation within the Environmental Chapter, introduced by the SEA, in which Article 174 (Ex Article 130r)2 commit the EU's environmental policy to 'the precautionary principle and on the principles that preventive action should be taken'.
- ⁴⁸ See section 6.3.1 on institutionalised deliberation for an extended discussion of this matter.
- ⁴⁹ The term comitology refers not to 'the European committee system as a whole but merely denotes those bodies involved with the 'implementation' of secondary legislation.' Joerges and Everson, 2000, p. 165.
- ⁵⁰ Ibid, p. 182.
- ⁵¹ Christian Joerges and Jurgen Neyer, 'Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector', Journal of European Public Policy, 1997, vol. 4, no. 4, p. 618. *Original emphasis.*
- ⁵² Ibid.
- ⁵³ Ibid, p. 620.
- ⁵⁴ Luigi Pellizzoni, 'The myth of the best argument: power, deliberation and reason' British Journal of Sociology, 2001, vol. 52, no. 1, p. 64.
- ⁵⁵ Ibid.
- ⁵⁶ Pellizzoni, 2001, pp. 60-61; Dryzek, 2000, pp. 85-6.
- ⁵⁷ Joerges and Neyer, 1997, p. 616.
- ⁵⁸ Pellizzoni, 2001, p. 64.
- ⁵⁹ Jürgen Habermas, Toward a Rational Society: Student Protest, Science and Politics, London, Heinemann, 1971, p. 57.
- ⁶⁰ Ibid, p. 61.
- ⁶¹ Claudio M. Radaelli, 'The public policy of the European Union: whither politics of expertise?', Journal of European Public Policy, 1999, vol. 6, no. 5, p. 762.
- ⁶² Ibid, pp. 763-4.
- ⁶³ Ibid, p. 762.
- ⁶⁴ See section 6.4.2 for analysis of regime modification in relation to Novartis' application to market its Bt maize.
- ⁶⁵ The application was actually submitted by Ciba-Geigy, which subsequently became Novartis, following its merger with Sandoz in 1996. Since 1999 Syngenta, a spin off firm launched by Novartis and AstraZeneca has been responsible for commercialisation of Bt 176 among other Novartis maize lines. Claire Marris, 'Swings and Roundabouts: French Public Policy on Agricultural GMOs since 1996', notizie di Politeia, 2000, vol. xvi, no. 60, p. 35, n. 2.
- ⁶⁶ Ibid, p. 24.
- ⁶⁷ Terence P. Stewart, and David S Johanson, 'Policy in Flux: The European Union's Laws on Agricultural Biotechnology and their Effects on International Trade', Drake Journal of Agricultural Law, 1999, vol. 4, p. 261.
- ⁶⁸ Ibid, p. 262, Article 205 (ex Article 148 EC), EU Treaty.
- ⁶⁹ Stewart and Johanson, 1999, p. 262
- ⁷⁰ Ibid.
- ⁷¹ Ibid.
- ⁷² Stewart and Johanson, pp. 262-3; Grossman and Endres, 2000, p.426, n. 34.
- ⁷³ Ibid, p. 263, Grossman and Endres, 2000, p. 401,

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- ⁷⁴ Marris, 2000, p. 33.
- ⁷⁵ Article 16, Directive 90/220. *Emphasis added.*
- ⁷⁶ Stewart and Johanson, 1999, p. 266; Commission of the European Communities, Commission proposes to repeal national bans on GMO maize in Austria, Italy and Luxembourg, IP/97/784, (10.9.97).
- ⁷⁷ IP/97/784.
- ⁷⁸ Stewart and Johanson, 1999, p. 263.
- ⁷⁹ Joerges and Neyer, 1997, p. 619.
- ⁸⁰ Ibid, p. 618. *Original emphasis.*
- ⁸¹ European Parliament, 'Resolution on Genetically Modified Maize', 8.4.1997, final ed., OJC1322/1997, pp.5-7.
- ⁸² Joerges and Everson, 2000, pp. 187-8, n. 75.
- ⁸³ Joerges and Neyer, 1997, p. 619.
- ⁸⁴ Stewart and Johanson, 1999, p. 265.
- ⁸⁵ Marris, 2000, p. 24. See section 6.4.3. for further commentary in relation to the EU US trade conflict.
- ⁸⁶ Stewart and Johanson, 1999, p. 269.
- ⁸⁷ Geoffrey P. Lomax, 'From Breeder Reactors to Butterflies: Risk, Culture, and Biotechnology', *Risk Analysis*, 2000, vol. 20, no. 5, p. 749.
- ⁸⁸ Ibid, p. 749.
- ⁸⁹ Ibid.
- ⁹⁰ Ibid, pp. 750.
- ⁹¹ Susan Carr and Les Levidow, 'Exploring the links between science, risk, uncertainty and ethics in regulatory controversies about genetically modified crops' *Journal of Agricultural and Environmental Ethics*, 2000, vol. 12, pp. 33, 35.
- ⁹² The following factors influenced choosing the UK and France as case studies: (1) Prior to politicisation of the regime both national regulatory frameworks seemed effective and stable; (2) The regimes diverged with respect to the constitution of relevant voices. In this respect it is noted that whereas the French regulatory system primarily comprised a limited number of actors from the state, industry and experts drawn from a narrow base of molecular biology, genetics and agronomics, the UK regime was more consensual in its approach and included a broader range of 'experts'; (3) Between 1997 and 2000 the level of the intensity of the controversy was highest in the UK and France.
- ⁹³ Stewart and Johanson, 1999, p. 268.
- ⁹⁴ Marris, 2000, pp. 25-6.
- ⁹⁵ Ibid, p. 25.
- ⁹⁶ Ibid, p. 26.
- ⁹⁷ Alexis Roy and Pierre Benoît Joly, 'France: Broadening precautionary expertise?', *Journal of Risk Research* 2000, vol. 3, no. 3, p. 248.
- ⁹⁸ Ibid.
- ⁹⁹ Marris, 2000, pp. 28-9.
- ¹⁰⁰ Although see Molly Cochran, 'A Democratic Critique of Cosmopolitan Democracy: Pragmatism from the Bottom-Up', *European Journal of International Relations*, 2002, vol. 8, no. 4, pp. 533-535, for a critique of Dryzek's concern to maintain a clear conceptual separation between civil society and the state, and his overstatement of the dangers of cooption.
- ¹⁰¹ Les Levidow, 'Democratizing technology – or technologizing democracy? Regulating agricultural biotechnology in Europe', *Technology in Society*, 1998, vol. 20, no. 2, p. 217.
- ¹⁰² PABE research project, 'Public Perceptions of Agricultural Biotechnology in Europe', Commission of the European Communities, contract FAIR CT98-3844, Final Report, 2001, p. 37.
- ¹⁰³ Roy and Joly, 2000, p. 248.
- ¹⁰⁴ The decision to frame their objections in terms of the precautionary principle implies the efficacy of institutional preference adjustment such as the civilising force of hypocrisy as well as suggesting an ambivalent relationship to science. See section 6.5. in respect of Beck's ideas of society's ambivalence towards science in late modernity.
- ¹⁰⁵ Marris, 2000, p. 30.
- ¹⁰⁶ Ibid, p. 32.
- ¹⁰⁷ Roy and Joly, 2000, p. 252.
- ¹⁰⁸ Marris, 2000, p. 23.
- ¹⁰⁹ Levidow, 1998, p. 214.

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- ¹¹⁰ Marris, 2000, p. 33.
- ¹¹¹ Ibid.
- ¹¹² Roy and Joly, 2000, p. 251.
- ¹¹³ Ibid, p. 252.
- ¹¹⁴ Les Levidow, Susan Carr and David Wield, 'Regulating biotechnological risk, straining Britain's consultative style', *Journal of Risk Research*, 1999, vol. 2, no. 4, p. 309.
- ¹¹⁵ Ibid.
- ¹¹⁶ Ibid, pp. 310, 316.
- ¹¹⁷ Ibid, p. 309.
- ¹¹⁸ Ibid, p. 316.
- ¹¹⁹ Ibid.
- ¹²⁰ Ibid, p. 317, Simmons and Weldon, 2000, p. 56-7.
- ¹²¹ Levidow et al., 1999, p. 316.
- ¹²² Sarah Hall, 'Jury split over GM crop destroyers', *The Guardian*, 20 April 2000, p. 2; Paul Brown, 'GM crop protesters cleared in high court test case', *The Guardian*, 17 October, 2001, p. 12.
- ¹²³ Simmons and Weldon, 2000, p. 58.
- ¹²⁴ Ibid.
- ¹²⁵ Ibid, p. 61.
- ¹²⁶ Tony Blair, 'The Key to GM is its potential, both for harm and good', *The Independent on Sunday*, 27 February 2000, p. 28. This more receptive position culminated in 2003 with the government's 'GM Nation? The Public Debate' comprising a series of regional public debates to provide fora for citizens input. See section 7.2.3. for some further comments in relation to this initiative.
- ¹²⁷ Simmons and Weldon, 2000, pp. 58-60, Levidow et al., 1999, pp. 318-9.
- ¹²⁸ Simmons and Weldon, 2000, p. 64.
- ¹²⁹ DEFRA, 'Foreword', Advisory Committee on Releases to the Environment, Annual Report Number 4 - 1996/1997, London, DEFRA, 1998.
- ¹³⁰ DEFRA, 'The Commercial Use of Genetically Modified Crops in the United Kingdom: the Potential Wider Impact on Farmland Wildlife', London, DEFRA, 1999.
- ¹³¹ DEFRA, 'Notes of meeting - 15th March 1999', Advisory Committee on Releases to the Environment: Sub-group on Wider Biodiversity Issues, ACRE/BIO/99/M1, London, DEFRA, 2000.
- ¹³² Ibid.
- ¹³³ Simmons and Weldon, 2000, p. 65.
- ¹³⁴ Grossman and Endres, 2000, p. 401; Marris, 2000, p. 31; Council of the European Communities, 2194th Council Meeting, Environment, Luxembourg, 24-5 June, 1999.
- ¹³⁵ 2194th Council Meeting, 1999.
- ¹³⁶ European Parliament and Council Directive 2001/18/EC of 12 March 2001 on the deliberative release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC – Commission Declaration OJ L106, 17.4.2001.
- ¹³⁷ 'In accordance with the precautionary principle, the objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States and to protect human health and the environment ...', Article 1, Directive 2001/18/EC.
- ¹³⁸ Paragraphs 20 and 52, Preamble, Directive 2001/18/EC.
- ¹³⁹ Annex II, Principles for the Environmental Risk Assessment, part B, 2nd indent
- ¹⁴⁰ Articles 23 and 28.
- ¹⁴¹ Paragraph 9.
- ¹⁴² Article 31(5).
- ¹⁴³ Paragraph 62, Preamble.
- ¹⁴⁴ Article 2(8), Directive 90/220/EC.
- ¹⁴⁵ Article 2(8), Directive 2001/18/EC and Annex II, part A.
- ¹⁴⁶ Carr and Levidow, 2000, p. 33.
- ¹⁴⁷ Commission of the European Communities, 2001, 'European Governance: A White Paper' COM (2001) 428, final (25.7.2001); COM (2001) 454 final, p. 20.
- ¹⁴⁸ Commission of the European Communities, 2002, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions': Life Sciences and

