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# "Deliberative Supranationalism" Revisited

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Part I
The Deliberative Turn in Integration Theory
JÜRGEN NEYER

Part II
European Law as Conflict of Laws
CHRISTIAN JOERGES

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**ABSTRACT**

Legal and political science cannot merge, but they should, at the very least, "listen to each other". This working paper is a further step in an ongoing interdisciplinary co-operation which seeks to make sense out of Louis Henkin's famous admonition. This co-operation had begun with a research project on the European comitology system in 1995 and the publication, *inter alia*, of two articles on deliberative supranationalism in 1997. The present article is an effort to get?/go beyond the scope of our original analyses and to explore the potential of our guiding ideas at a more general level of integration research.

In Part I of this paper, Jürgen Neyer summarises strands of normative and positive political theory on which deliberative approaches to international and European governance can build. These approaches not only support coherence, social acceptance and normative recognition, they also have in important potential for the design of empirical studies. They seem to be particularly promising for the understanding of the institutional design and the political process in the EU.

In Part II, Christian Joerges first summarises the objections against deliberative suprantionalism and comitology in legal science. He then presents a conflict-of-law's approach to European law which builds upon the 1997 articles and seeks to develop their normative-legal perspectives further. European law is interpreted as a new type of conflict of law which constitutionalises a European *unitas in pluralitate.* Comitology is interpreted as a cognitive opening of the legal system which institutionalises a second order of conflict of laws

**KEYWORDS**

Comitology, constitutionalisation, decentralisation, democracy, European public space, integration theory, legitimacy, participation, political representation, supranationalism, supremacy

**Disciplinary background**: political and legal science

**Contents**

# *I.*

# *The Deliberative Turn in Integration Theory*

*Jürgen Neyer*

## 1. Deliberation and the European Union

Until recently, integration theory was firmly located within the realm of international relations.[1] Supranationalism and intergovernmentalism dominated a theoretical agenda which was concerned with explaining international cooperation and the role of technocracy in the European integration process. Much has changed in the last few years. The 'deliberative turn' has opened integration theory for modern political theory. Deliberative approaches build on a large body of political theory that highlights the contribution of argumentative interaction for the coherence of a polity, its social acceptance and its normative acceptability. Deliberative approaches accept the insight that only public discourse and deliberative interaction between the authors and the addresses of rules can provide a functional equivalent for the coercive power of the state and the integrative forces that national ideology and religion one had. The advent of deliberative analyses reflects the insight that the EU has grown out of its earlier phases of regime formation and must be viewed as a mature polity that is subject to very similar requirements as national polities: In the absence of coercive powers and any widely held belief in the sacredness of a given political order, legitimacy by means of discourse today carries the burden of providing a normative foundation for political integration.

## 2. The Origins

The deliberative branch of integration studies is the product of a merger between empirical and normative insights. On the empirical level, deliberative approaches were clearly inspired by the insight that European politics is more than strategic interaction in formal institutions. A great number of empirical studies underline that governmental and non-governmental actors often engage in discursive modes of interaction. The dominating "hard bargaining" image of intergovernmental discussions (Lewis 1998, Puetter 2004) conceals that discursive modes of interaction are important elements in a wide variety of European policies (Eder & Trenz 2001; Hodson & Maher 2001; Sjursen 2002; Jacobsson & Vifell 2005).

[1] The author is grateful for research assistance by Michael Schroeter. Comments from Berthold Rittberger and an anonymous reviewer on an earlier version of this review have helped to clarify many of the issues discussed here and – hopefully – made the whole paper more comprehensible.

The second major influence came from normative reflections on how to justify the EU. After Maastricht, it became clear that none of the two traditional models employed for the EU's justification would satisfy its critiques. The intergovernmental model of executive multilateralism failed to convince for a number of reasons. It could neither provide a response to the danger of executive self-empowerment (Moravscik 1994) nor explain how limitations to governmental discretion could be guaranteed. The introduction of QMV furthermore underlined the need for own supranational resources of legitimacy (Weiler et al. 1995). The normative limitations of intergovernmentalism, however, did not lead to broad demands for transforming the EU into a parliamentarian democracy. Although some made the case for a replication of the national model on the European plane, all such proposal suffered from the difficulty of finding an answer to the question of how to establish a European public sphere. Not surprisingly, the readiness of the member states and their societies to proceed along these lines was severely limited. It became clear that the sui generis institution EU demanded the development of a *sui generis* normative approach.