- biotechnology – A strategy for Europe’, COM (2002) 27 final, (23.1.2002), p. 20. Carr and Levidow offer a less enthusiastic assessment of the European Ethics Groups achievements describing the group’s advice (albeit in its previous guise as the Group of Advisors on the Ethical Implications of Biotechnology (GAEB)) as ‘limited and bland.’ (p. 31).
- ¹⁴⁹ COM (2002) 27 final, (23.1.2002), p. 21.
- ¹⁵⁰ See section 3.4.3.
- ¹⁵¹ COM (2002) 27 final, p. 20.
- ¹⁵² Commission of the European Communities, 2001, ‘Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Science and Society Action Plan’, COM (2001) 714 final, (04.12.2001), p. 22.
- ¹⁵³ European Commission, Research Directorate-General, Directorate E – Life Sciences: biotechnology, agriculture and food research, 2001, ‘A European Round Table on GMO Safety Research, Concept paper presented at the Launch Meeting, Brussels, 9 October 2001, p. 1.
- ¹⁵⁴ A weakness of the Roundtable is that despite commitments to involving a ‘broad range of stakeholders’ participation is by invitation, thus providing for the selective incorporation and by implication exclusion of important distinct but affected voices. See section 6.1.3 for further consideration of output-oriented legitimacy.
- ¹⁵⁵ The Challenge of Reconciling Regulatory Differences: Food Safety and GMOs in the Transatlantic Relationship, in Mark A. Pollack and Gregory C. Shaffer, Eds., Transatlantic Governance in the Global Economy, Rowland and Littlefield Publishers, Lanham, Maryland, 2001.
- ¹⁵⁶ Pollack and Shaffer, 2001, p. 155; Mark A. Pollack and Gregory C. Shaffer, ‘Biotechnology: The Next Transatlantic Trade War?’, The Washington Quarterly, 2000, vol. 23, no. 4, p. 44.
- ¹⁵⁷ World Trade Organisation, ‘European Communities - Measures Affecting the Approval and Marketing of Biotech Products - Request for Consultations by the United States’, WT/DS291/1, 03-2677, 23/05/2003.
- ¹⁵⁸ Ian Black, ‘Europe ready to open the door to labelled GM foods’, The Guardian, 2 July, 2003, p. 13.
- ¹⁵⁹ Pollack and Shaffer, 2001, pp. 154-5; Pollack and Shaffer, 2000, p. 42.
- ¹⁶⁰ William Farish, ‘Biotech is benign’, The Guardian, 4 June 2003, p. 22.
- ¹⁶¹ Stewart and Johanson, 1999, p. 287.
- ¹⁶² Ibid, p. 288.
- ¹⁶³ Pollack and Shaffer, 2001, p. 160.
- ¹⁶⁴ Stewart and Johanson, 1999, p. 288.
- ¹⁶⁵ Ibid.
- ¹⁶⁶ Pollack and Shaffer, 2001, p. 171-2; Pollack and Shaffer, 2000, p. 52.
- ¹⁶⁷ Grace Skogstad, ‘The WTO and Food Safety Regulatory Policy Innovation in the European Union’, Journal of Common Market Studies, 2001, vol. 39, no. 3, pp. 500-501; Pollack and Shaffer, 2000, pp. 52-53; Pollack and Shaffer, 2001, pp. 171-2.
- ¹⁶⁸ Gambetta, 1998, p. 22.
- ¹⁶⁹ Fearon, 1998, pp. 56-7.
- ¹⁷⁰ Cass R. Sunstein, ‘The Law of Group Polarization’, The Journal of Political Philosophy, 2002, vol. 10, no. 2, p. 186.
- ¹⁷¹ Ibid, pp. 178-9.
- ¹⁷² Ibid, p. 182.
- ¹⁷³ George Poste, ‘The new risks to scientific progress’, *Life Sciences supplement*, Financial Times, 28 October 1999, p. vii.
- ¹⁷⁴ Com (2002) 27 final, p. 8.
- ¹⁷⁵ Simmons and Weldon, 2000, p. 63.
- ¹⁷⁶ PABE, 2001, p. 75.
- ¹⁷⁷ Ibid.
- ¹⁷⁸ Ibid, p. 79.
- ¹⁷⁹ See for instance Eurobarometer, ‘Europeans, science and technology’ Report Number 55.2, 2001, pp. 40-42.
- ¹⁸⁰ PABE, 2001, p. 47.
- ¹⁸¹ Fearon, 1998, p. 57.
- ¹⁸² Christopher Lord, ‘The role of the European Parliament in the accountability of the European Central Bank’, EPRG Working Paper, No. 3-99, September 1999, p. 12.
- ¹⁸³ Fearon, 1998, p. 49.

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- ¹⁸⁴ Ulrich Beck, Risk Society: Towards a New Modernity, London, Sage Publications Ltd, 1992.
- ¹⁸⁵ Ibid, pp. 160-1
- ¹⁸⁶ Ibid, pp. 163-9.
- ¹⁸⁷ Ibid, p.172.
- ¹⁸⁸ Ibid, pp. 164-5.
- ¹⁸⁹ Although see Brian Wynne, 'May the Sheep Safely Graze? A Reflexive View of the Expert Lay Knowledge Divide', in Scott Lash, Bronislaw Szerszynski, and Brian Wynne, Eds., Risk, Environment and Modernity: Towards a New Ecology, London, Thousand Oaks, New Delhi, Sage, 1996, for a critique in relation to reflexive modernity's tendency to overemphasise the uniqueness of scepticism and ambivalence as characteristics of lay-expert relations .
- ¹⁹⁰ Beck, 1992, p. 167.
- ¹⁹¹ The three year field trials held in the UK reflect the influence of the preventative approach.
- ¹⁹² Article 20, Directives 90/219 and 90/220.
- ¹⁹³ Council Directive 98/81/EC of 27 October 1998 amending Directive 90/219/EEC on the contained use of genetically modified micro-organisms, OJ L 330 5.12.98 p. 13, preamble, para. 11
- ¹⁹⁴ Ibid, para. 14.
- ¹⁹⁵ COM (2001), 454 final, (4.9.2001), p. 20. *Emphasis added*.
- ¹⁹⁶ Beck, 1992, p. 165.
- ¹⁹⁷ European Parliament, 8.4.1997,, p. 55.
- ¹⁹⁸ Goodin, 2003, p. 150.
- ¹⁹⁹ Joerges and Neyer, 1997a, pp. 292ff; Joerges and Everson, 2000, p. 182.
- ²⁰⁰ Joerges and Everson, 2000, p. 182.
- ²⁰¹ Pellizzoni, 2001, p. 61.
- ²⁰² Ibid, Joerges and Neyer, 1997, p. 616.
- ²⁰³ Pellizzoni, 2001, p. 64.
- ²⁰⁴ Dryzek, 2000, p. 103; Eriksen, 2000, p. 54.
- ²⁰⁵ Dryzek, p. 103.
- ²⁰⁶ Ibid, p. 101.
- ²⁰⁷ Ibid.
- ²⁰⁸ Patterson, 2000, p. 328.
- ²⁰⁹ Elster, 1998, p. 111.
- ²¹⁰ Ibid, p. 620.
- ²¹¹ Joerges and Neyer, 1997, p. 618. *Original emphasis*.
- ²¹² Ibid, p. 619.
- ²¹³ Dryzek, 2000, p. 77.

7. Conclusion.

7.1. Introduction.

This thesis has treated globalisation as a complex of distinct but interrelated material and ideational processes whose modes of interaction are increasingly coordinated through transnational networks of power, which reconfigure the authority and power of the territorial state across a range of domains of activity including, the economic, political, military, cultural, and environmental. States have not been passive actors in this process. On the contrary they have been active agents alongside and in tandem with private institutions.¹ However, whilst states may have been co-authors of this new order it has also had a 'profound effect on states in return.'² In particular it has contributed towards an increasing mismatch between the national state as the primary structure of territorially based governance and the denationalised modes of activity, creating a tension whereby legitimate questions are posed concerning the state's capacity to provide effective governance.³ Moreover, this mismatch between the national state and denationalised modes of activity impacts on issues of democratic legitimacy where democratic government remains anchored to a 'Westphalian cartography' which assumes the congruence of sovereignty, authority and political membership.⁴

Possible responses to this mismatch between Westphalian-sovereignty and denationalised activity have been formulated in terms of the need to reinforce the state's capacity for governance with larger political units which are more commensurate with contemporary 'political-economies of scale'.⁵ Instances of transnational modes of governance abound, ranging from high profile global actors such as the UN, WTO and IMF, through regional trade blocs such as NAFTA, APEC and the EU, to roughly 350 governmental organisations designed for economic, social and peacekeeping functions, which are themselves interconnected through a complex network of relationships.⁶ Whilst perhaps offering more effective governance these transnational modes of governance do not necessarily benefit democratic governance. As this thesis has confirmed the relationship between effective and democratic governance under the conditions of globalisation and Europeanisation remains highly contested. Indeed, as much as they provide a possible

solution to the problems of effective governance and democratic accountability, these transnational modes of organisation pose them anew.

Legitimacy is thus conceived as a dual concept comprising both input-oriented and output-oriented dimensions, where the former requires citizens have an authentic voice and the opportunity to influence policy and the latter depends upon effective fate control. Authors such as Scharpf and Majone both argue that, at least at present, only output-oriented legitimacy is obtainable in the EU, and thus conclude that ‘there is a special, limited form of political legitimacy of which European-level policy-making avails itself already in its current institutional form.’⁷ Other authors such as Zürn are far more optimistic concerning the legitimacy obtainable at the transnational level, and, in this respect, argue that transnational institutions such as the EU positively contribute towards both input and output oriented legitimacy.

This thesis has set about evaluating the possibilities and limits of transnational democracy within a post-Westphalian sovereignty order, in which territory, authority and community are articulated in relation to each other in increasingly complex ways. In order to do so it has interrogated three EU policy regimes – the ECB, EU gender rights, and EU regulation of agro-food biotechnologies, using three models of transnational democracy – democratic intergovernmentalism, cosmopolitan democracy and deliberative democracy. The purpose of this exercise was to discover both the relevance of these models in relation to transnational democracy and the democratic qualities of the regimes themselves. Whilst the choice of normative models reflects their prevalence in the literature on transnational democracy, the choice of the policy regimes was driven by an apparent *prima facie*-fit with aspects of the normative models. This ‘fit’ between the normative model and the regime suggested that mapping the ideal type over the chosen regime would reveal important aspects of its democratic credentials. It would also provide the opportunity to reflect upon the validity of the propositions, and hence, the usefulness of the models.

With these aims held firmly in mind the purpose of this conclusion is threefold. Firstly it evaluates the possibilities and limits of the different models in relation to what they reveal about transnational democracy (section 7.2.). In doing so it reviews not only the model applied to the policy regime but also considers the relevance of the other prescriptive models. Secondly, it reviews the arguments made earlier in the thesis in relation to the benefit of conceiving of the EU as a series of regimes rather than as a single entity for the purposes of evaluating its democratic legitimacy (section 7.3). This involves reflecting upon the strengths and weaknesses of the case study method of enquiry adopted to interrogate the

regimes. Finally, in section 7.4, the orientation of the argument turns towards the future and considers the potential of the European project in transnational democracy under conditions of increasing Europeanisation and globalisation.

7.2. Models of transnational democracy: Reviewing the normative propositions.

Each of the models of transnational democracy explicated and examined through the course of this thesis articulate both input and output oriented dimensions of legitimacy. In each case the ways in which these dimensions are articulated demonstrate both similarities and differences. The models and corresponding regimes were adopted on the basis of a prime-facie fit, which suggested that interrogating the ideal-type in relation to the chosen regime would reveal important strengths and weakness of the normative model's ability to elucidate transnational democratic practices and provide evidence concerning the propositions derived from the models central normative principles. The purpose of this section is to review the evidence generated by the case studies in relation to the normative positions identified in chapter 1.

Model of democracy	Policy Regime	Proposition
Democratic Intergovernmentalism	ECB	The bases of legitimacy in both input and output terms are primarily intergovernmental
Cosmopolitan Democracy	EU Gender Rights Regime	Input and output-oriented legitimacy is primarily provided by a cluster of enabling rights embedded across multiple levels of governance.
Deliberative Democracy	EU Agro-food biotechnology Regime	Democratic legitimacy is primarily provided by both institutionalised deliberation and civil society voices providing channels for preference articulation, reflection and modification (<i>input</i>) and the generation of superior policy (<i>output</i>) which is reflective of the preceding deliberation.

Table 7.1. Normative propositions.

7.2.1. Democratic intergovernmentalism and ECB.

The model of democratic intergovernmentalism argues that democratic legitimacy in transnational institutions is anchored to its intergovernmental membership. National states are primarily motivated to participate in international institutions in order to reduce the transaction costs of applying policy decisions under conditions of complex interdependence. Reducing the transaction costs improves policy effectiveness thereby contributing towards output-oriented legitimacy. National states are considered to constitute the relevant community of fate, in view of an established common language, in which citizens participate in opinion formation and influence the policy positions of the national governments. In turn the state actors represent these nationally formulated preferences in the international fora. Accordingly, input-oriented legitimacy is indirectly constituted. Reflecting the contention that democratic legitimacy ultimately depends upon the mandate of the national constituency the model of democratic intergovernmentalism requires that states must retain the option of (at least partial) exit from their transnational commitments, if this is determined at the national level.

Mapping the model of democratic intergovernmentalism onto the EMU highlights the overriding importance of the 'credibility' arguments underpinning the ECB. The thrust of these arguments relate the improvements in credibility commitments signalled by an independent ECB, and their contribution towards reducing the transaction costs of maintaining low inflation in the Euro area. The arguments underpinning the regime's legitimacy are therefore primarily output-oriented. It also emphasises the intergovernmental basis of the regime – that is the continued salience of the member states as the political principals and the ECB as a technical agency. In terms of input-oriented legitimacy, the intergovernmental lens underscores the representative role of the member states, in the intergovernmental institutions such as the European Council, Council of Ministers, and Eurogroup in both formal and, arguably more importantly, informal contexts. The intergovernmental dimension of the regime is constituted, in particular, by the asymmetrical institutional design of the ECB, whereby the member-states retain responsibility for macro-economic policy, which remains a key factor of inflation. These factors are summarised in table 7.2. below.

Democratic Intergovernmentalism	ECB
International institutions improve policy effectiveness (output-oriented legitimacy).	Independent monetary authority improves monetary policy credibility, thereby lowering transaction costs and improving policy effectiveness (output-oriented legitimacy).
Institutions indirectly authorised by national constituencies who determine whether membership of the institution continues to effectively provide output oriented legitimacy.	Member States of the Euro area (principals) delegated monetary authority to ECB (agency). The ECB expresses the interests of the national states.
State provides a transmission belt for the representation of national voices, thereby also providing input-oriented legitimacy.	Asymmetric EMU (in which member states remain principal institutions in relation to macroeconomic policy) requires coordination between states and ECB. The ECB's legitimacy depends upon the support of the national states and their citizens, whose voices are represented in various intergovernmental institutions (ECOFIN, Eurogroup).

Table 7.2. Democratic intergovernmentalism and the ECB.

Output-oriented legitimacy.

The principal function of the ECB, as reflected in its primary goal, is to maintain price stability within the Euro area, which it has specified as a level of inflation of below 2 percent (see section 4.6.1). Various aspects of economic theory suggest potential benefits arising from EMU. Optimal Currency Area literature suggests that EMU provides economies of scale, lower exchange transaction costs and exchange rate security.⁸ Mundell's Assignment Problem specifies the limited policy choices states have in relation to monetary autonomy and exchange rate freedom under conditions of increasing capital mobility. Time-inconsistency literature maintains that credible policy commitments are necessary to improve policy effectiveness and prescribes delegation to politically insulated non-majoritarian institutions to provide the necessary credibility. These insights from economic thought provide a context in which to understand the expected benefits of EMU and the ways in which it enhances state participants output-oriented legitimacy. Credibility arguments have been particularly salient in relation to the ECB's output oriented legitimacy, where credibility commitments – that is the expectation that institutions will carry out the functions that are

ascribed to them - are seen as vital in relation to securing stability in the financial markets, reducing the overall risk premium applied by the markets, and thereby encourage price stability across the economy. (See section 4.6).

These arguments are underpinned by a monetarist paradigm which links the maintenance of price stability in the medium term with control over the money supply. In this respect it contended that the institutional design of the ECB was directed by a monetarist epistemic community, dominated by European central bankers, whose policy beliefs converged on a set of principled normative and causal beliefs and shared criteria for weighing knowledge in respect to the common enterprise (section 4.4.). This monetarist discourse informs the appropriate policy mix, 'which privileges price stability as an absolute good'.⁹ Accordingly, the particular institutional solution offered by the ECB, 'is provoked in part by the need to find legitimacy in terms of the prevailing norms, rather than adaptation to straight forward functional problems.'¹⁰ The privileging of price stability, within the policy mix, and associated institutional solution, involves trade offs in relation to substantive policy choices, especially in terms of the demotion of alternative economic goals such as high levels of employment, social protection and so forth (see section 4.6.2).¹¹ Determining whether the delegation of monetary policy to the ECB, does actually produce better economic outcomes – that is whether it does contribute toward output-oriented legitimacy – cannot be adequately captured by reference to the maintenance of price stability alone despite the contentions of the ECB (see section 4.6.1.). EU citizens continue to value a broad range of social policy goals, which, especially in the short term, may be in tension with the objective of achieving price stability. Macroeconomic policy remains the responsibility of national governments under EMU, and it is in relation to their government's ability to continue to provide these public goods that national citizens will judge the output-oriented legitimacy of their governments.