Both theoretical strands met in the insight that the empirical reality of the EU showed a number of normative strengths which were by and large over-looked by the debate. Following the ideas of Habermas (1992), a growing body of literature argued that supranational discursive processes were not just empirical data but also indicated the possibility of justifying supranational political processes if they were understood as efforts to facilitate transnational cooperation (Zürn 1996, Gerstenberg 1997, Joerges 2005). Under conditions of complex interdependencies, a major shortcoming of the democratic nation-state is the negligence of its external effects. Individual state actions effect other states and societies without giving them a constitutionally guaranteed voice in deciding on those actions. Deliberative procedures would correct these deficiencies by giving voice to 'foreigners' in all cases where they have a legitimate concern. A supranational polity would then have the task of facilitating deliberative interaction among affected states and societies by providing an institutional set up which complements national member state democracies with transnational deliberative structures. Understood as such, deliberative supranationalism is neither the successor of the nation-state nor does it aim at establishing a democratic polity above the nation-state. Its aim is to improve the democratic nation-state by adding a supranational layer of governance which helps to correct the functional deficiencies of national governance under conditions of complex interdependence.

## 3. The Three Approaches to Deliberation

All deliberative approaches to politics start from the assumption that "important political decisions, whether individual or collective, ought to emerge from careful and informed judgement, rather than … capricious choice or unreflected deference to prevailing opinion" (King 2003: 25). It is also a widely shared assumption that the quality of judgements on public matters will be improved by open exchanges among informed parties. At the same time, however, a number of analytical issues remain contested. One of the most crucial issues is the question, what deliberation actually entails and what it can be expected to deliver. Some argue that deliberation can only be

a meaningful concept if it includes, among others, noble individual cognitive dispositions, a democratic institutional setting and a normative agenda that is shared among all participants (Cohen 1989). Others choose a less demanding definition considering deliberation as a "careful and informed reflection on the facts and opinions" (King 2003: 25) or, even less ambitiously, as "a conversation whereby individuals speak and listen consequentially" (Austen-Smith, cited in Gambetta 1998: 19).

In order to systematically distinguish these different understandings and explicate their implications for researching the EU, we proceed by grouping the deliberative literature into three approaches which we will label the normative, the rational and the functional approach. In the ensuing sections we will first briefly outline the theoretical background of each of the three approaches. In a second step, we will discuss how these approaches can be employed for empirical research. The final section of the review provides a brief summary and identifies the next challenges on the deliberative research agenda.

## 3.1. Normative Approaches

Normative deliberative theorizing most often starts from a republican understanding of democracy which holds that political power is power which is ultimately vested in the public, that is, the power of free and equal citizens as a collective body (Rawls 1993: 136). The notion of a public sphere is of crucial importance in any republican understanding of legitimate governance. The public sphere serves as the medium in which individual preferences are formed and transformed into a collective will. Normative approaches are, however, sensitive to the fact that the public sphere is subject to asymmetrical relations of power and influence, to exclusionary mechanisms and to the dominance of selective criteria of rationality. The crucial question for a normative deliberative approach therefore is to analyse these mechanisms and to identify the conditions under which a public discourse comes close to the "ideal speech situation" (Habermas 1973: 258).

### 3.1.1. The Argument

Much of the attractiveness of deliberative approaches to analysing the EU stems from the fact that they take the heterogeneity in the EU as an important resource of democratic self-government (cf. Gerstenberg 1997: 350). In contrast to communitarian approaches, which conceptualize a common political culture as an important precondition for meaningful discourses about right and wrong (cf. Miller 1995), deliberative approaches emphasise that disagreement is even conducive for democratic governance. It gives incentives to debate, political interaction and intersubjective learning. Following Castiglione (2004: 78-86), disagreements about preferences and even values and the ensuing political discourse contribute to an on-going process of political constitutionalism whereby a polity and its regime is continually reconstituted more appropriately to recognise, respect and represent the values, opinions and vital interests of its members. Thus, the crucial problem which normative, cultural and social cleavages pose for communitarian ideas of democracy, are downplayed by deliberative

ones (cf. Dryzek 1999: 44, Dryzek 2002: 116, Eriksen & Fossum 2004). Not surprisingly, the normative deliberative approach is in general very supportive with regard to a supranational mode of governance. As opposed to communitarian approaches, which see democracy endangered by supposedly incompatible national cultures, supranationalism is cherished if and when it "abstracts the idea of democracy from the limitations of the nation state" (Gerstenberg 1997: 346). Deliberative Supranationalism rejects any effort to reinvent the nation-state at the European level and interprets instead the EU as "a framework that facilitates and enhances the public use of reason" (Gerstenberg 1997: 351).