The model of democratic intergovernmentalism underscores the continued importance of intergovernmental interests in judging the output-oriented legitimacy of the regime and in so doing not only highlights the intergovernmental aspects of the asymmetrical union, but also helps us identify potential weaknesses of the regime which are likely to require attending to in the future. Despite the prominence of Optimal Currency Area (OCA) theory in discussions of the likely benefits of EMU, the Euro area does not satisfy the necessary conditions of an OCA (see section 4.6.2.). This means that the policy actions of the ECB, which acts in relation to the entire Euro area, and external economic shocks, are likely to have uneven effects within the Euro area, resulting in differential allocation costs and

benefits upon the Euro member states. Increasing awareness of the likely costs in relation to EMU – the possible impact of Euro membership upon the provision of comprehensive national health service - highlighted by media reports in the UK, or citizens direct experiences of cuts in public provisions – the German federal governments attempts to reduce employment protection in Germany, are going to inspire nationally shaped responses. This is suggested by the third stage of Verdun's Eclectic Theory – and illustrated by the divergent responses by France, Germany, Ireland, and the UK to Commission and ECB criticisms of their macroeconomic circumstances (see section 4.3).¹² These institutional tensions could generate a variety of solutions, (see section 4.6.2), but under conditions of economic globalisation, any solution will ultimately be required to satisfy the dual demands for political legitimacy by the political principals - that is the member states, and credibility by the economic institutions – principally the markets.

Input-oriented legitimacy.

The tension between the ECB's need for political legitimacy – derived from the support of the member states, and its need for credibility – emanating from satisfying the markets expectations, emerges at the nexus of input and output-oriented legitimacy in EMU. Input oriented legitimacy – the opportunity for voice and representation – is channelled through a variety of supranational and intergovernmental routes. The principal supranational institutions are the European Court of Justice (ECJ) and European Parliament (EP) (see section 4.5.1). The principal intergovernmental institutions include the European Council, ECOFIN, Eurogroup, and the national central bankers (NCBs) who dominate the ECB Governing Council (see section 4.5.2). However, the opportunities for voice offered by these supranational and intergovernmental channels are constrained by the constitutionally guaranteed independence of the ECB – the purpose of which is to engender the ECB's credibility. These formal restrictions of political influence apply equally to both the supranational and intergovernmental institutions. However, it is argued in this thesis that, the asymmetrical EMU and the consequent co-responsibility of both the member states and the ECB for providing the conditions required for price stability, gives the member states informal opportunities for voice (4.5.2), or in Elgie's phrase, for 'shaping the unspoken expectations of the EMU process'.¹³

Therefore informality provides a solution for the tensions created by the divergent pulls of political legitimacy and credibility or input and output-oriented legitimacy. It provides the opportunity for the representation of national voices in the shaping of monetary policy, whilst at the same time, respecting the limits of influence required for achieving credibility – a prerequisite for achieving output oriented legitimacy. However, there is clear evidence, of the instability of this compromise, and the corresponding weaknesses of the regime in maintaining both voice and effectiveness. In this particular manifestation, democratic intergovernmentalism represents an uneasy mode of obtaining both input and output oriented legitimacy.

In discussing the informal aspects of democratic intergovernmentalism, as it is manifested in the context of the Eurogroup, Puetter distinguishes between a ‘pure’ and an ‘informal’ Intergovernmentalist framework.¹⁴ The informal framework emphasises the processes of arguing and deliberation rather than simple bargaining in relation to the mode of institutional interactions. The argument made is that rather than policy simply representing the outcome of the distribution of intergovernmental resources, processes of social learning occur within the institutions. This contention represents a clear challenge to the two stage model of democratic intergovernmentalism set out by this thesis, (see section 3.4.1.) in which the processes of arguing and deliberation are located within the national fora, and then represented at the European level through bargaining practices. As illustrated by the consideration of monetary policy formulation in EMU, (see section 4.5.2), the modified model of democratic intergovernmentalism would seem to have some relevance in relation to the member states and ECB interactions despite instances of shifting back ‘towards the well-known pattern of intergovernmental bargaining’ – as recently displayed by France.¹⁵ In Dyson’s phrasing the EMU regime displays both ‘Lockian’ and ‘Kantian’ characteristics.¹⁶

These Kantian characteristics – processes of social learning and principled arguing, rather than simple bargaining, strongly reflect the normative prescriptions of the model of deliberative democracy, employed by this thesis. In his discussion of the Kantian conception of the Euro area, Dyson claims that it is to be distinguished from the Lockian conception on the basis that ‘the process of cooperation is seen as motivated by the desire to reach agreement on terms that nobody could reasonably reject.’¹⁷ Adopting this deliberative framework Dyson anchors the legitimacy of the regime in the ‘forceless force of the better argument.’ This requires that communication is free from power over speech and power in speech (see section 3.4.3).¹⁸ The contention that these conditions pertain in the EMU regime at the current time are misplaced.

ECB communications are characterised by ‘pronunciamentism’ – that is ‘top-down communication rather than dialogue.’¹⁹ In this regard the ECB press conferences are a case in point. Moreover, as was noted earlier, (section 4.6.1), these statements are primarily aimed at the market institutions rather than at the general public. The favourable opportunities provided for economic institutions to voice their opinions, compared to those for ordinary EU citizens, – in view of their market power – constitutes an exercise of power over communication. Restrictive conditions are applied in relation to the opportunities for participation, and in doing so undermine possibilities for authentic deliberation.

The best example of public deliberative engagement with the ECB occurs in the EP EMAC hearings with the members of the ECB Executive Board. The analysis of these engagements, (section 4.5.1.), has highlighted the ways in which arguments have been constructed around generalised principles such as the goals of price stability versus the broader goals of EMU, and in this regard constitute an example of institutionalised deliberation (see section 6.3.1). Nevertheless, in view of the highly technical nature of the discourse restrictions are placed upon the ability of the EMAC to fully engage with the ECB (section 4.5.1).

The restrictions placed upon the EMAC are not constitutive of power over communication – indeed it is legally entitled to hear the members of the ECB Executive Board. Instead the restrictions are constitutive of power in speech – that is the legitimacy of the types of arguments that may be deployed and the language that may be used in their construction. The monetarist paradigm, which has been institutionalised within EMU, shapes the types of arguments that are viewed as legitimate and the type of language they are constructed in. In this regard Dyson notes that:

[t]he institutional organization of the Euro-Zone is not simply to be understood in terms of a functional response to the challenge presented by global financial markets and the scale of capital mobility. It embodies a discourse about economic and monetary policies amongst a provisional group schooled in monetary policy that has come to possess a cultural authority and to shape the form that globalization has taken. This discourse is about policy ‘credibility’ and ‘reputation’, about ‘modernization’ of labour markets and the welfare state, and about economic ‘restructuring’ ... Espousing policies consistent with this agenda becomes associated with validation for the actors concerned and gaining legitimacy.²⁰

In this context we may read the continued efforts of the EMAC to engage with the ECB in relation to its absolute prioritisation of price stability as an instance of discursive

contestation. Implicitly, at least, their interrogations question aspects of the prevailing monetarist discourse - the normative commitment to price stability and the set of causal beliefs concerning the sources of inflation and its impact on broader economic goals. The ineffectiveness of the interrogation – indicated in part by the level of repetition – can be interpreted as reflecting the absolute hegemony of the monetarist discourse. This observation further undermines the resonance of ‘the forceless force of the better argument’.

This selective application of the model of deliberative democracy, has underscored the discursive bases of legitimacy in relation to EMU, highlighted some of the constraints upon incorporating divergent voices within the regime and the limitations concerning the definition of output oriented legitimacy beyond the dominant monetarist discourse. This indicates that the narrative generated by a fuller application of the model could be worthwhile.²¹

7.2.2. Cosmopolitan model and gender rights regime.

The model of cosmopolitan democracy contends that the central premise of democracy is the principle of autonomy. Autonomous individuals are free to determine the conditions of their own association – that is to say they are entitled and empowered to have voice in the shaping of public policy decisions, (input oriented legitimacy), and they are governed by a fair framework which effectively upholds the principle of autonomy for all its constituents. The realisation of input and output-oriented legitimacy is founded upon a constitutional legal framework which provides an overarching cluster of empowering rights across distinct but overlapping sites of power: body; welfare; culture; civic associations; the economy; coercive and organised violence; and legal and political institutions. These rights counter conditions that impede individuals fully pursuing their lives as private individuals and public citizens. These rights are embedded across multiple levels of governance, thus constituting a transnational democratic framework, simply called a cosmopolitan law. The need to embed the principle of autonomy both below and above the state is justified by the contention that in a globalising world individuals are increasingly enmeshed in a variety of communities of fate other than the territorially bounded state. The relevance of mapping the model of cosmopolitan democracy onto the EU gender rights regime indicates three principal similarities. These are summarised in table 7.2 below.

Cosmopolitan Democracy	EU Gender Rights Regime
Legitimacy achieved through the realignment of multiple communities of fate with institutions of governance through the dispersal of authority below and above the state.	Multiple channels of voice and representation, and institutions of governance at the local, national and supranational level.
Choice of appropriate community of fate guided by the principles of voice and effectiveness (input and output-oriented legitimacy).	Appropriate level of governance guided by principles of subsidiarity and inclusiveness.
Legitimacy given legal form through the provision of bundles of enabling rights embedded within institutions across multiple sites of power.	Gender rights regime comprises a cluster of empowering gender rights, given legal form in EU supranational law, and may be invoked across multiple levels of governance.

Table 7.3. Cosmopolitan democracy and EU gender rights regime.

The analysis provided in chapter 5 suggests that the cosmopolitan model does indeed have relevance in relation to the articulation of input and output-oriented legitimacy across these different dimensions, and does accordingly provide insights into the constitution of democratic legitimacy in the gender rights regime. Nevertheless limitations in relation to its relevance were identified and need to be given further consideration.

Input-oriented legitimacy.

Reflecting its assertion that globalisation increasingly enmeshes citizens in overlapping communities of fate the cosmopolitan model contends that the appropriate institution of governance will not necessarily be the territorially bounded state. Rather, it endorses the development of multiple levels of governance. This requires an extension of citizenship rights beyond the territorial confines of the state, but not their replacement. Instead, within the framework of multiple citizenships, 'the laws and rules of the nation-state would become but one focus for legal development, political reflection, and mobilization.'²² Determination of the appropriate level of governance is guided by consideration of the principles of inclusiveness and subsidiarity.

The EU Gender regime reflects the cosmopolitan model's commitment to inclusiveness and subsidiarity. It is constituted by, and constitutive of, a women's network which incorporates a range of institutional and civil society actors within a multi-tiered system of governance and separation of powers at the Community level providing multiple points of access for diffuse interests.²³ The EU institutional actors include, *inter alia*, the Commission's Equal Opportunities Unit and the EP's Women's Rights Committee and the ECJ; whilst at the sub-national level local authority equality units and European Officer's are involved. The key civil society actors include grass roots women's voluntary organisations represented through umbrella organisations such as ENOW and EWL and the trades unions organised through ETUC.

A number of limitations may be identified, however, with respect to the opportunity structure provided by this network, concerning both the range of diffuse interests represented – that is who is incorporated and who is excluded, and the level of institutional responsiveness to those interests which do have access.²⁴ The analysis of the EU Women's network (section 5.5.) noted that whilst the network incorporates actors at multiple levels of governance - from the local to the supranational - experiences of access do remain differentiated. Local actors, in particular, expressed feelings of marginalisation from the network. This reflects both institutional deficiencies restricting access to the network as experienced by local authority women's committees and the propensity for the umbrella organisations at the national and European levels to operate 'as a series of sluices' diluting grass roots policy inputs.²⁵ The tendency for policy to reflect the best resourced groups - which are normally white, professional women²⁶ - means that women who are also members of minority groups, such as lesbians, blacks and migrants, have a very different experience of EU policy and are unable to readily benefit from the women's network.²⁷

Thus whilst a multi-level and dispersed European women's network is clearly identifiable and assessments concerning its operation are broadly positive, there remains a real sense of alienation amongst some women's groups. This stems from both the EU's limited competences which primarily remain restricted to employment matters and a more general sense of alienation attributable to a lack of resources, even where the groups concerns and EU's competences coincide.²⁸

The cosmopolitan model's commitment to double democratisation – both within and between states - is set out in section 5.3.1. The argument for double democratisation follows from the model's commitment to autonomy and the acknowledgement that individuals are enmeshed within transnational institutions. By rejecting the territorial state as the principal

institution of governance the model advocates both relocating decision making nearer towards the individual and delegating it to transnational institutions, thereby expressing ambivalence towards both centralisation and decentralisation. The principles of voice and effectiveness (subsidiarity and inclusiveness) provide guidance in relation to determining the appropriate level of governance, in the absence of an a priori commitment to a fixed community of fate. In order to fulfil both of these principles, 'democracy is best located when it is closest to and involves those whose life chances and opportunities are determined by significant social processes and forces.'²⁹ In practice, this means that the lowest effective level of governance should be adopted. In order to determine the appropriate level of governance Held outlines three tests – extensiveness, intensity, and comparative efficiency. These tests express a functional or instrumental response, rather than a solution which is the outcome of deliberation in the first instance. Cochran is therefore quite right to label Held's approach as 'top-down'.³⁰ Held does acknowledge the possible need for deliberation in instances of ambiguity but this follows rather than precedes the definition of the problem.³¹ Thus, whilst Held is absolutely right that '[i]t yields the possibility of multilevel democratic governance', questions need to be raised in relation to the democratic credentials of the procedure for choosing the appropriate community of fate.³² In its current formulation deliberation is incorporated within the cosmopolitan model as an optional extra. Held maintains that reflexive deliberation and decision making depends upon 'their entrenchment in a political community or communities.' This assumes that the political community already exists or can be identified from above. A thicker commitment to deliberation would require that the constitution of the political communities is (partially at least) an outcome of the process of deliberation from below.

The cosmopolitan model's commitment to multiple levels of governance is inadequately translated into practice within the current institutional arrangements in the EU. As noted, (section 5.3.1.), the principle of subsidiarity articulated within the EU is complex and ambiguous. It is expressed both as the principle of bringing decision making as 'closely as possible to the citizen' and as a means of interpreting the division of competence between the member states and the EU; an interpretation which has been reinforced by the protocol on the Amsterdam Treaty.³³ In relation to the Amsterdam conception of subsidiarity Føllesdal comments that it 'seems to grant unwarranted powers to Member States' and that '[i]nsofar as the present system of nation-states in Europe is taken for granted, Amsterdam Subsidiarity does nothing to alleviate such injustices.'³⁴ Evaluated against the cosmopolitan model's commitment to the erosion of the normative borders of the state, (See section 3.4.2.), this

interpretation of subsidiarity is inadequate. Instead it seems to accord more with the model of democratic intergovernmentalism which advocates retaining democratic states as a principal prerequisite for transnational democracy.

Output-oriented legitimacy.

Gender discrimination in the EU has undermined women's capacities to freely and fully determine their own life paths. With respect to the workplace this discrimination has taken the form of unequal (lower) pay for equal work, unequal treatment in the workplace, unequal pension entitlements and exposure to sexual harassment. The restricted opportunities available to women have not been the outcome of acceptable differences through personal choices but rather unacceptable structures of difference. The workplace has been systematically structured towards male workers such that they benefit from the established work day patterns and hours, job hierarchies, normalised behaviour in the workplace and so forth. In short, conditions of employment have historically been gendered.

The EU gender equality regime constitutes a commitment to the principle of democratic autonomy through the provision of a cluster of empowering rights which aim to reduce women's exclusion and marginalisation in the workplace simply because they are women. The cluster of rights has expanded considerably since the activation of the EU gender rights regime in the 1970s (before which time the Treaty provisions remained a 'dead letter'), incrementally negating the autonomous structures which restrict women's participation in the workplace. In more recent years this has also included provisions which address the issues of childcare and the division of labour in the home which have a direct bearing on women's relations to the marketplace. The inclusion of these issues historically thought of as belonging to the 'private sphere', but which do nevertheless impact upon women's enjoyment of 'a common structure of political action' is entirely in keeping with the cosmopolitan model's broad notion of the political.³⁵ Moreover with the introduction of gender mainstreaming the principle of gender equity has been extended – in principle at least - to all spheres of social interaction.

The evolving nature of the gender rights regime reflects the reality that gender equality remains only partially constituted in EU law, and thus continues to remain a regulative principle rather than a fully achieved ideal. However it does represent a complex of

constitutional empowering rights which address socio-economic inequalities which women may claim against colleagues, employers, national governments and the EU in pursuit of achieving self-determination. In addressing economic structures of autonomy the regime clearly exceeds the liberal democratic focus on formal civil and political rights.

Nonetheless a number of empirical and conceptual weaknesses in the EU approach to sex discrimination should be highlighted, concerning: the continued existence of gender inequality in the workplace; the narrowness of the rights regime; the formal or liberal reading of the rights; the relationship of EU law to structures of power and the gender bias of legal concepts; and the displacement of the political by the juridical.

Despite the development of a cluster of entitlement capacities with respect to gender equality in the workplace, stark inequalities still exist. In this respect it may be noted that female employment is 18 percent below the male rate whilst unemployment is 3 percent higher for women than men. The labour market remains segregated by gender, a majority of women still being employed in lower paid jobs (77 percent of low income employees).³⁶

More broadly, notwithstanding more recent policy provisions such as mainstreaming, the regime has remained confined to the issue of discrimination in the workplace. Accordingly aspects of gender equality - in particular the gendered division of labour - which have a fundamental bearing on women's relations to the economy, continue to have a major detrimental impact on women's right to self-determination. In this respect Duncan suggests that the policies aimed at gender inequality in the workplace can be expected to have little impact whilst they are implemented in isolation 'because it is the links between elements which are all important.'³⁷

In order to be effective gender rights in the workplace require buttressing by a far broader range of gender rights, especially with respect to guaranteeing women's fundamental rights to reproductive freedom and sexual and reproductive health.³⁸ Moreover in the context of removing domination more broadly Hoskyns notes that '[e]quality between men and women is a somewhat lonely principle in EU law.'³⁹ The absence of other bundles of enabling rights regarding other aspects of identity such as race, disablement and so forth 'means that the equality principle is not easily carried over to or applied in contexts of greater diversity and complexity.'⁴⁰ Whilst the extension of the principle of non-discrimination to a wider variety of issues including sex, racial or ethnic origin, religion or belief, age or sexual orientation, may initially be welcomed it remains the case that a generalised principle of non-discrimination remains undeveloped. In this light Somek concludes that, '[t]hus far, the

Community's approach to equal protection against acts by the Member states is that of *non-discrimination with an exhaustive list of prohibited grounds*.⁴¹

The approach taken with respect to gender equality in the workplace has itself been criticised. The 'equal treatment' approach adopted in much of the legislation is arguably inadequate because it expresses a view of equality in which men and women are constituted as the same, rather than reflecting the clear embodied differences between men and women. The weakness in this formal approach to equality is its inability to provide the necessary normative resources to address the structural bases of inequality. Within this approach 'the line between what is 'discrimination' [i.e. unacceptable structures of difference] and what 'is personal lifestyle choice' (e.g. legitimate differences in relation to child-bearing and child-raising for instance) tends to collapse in an equal treatment analysis.'⁴² Moreover these 'negative comparative rights' are formulated in terms of discrimination as differential treatment.⁴³ Ultimately this formulation cannot guarantee the achievement of democratic autonomy – only that everyone enjoys equal nautonomy.

The fact that EU policies have primarily been aimed at gender relations in the workplace is, as has been acknowledged, a reflection of its economic underpinnings. (See section 5.4.). The EU remains a market driven institution despite the Amsterdam Treaty's recent extension of the Community's goals to include creating 'an area of freedom, security and justice'.⁴⁴ Accordingly, the EU commitment to gender equality remains contingent upon market imperatives. The impact of this 'economic prism' is reflected in the weak advances in EU gender equality law in the 1980s at which time market liberalisation guided by a neoliberal economic discourse was actively pursued in response to perceived threats from global competition.⁴⁵ In the 1990s the continued emphasis on deregulated labour markets and flexible working practices has tended to encourage the generation of part-time and low paid work, whilst maintaining the traditional gendered division of household labour, despite bringing more women into paid work.⁴⁶

Within the cosmopolitan model, democratic autonomy is embedded in an overarching cosmopolitan law which provides the necessary legal and normative recourses by which individuals can protect their right to self-determination. In order for democratic law to delimit various networks of power by necessity it must be autonomous - transcending the particular claims of nations and states and extended 'to all in the 'universal community'.⁴⁷ With respect to the autonomy of EU law it is argued that the ECJ's judgements have set it apart from both national and international law. Its judgements in relation to the supranational credentials of EU law have been central in this respect (see sections 5.3.3. and 5.6.).

However, despite the constitutional nature of EU law, the adoption of the legal provisions is ultimately controlled by the member states in the Council who have frequently weakened both the content and source of legislation adopted. In addition, the ECJ has considered the prevailing political conditions and these have been reflected in its judgements. Feminist scholars have questioned the gender neutrality of abstract legal concepts such as the disembodied individual, reason, rule, and justice and the historical contingency of law in underpinning gender hierarchy.⁴⁸ Accordingly fundamental normative and political challenges exist in relation to attempts to embed gender rights within the legal framework as it currently stands.

Finally, and contrary to the argument immediately above, it should be recalled that democracy is an inherently political process, and accordingly we should ask whether the delegation of these issues to a judicial institution really benefits democracy. Juridical deliberation has, in Mouffe's opinion, 'contributed to the current displacement of the political by the juridical'⁴⁹ Politics, in Mouffe's view must hold agonism – struggle between adversaries – central.⁵⁰ The early history of the EU rights regime visibly exhibited agonism – political struggle; especially at the height of second wave feminism in the 1970s. However, the routine deliberations of the ECJ have increasingly become separated from a wider political struggle, and hence seem increasingly to entail technical rather than political decisions – in sum the technocratisation of policy. Mouffe associates this trend with the deliberative turn in political theory, and accordingly laments its rise to prominence.⁵¹ This issue is addressed in the following section on the model of deliberative democracy, where it is argued that the model articulated by this thesis is inherently political.

7.2.3. Deliberative democracy and Agro-food biotechnology regime.

The model of deliberative democracy adopted in this thesis asserts the right for individuals to participate in opinion formation in relation to those policy matters which affect them. The model incorporates two key sites in which opinion formation occurs: the public sphere and the institutions of governance. The quality of openness of the public sphere is its decentred and non hierarchical organisational structure, and freedom from state imperatives.⁵² Ultimately however the requirements of decision-making entail that a process of will formation occurs. This is the realm of governance. Deliberative institutions of

governance provide the opportunity structure for the generation of generalised arguments and encourage the wider representation of distinct voices, thus contributing towards output-oriented legitimacy. In relation to output-oriented legitimacy the model suggests four ways in which the quality of decision-making is improved by deliberation: (1) the generation of Pareto superior decisions; (2) the production of fairer decisions; (3) the achievement of a larger consensus; and (4) conferring decisions with greater legitimacy.

The deliberative model adopted by this thesis does successfully capture key elements concerning the operation of the agro-food biotechnology regime. It furnishes us with useful insights in relation to the operation of comitology and the institutionalisation of generalised principles – the competitive state versus the precautionary principle - to generate deliberative and argumentative modes of interaction rather than overt bargaining on the basis of resource differentials. It also facilitates appreciation of the contestation of non-institutionalised discourses in the public sphere and their interaction with the more formalised debates occurring in the institutionalised fora following the politicisation of the regime in 1996. In particular it provides us with an understanding of how the contestation between these discourses has had a powerful transformatory impact on the regime by altering the balance of the dominant discourses within the institutions of governance themselves. The relevance of the model is summarised below in table 7.3.

Deliberative Democracy	Agro-food Biotechnologies
Legitimacy achieved primarily in the process of opinion formation (reflexive arguing), rather than the process of decision making itself, (aggregation of preferences), thereby emphasising input oriented legitimacy.	Institutional provisions of the regime (generalised principles and comitology) promote deliberation and search for consensus, rather than a simple aggregation of preferences.
Voices are articulated both through institutionalised deliberation and through the public spheres.	Regime characterised by both institutional deliberation, and after 1996 increasing involvement of civil society voices in relation to the appropriate regulatory approach.
The contestation of discourses impacts upon the (pre)existing balance, thereby transforming the terms of legitimacy for subsequent debate.	Agro-food biotechnology regime comprises competing economic and environmental principles (the precautionary principle versus the competition state).

Table 7.4. Deliberative democracy and agro-food biotechnologies.

However a number of weaknesses in the fit between the model and the regime need to be acknowledged. In terms of input oriented legitimacy, only a narrow range of distinct voices were represented in the institutional contexts. In the realm of civil society, limitations include the (un)representativeness of the civil society voices; the marginalisation of lay voices and the overall quality of discussion. More fundamentally the nature of the regime modification requires consideration, in relation to the continued centrality of state power within the regime. This raises questions concerning both the deliberative quality of the regime and epistemological/methodological issues in relation to distinguishing different modes of opinion formation (bargaining versus deliberation). In terms of output-oriented legitimacy, the initial proposal concerning improved decisions is not borne out. Indeed the extended processes of opinion formation have resulted in a protracted moratorium and non-decision-making.

Input-oriented legitimacy.

The principal voices in the public sphere were initially those of international NGOs such as Greenpeace and Friends of the Earth involved in anti-GMO campaigns. A wider range of non-institutionalised voices entered the public sphere following media attention on highly visible events such as the debacle surrounding research scientist Arpad Pusztai in the UK and the arrival of the first arrival of US GM crop imports in France.⁵³ The representativeness of these various civil society organisations needs to be examined. Initially the contestation of discourses in the public sphere was dominated by a limited number of international NGOs opposed to the use of GMOs. Subsequent media coverage generated public awareness and a wider debate, however this largely remained a vicariously mediated affair the effect of which has been to polarise and simplify the debate. The polarisation of arguments (via power in speech) and the limited access to deliberative fora (via power over speech) has restricted the opportunity for citizen participation in the debates in relation to the commercial use of agro-food biotechnologies. In response to these perceived limitations, and calls for wider debates, various forms of citizens' panels have been set up. In June 2003 the UK government launched 'GM Nation? The Public Debate' – a series of regional conferences.⁵⁴ Despite claims of being 'a unique experiment to find out what ordinary people really think once they've heard all the arguments',⁵⁵ valid criticisms have been

levelled at the experiment in relation to the limited opportunities for access. These include: the dearth of publicity; the limited number of venues; the inconvenient scheduled timings for working people; and the ensuing dominance of NGO activists.⁵⁶ Consequently the challenge still to be met, Sample concludes, is 'engaging with those elusive 'ordinary people'.'⁵⁷ A number of reasons for the limitations in relation to an active and wide ranging European debate require consideration.

One possibility why the debates may have remained restricted to sectoral demois may be the result of language itself. This argument echoes that put forward earlier in the thesis, (sections 3.2.1 and 6.6.), which suggests that, with respect to techno-scientific EU policy, language barriers crystallise along both national and technical axes. However, this argument seems to be partially rebutted by the findings of the PABE study. Firstly, in relation to the 'national' aspect of the argument, the study identified a Europeanisation of public discourse surrounding the application of GM technologies.⁵⁸ The study suggests that this unanticipated finding may be a reflection of the increasingly Europeanised orientation of the industries, national governments and EU regulators, whose world views are shaped in terms of international trade and economic competition of global markets.⁵⁹ Moreover in terms of the technical barriers, whilst Eurobarometer findings clearly identify low levels of understanding concerning aspects of GM technologies, and the PABE study participants admitted their own relative ignorance concerning recombinant DNA techniques, the study participants also demonstrated their ability to engage meaningfully with the subject matter drawing on non-specialised lay knowledge of the behaviour of non-human living organisms, human fallibility and past behaviour of regulatory institutions, often referring to their own local experiences.⁶⁰ Such conclusions support the contention that, 'the relevant wisdom is not limited to scientific specialists and public officials' and highlight the value of non-specialists' insights and contributions in relation to technically complex policy problems.⁶¹

An alternative interpretation may be formulated which emphasises the uneven and partial representation of civil society actors. Public opinion has often been gauged by regulatory actors through food retailers' policies leading states to view the European publics primarily as economic consumers rather than political citizens. This limited construction of citizenship undermines the democratic principle of equal worth because people do not bring equal wealth to the market place.⁶² From a deliberative perspective this means that some opinions are likely to be marginalised on grounds other than the merit of their argument. More fundamentally, constructing citizenship through reference to consumer identity is questionable within the terms of deliberative democracy, as the role of the consumer

ostensibly involves registering pre-political preferences, rather than reflexively based, collectively formulated arguments.

Turning to the institutionalised discourses, the regulatory provisions of the regime require that in order for arguments to be perceived as legitimate they must be constructed in terms of generalised principles such as risks to human health and so forth. Thus, even in the absence of a commitment to normative learning and communicative rationality, actors are motivated by the 'civilizing force of hypocrisy' to deploy reasoned arguments, in order that they are perceived to be respecting the positions of other actors and therefore worthy of respect themselves.⁶³ A commitment to generalised argumentation helps secure the democratic legitimacy of the regime by encouraging the representation of opinions and interests of actors who do not directly participate in the regime.⁶⁴ However the continued dominance a techno-scientific discourse has encouraged the generation of arguments which remain narrowly tied to scientific principles and, in consequence, maintained the continued marginalisation of other non-scientific voices. In this respect the shift from a multiple number of scientific committees, voicing a variety of perspectives, to a single centralised European Food Agency (EFA)⁶⁵ for the purpose of assessing the risks of agro-food biotechnologies is, perhaps, to be regretted as it is likely to narrow the range of voices further still.⁶⁶ Accordingly, the argument that lay discourses have had a powerful effect in the regime by altering the balance of the dominant discourses within the institutions of governance requires critiquing. Despite the recognition and incorporation of other issues and forms of knowledge generation relevant to the regulation of agro-food GMOs, scientific risk assessment procedures remain at the heart of the EU regulatory regime. In fact certain regime innovations such as the creation of a European Food Authority elevate the importance of scientific discourses. Therefore any claims concerning the displacement of the hegemonic techno-scientific discourses within the regime must be robustly qualified.

More fundamentally, the assertion in relation to the importance of deliberation and discourse as a principal cause of regime modification requires challenging, in view of the ostensible domination by national state actors in the regime. The principal actors in the regulatory dispute procedure (Article 21 Regulatory Committee) are national state representatives (section 6.4.1.). Moreover the EU wide moratorium was instigated by Council decision. The evident dependency on the member states to maintain the regimes legitimacy points to the potential insights that may be provided by the model of democratic intergovernmentalism.

Viewing the regime through the model of democratic intergovernmentalism highlights the salience of intergovernmental resources and state bargaining within the policy-making process. The argument is made that bargaining as a mode of policy making is suppressed by the requirement that arguments are framed according to institutionally embedded generalised principles - the civilising force of hypocrisy. Reflecting on the potential of the civilising force of hypocrisy as a mechanism for preference adjustment, Føllesdal contends that '[i]t is unclear, however, whether this and other mechanisms reduce the harms of partial compliance sufficient to protect against exploitation.'⁶⁷ Despite the need to avoid arguments constructed in the terms of 'Its' good for me' there is no guarantee that actors will not act in their own selfish interests.⁶⁸ Indeed, although expressing their arguments in the institutionally required scientific terms, it can be convincingly argued that those states which unilaterally decided to ban the commercial import of approved agro-food biotechnologies were ultimately acting in their national interests and reflecting the concerns of their national citizenry.⁶⁹ This raises difficult questions in relation to distinguishing whether it is bargaining or deliberation that ultimately matters?

As noted in the case study conclusions, (section 6.6), regime modification may well reflect the simultaneous operation of both strategic and deliberative behaviour. The possibility of distinguishing the mode of interaction requires reflection on the method of enquiry employed by this thesis. The application of each of the models of transnational democracy to the regimes has generated a distinct narrative. In each case, these narratives should be considered as provisional suggesting that ultimately there are no absolute truth claims.⁷⁰ From this broadly interpretivist perspective judging these rival accounts is highly problematic. This is not equivalent to the contention that critical engagement is impossible. We may ask whether: our concepts are 'meaningful to practitioners and users'; the narrative is 'consistent with the data'; and 'does the story meet the agreed knowledge criteria'?⁷¹ I would suggest that convincing cases could be made that both the 'deliberative' and 'intergovernmental' narratives provide meaningful accounts. Nevertheless which narrative is adopted does have normative implications regarding the identification, diagnosis and prognosis of the democratic potential of the regime, reminding us that these are normative as well as analytical models.⁷²

Output-oriented legitimacy.

The case study findings indicate that the initial proposal concerning the deliberative contribution to generating superior policy has only limited validity. The model proposed that deliberation could contribute towards output-oriented legitimacy by building consensus, constituting procedures of normative fairness and the inclusion of all relevant voices in the process of opinion formation. However the findings convey the absence of any of these aspects. (Section 6.5.). Moreover its proposed contribution towards cognitively superior decisions would also seem invalid in view of the current institutional stalemate constituted by the regime moratorium. The problem is similar to the ‘joint-decisions trap’ under conditions of dispersed decision making in which agreement cannot be reached but the freedom of independent action is also lost because authority has been delegated to the EU.⁷³ Under these conditions the overall problem-solving capacity of the institutional solution may decline.⁷⁴ However this interpretation of the cognitive function of deliberation is contestable. Rather than problem-solving, we may propose that the purpose of deliberation is ‘problem-posing, where ‘[p]roblematizing is the direct antithesis of technocratic problem solving.’⁷⁵ This alternative formulation of the deliberative process as a process of ‘civic discovery’ focuses on, ‘how problems are defined and understood, what the range of possible solutions might be, and who should have the responsibility for solving them.’ Thus although inefficient according to orthodox theories of problem-solving, problematizing may well ‘build legitimacy for policy decisions ultimately taken by public officials.’⁷⁶

7.3. EU democracy: multiple versus single conceptions?

This thesis contends that the tendency in the established literature towards treating the EU as a single entity has led to overly generalised and unwarranted conclusions regarding the EU’s democratic deficit or potential. In order to rectify this shortfall in the current scholarship it is suggested that instead we should conceive of the EU as a series of regimes. The validity of this ontological critique is based on the claim that different regimes are enmeshed within differentiated structural, institutional, and ideational conditions which present distinct challenges for transnational democracy; hence Weiler et al.’s contention concerning the ‘uneasy notion’ of the EU as a single polity as regards ‘governance and

power – its exercise, control and accountability’.⁷⁷ Specifically, it is contended that these factors are likely to constitute differing opportunities and constraints in relation to achieving input and output-oriented legitimacy. Thus, it is argued that, by examining regimes which display divergent conditions provides the opportunity for comparative assessment of the possibilities for realising both input and output-oriented modes of legitimacy across the EU.

The epistemological implication of this ontological plurality – i.e. multiple Europes - is the need to acknowledge different models of democracy which should inform the ‘diagnosis, prognosis and possible remedy of democratic shortcomings.’⁷⁸ These models of democracy specify different institutional and normative prerequisites for establishing input and output-oriented legitimacy. The choice of models reflects the principal debates in the current literature and the logic of their mapping on the respective policy regimes was guided by a proposed *prima facie* correspondence between their normative prescriptions and the characteristics of the policy regime. (Section 1.4.). Guided by these initial mappings and, the propositions they generated, the case study chapters present an extended narrative of the different articulations of input and output-oriented legitimacy. As noted above (section 7.2.3), the knowledge generated by applying these normative models is partial. It is by accepting this limitation, and the possibility of generating alternative meaningful narratives, that the application of the other models to the policy regime makes sense. The validity of these alternative narratives is indicated in the above critiques of the various models (sections 7.2.1-7.2.3) which highlight deliberation in the ECB and intergovernmentalism in the regulation of agro-food biotechnologies and gender rights regime. The construction of these various narratives provides the beginnings of an appreciation of the different ways in which input and output-oriented legitimacy may be constituted at the transnational level, and the differentiated opportunities and constraints for doing so across different policy regimes within the contemporary EU. Despite the various critiques specified above, the narratives illustrate various ways in which both input and output oriented legitimacy are manifested in the EU. These findings are clearly contrary to Scharpf’s proposition that the EU only provides the prerequisites for output-oriented legitimacy. Moreover, in all three instances the case studies indicate that output-oriented legitimacy alone is an insufficient expression of democracy. Thus, this thesis rejects Scharpf’s proposition that democracy in the EU can and should be advanced via a reorientation towards output-oriented legitimacy: ‘[f]unctional efficiency and governance capacity do not justify outcomes, they are themselves in need of legitimation.’⁷⁹ Input-oriented legitimacy – voice and representation – constitutes a crucial dimension of democracy.

Conceiving of the EU as constituted by, and constitutive of, multiple regimes rather than as a single polity certainly facilitates and encourages a valuable exploration in relation to the democratic credentials of different policy sectors. However, it may reasonably be argued that democratic legitimacy *within* regimes does not adequately constitute the democratic legitimacy of the EU overall. Specifically, it may be claimed that legitimacy within regimes must be accompanied by legitimacy between regimes. In relation to deliberation Føllesdal notes that '[d]ifferent arenas for public deliberation may arise clustered around each functional regime, without arenas for addressing the issues arising *across* functions.'⁸⁰ Expressing this point in more generalised terms Hurley asserts that '[w]e need to understand how the various horizontal layers of activity, which can themselves be more or less democratic, can also be related to one another more or less democratically.'⁸¹ This raises the possibility that the overall system – the EU as a single entity - might also have democratic tendencies resulting from interaction of sub-networks that may not themselves be especially democratic.⁸² In order to further extend our understanding of the opportunities and constraints for establishing transnational democracy under conditions of globalisation and Europeanisation requires further research of the relations *between* the regimes and their simultaneous effects on individuals' lives, alongside analysis of their internal democratic qualities presented in this thesis.

7.4. The future for European transnational democracy?

In his address to the European Constitutional Convention, Prodi expressed an aspiration for a transnational democracy of both states and peoples.⁸³ This thesis argues that, under conditions of globalisation and Europeanisation, European transnational democracy is both desirable and possible. Furthermore, it is contended our aspirations for transnational democracy need to be informed by diverse normative and institutional commitments, which, in ideal form, are articulated by a variety of models of transnational democracy. These models incorporate both states and peoples in distinct ways, reflecting both the differentiated empirical challenges of the contemporary processes of globalisation and Europeanisation and diversity in normative commitments.

The continued transformation of states' enmeshment in dynamic processes of globalisation and Europeanisation means that the challenges and opportunities facing

European transnational democracy will continue to change in uncertain ways. Furthermore our ability to evaluate the democratic conditions pertaining, and formulate our democratic prescriptions, will continue to be shaped by the visions or models of democracy we adopt. Even where changes, such as, the future expansion of the EU are foreknown, the effects of these changes are likely to be complex and unpredictable.⁸⁴ Vague generalisations concerning Europe's democratic future are therefore, perhaps, of limited value. Nevertheless a few brief final points are worth noting.

Siedentop claims that '[d]emocratic legitimacy in Europe is now at risk.'⁸⁵ The risk has arisen because of the profound political changes constituted by Europeanisation and globalisation in the absence of the active participation of European citizens. Only through 'a great constitutional debate' Siedentop avers, 'can the peoples of Europe once again become involved in their own fate.'⁸⁶ In view of the current venture to adopt a new European Constitution, which commits Europe to a democratic future, such concerns could seem unwarranted.⁸⁷ Indeed the depth of commitment could be inferred from the preamble which opens with Thucydides claim that 'Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.'⁸⁸ However, the constitutional convention and the formulation of the constitutional treaty have proceeded largely out of the sight of the European peoples' gaze. In effect participation and power have continued to remain with the minority throughout the proceedings. In this regard, Wiener and Della Sala are right to stress that constitution building and formal rights provisions must be accompanied by active citizenship practices.⁸⁹ The requirement of an active citizenry is explicitly upheld by all three of the models of transnational democracy articulated by this thesis, although the type and boundaries of participation are contested. Only through diverse forms of participation in relation to the EU, can transnational democratic legitimacy be entrenched. In the end democracy requires input oriented legitimacy.

In view of the future plans to extend the boundaries of the EU the opportunities for input and output oriented-legitimacy will continue to change, and as contended above, will require further empirical evaluation and sustained diverse normative argument. Despite the contingent and open ended future for European Democracy the trend towards 'multiple Europes', constituting a polity of variable geometry, seems likely to continue. This will entail future engagement with, and further specification of, alternative normative models of transnational democracy in order that we may continue to advance our understanding of transnational democracy in contemporary Europe.

Notes for Chapter 7. Conclusion.

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- ² Coleman and Underhill, 1998, p. 6.
- ³ Zürn defines denationalisation as 'the extension of social spaces, beyond national borders without being necessarily global in scope.' Zürn, 2000, p. 187.
- ⁴ Richard Devetak and Richard Higgott, 'Justice unbound? Globalization, states and the transformation of the social bond', International Affairs, 1999, vol. 75, no. 3, pp. 483-487.
- ⁵ Phillip Cerny, 'Globalization and the Changing Logic of Collective Action', International Organization, 1995, vol. 49, no. 4, pp. 595-625.
- ⁶ Jürgen Habermas, 'Beyond the nation-state?' in Erik Oddvar Eriksen and John Erik Fossum, Eds., Democracy in the European Union: Integration through deliberation?, London and New York, Routledge, 2000, p. 35.
- ⁷ Heidrun Friese and Peter Wagner, 'Survey Article: The Nascent Political Philosophy of the European Polity', The Journal of Political Philosophy, 2002, vol. 10, no. 3, p. 349.
- ⁸ Amy Verdun, European Responses to Globalisation and Financial Market Integration: Perceptions of Economic and Monetary Union in Britain, France and Germany, Basingstoke and New York, Palgrave Macmillan, 2002, p. 23.
- ⁹ Kathleen R. McNamara, 'Rational Fictions: Central Bank Independence and the Social Logic of Delegation', West European Politics, 2002, vol. 25, no. 1, p. 60.
- ¹⁰ Ibid, p. 62.
- ¹¹ Ibid, p. 54.
- ¹² Verdun, 2002.
- ¹³ Robert Elgie, 'The Politics of the European Central Bank: principal-agent theory and the democratic deficit', Journal of European Public Policy, 2002, vol. 9, no. 2, pp. 196-197.
- ¹⁴ Uwe Puetter, 'The Informal Eurogroup: a New Working Method and an Institutional Compromise', Queens University, Belfast, Institute of European Studies, Constitutionalism Web Papers, ConWeb No. 2/2001, <http://les1.man.ac.uk/conweb/papers/conweb2-2001.pdf>.
- ¹⁵ Ibid, p. 19.
- ¹⁶ Kenneth Dyson, The Politics of the Euro-Zone: Stability or Breakdown?, Oxford, Oxford University Press, 2000.
- ¹⁷ Dyson, 2000, p. 227.
- ¹⁸ Luigi Pellizzoni, 'The myth of the best argument: power, deliberation and reason', British Journal of Sociology, 2001, vol. 52, no. 1, p. 60.
- ¹⁹ Philip Schlesinger and Deirdre Kevin, 'Can the European Union become a sphere of publics?' in Eriksen and Fossum, Eds., 2000, p. 206.
- ²⁰ Dyson, 2000, p. 131.
- ²¹ See section 7.3. for further comments in relation to the benefits of alternative narratives.
- ²² Held, 2002, p. 33.
- ²³ Mark A Pollack, 'Representing diffuse interests in policy-making', Journal of European Public Policy, 1997, vol. 4, no. 4, pp. 572-90.
- ²⁴ This duality of representation is noted in Ibid, p. 582.
- ²⁵ Sperling and Bretherton, 1996, p. 311.
- ²⁶ Catherine Hoskyns, Integrating Gender: Women, Law and Politics in the European Union, London, Verso, 1996, p. 15.
- ²⁷ Ibid, p. 20.
- ²⁸ Charlotte Bretherton and Liz Sperling, 'Women's Networks and the European Union: Towards an Inclusive Approach?', Journal of Common Market Studies, 1996, vol. 34, no. 1, pp. 494-99, 503-4 and Liz Sperling and Charlotte Bretherton, 'Women's Policy Networks and the European Union', Women's Studies International Forum, 1996, vol. 19, no. 3, pp. 309-11.
- ²⁹ David Held, 'Law of States, law of Peoples: Three Models of Sovereignty', Legal Theory, 2002, vol. 8, no. 1, p. 28.

- ³⁰ Molly Cochran, 'A Democratic Critique of Cosmopolitan Democracy: Pragmatism from the Bottom-Up', European Journal of International Relations, 2002, vol. 8, no. 4, pp. 517-548.
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- ³³ Gráinne de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', Journal of Common Market Studies, June 1998, vol. 36, no. 2, p. 219.
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- ⁴² Jo Shaw, 'Importing gender: the challenge of feminism and the analysis of the EU legal order', Journal of European Public Policy, 2000, Special Issue, vol. 7, no. 3, p. 408.
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- ⁴⁴ Shaw, 2000, p. 411.
- ⁴⁵ Duncan, 1996, p. 410.
- ⁴⁶ Diane Perrons, 'Flexible Working Patterns and Equal Opportunities in the European Union: Conflict or Compatibility?', The European Journal of Women's Studies, 1999, vol. 6, no. 4, p. 411-413.
- ⁴⁷ Held, 1995, p. 228.
- ⁴⁸ Shaw, 2000, p. 412.
- ⁴⁹ Chantal Mouffe, 'Politics and Passions: The Stakes of Democracy', CSD Perspectives, Centre for the Study of Democracy, London, 2002, p. 3.
- ⁵⁰ Ibid, p. 9.
- ⁵¹ Ibid, pp. 2-4.
- ⁵² John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations, Oxford, Oxford University Press, 2000.
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- ⁶⁶ Joerges and Everson, 2000, p. 171.
- ⁶⁷ Føllesdal, 2000, p. 91.
- ⁶⁸ Ibid, p. 92.

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- ⁶⁹ See sections 6.4.2. for an overview of the French and UK national debates.
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- ⁸⁴ Although see Hurley, 1999, regarding the possibilities of simulating complex dynamic systems.
- ⁸⁵ Larry Siedentop, Democracy in Europe, London, Penguin, 2000, p. 1.
- ⁸⁶ Ibid.
- ⁸⁷ Draft Treaty Establishing a Constitution for Europe, Adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome 18 July 2003, 2002/c/169/07.
- ⁸⁸ Ibid, p. 8.
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