In order to do so, however, a number of rather ambitious conditions must be met. A first criterion is that deliberation must not take place behind closed doors. In order to reflect societal concerns, deliberation must be conducted in a public sphere where "problems are discovered, but also thematized and dramatized and formed into opinions and wills that formal decision-making agencies are to act upon" (Eriksen & Fossum 2002: 403). Deliberation requires that the exchange of arguments is conducted publicly in full view of those who are ultimately affected by authoritative decisions and that all those who are affected by a decision have a say in what is on the agenda. All normative concepts of deliberation therefore emphasise in one way or the other that speech acts are enacted publicly. That entails that citizens can actively participate, voice their concerns and make their grievances an issue of concern for the political discourse.

A second crucial criterion for any deliberative approach refers to the dimension of participation. Deliberation without participation is close to technocratic governance and normatively unattractive. Following Robert Dahl, participation can be broken down into the two components of public inclusiveness and contestation (Dahl 1971, chap. 1). Inclusiveness refers to the degree to which those who are affected by a policy have a fair say in its formulation. Contestation refers to the degree to which the affected parties have a chance to block the adoption of policies if they are opposing it. Both elements are of central importance for any deliberative process. If deliberation is non-inclusive and if citizens do not have the chance to affect the formulation of a policy, deliberative governance can at best be deliberation *for the people*, but can hardly suffice the criterion of being deliberation *by the people* (cf. Scharpf 1999). Even the right to participate in the making of regulations, however, is of little value if that participation is limited to contributing expertise or to supporting a political agenda which itself is excluded from contestation. Inclusiveness and contestation therefore are two crucial elements which distinguish a technocratic from a democratic form of deliberation.

### 3.1.2. The Research Agenda

A great number of research questions follow from the normative approach. A first research question is connected to the institutional preconditions of public deliberation. In the nation-state, civil society associations and a well-developed media system facilitate the discourse between citizens and the political system. How does such mediation work in a transnational political context in which mediating organizations and cross-border discourses are only embryonic (cf. Wimmel 2004)? Some approaches on deliberative democracy in Europe downplay the problem, arguing that public

discourse and the communicative infrastructures required to support such discourse will emerge as soon as European political institutions have been invested with additional political authority (Habermas 1998). More sceptical voices take the multiplicity of nationally constituted discourses in Europe as a reason for rejecting the possibility of European deliberative democracy altogether (Greven 2000). A third line of reasoning addresses the problem by reflecting on an adequate meaning of the basic analytical concepts of a deliberative democracy in the first place. Eriksen and Fossum (2002), for example, distinguish between "general" and "strong" publics. While the notion of a "general" public refers to public spheres in civil society which are unbound by formal rules and decision-making procedures, the notion of a "strong" public refers to institutionalised, deliberative and inclusive fora in which opinions are formed and decisions are taken. Although Eriksen and Fossum emphasize that 'strong' publics are only "a necessary but not sufficient condition for democracy" (2002: 402), they nevertheless provide an important analytical distinction. They underline that any analysis of structures of discourse in the EU should allow for the possibility of "not one homogenous public sphere but of a multitude of publics" (2002: 420). By introducing the idea of a multiplicity of discourses, Eriksen and Fossum open the conceptual space to move beyond the notion of one all-encompassing discourse and provide a normative category that resonates well with the empirical reality of the EU.

A related research question refers to the pathologies of deliberation. Iris Young (1996) argues for the importance of recognizing and respecting diverse cultural values and expressive practices in public deliberations and authoritative decisions. Prevailing forms of deliberation can exclude minority values or undervalue certain expressive and argumentative styles if they become hegemonic. It is also pointed out that deliberation structurally disadvantages some groups and individuals by privileging modes of communication that are formalistic and highly demanding in terms of the communicative skills of speakers (a similar point is made by Stokes 1998; cf. Shapiro 1999). Deliberative procedures may also be the source of ideological domination if they are not open to reflections about their underlying normative principles (Przeworski 1998). Dissent therefore must have a realistic chance of being taken seriously, and deliberative procedures must "forge and preserve their own cacophonous public spheres" (King 2003: 41). The multiplicity of discourses in Europe, which is often viewed as a problem to the emergence of a broad European public discourse, therefore, must be regarded as an important asset which guarantees that no normative standard gains hegemonic status but that any standard remains perpetually contested.

Finally, it has been argued that any approximation to the Habermasian "ideal speech situation" depends on the condition that no more than a few people interact. If deliberations are conducted in assemblies that comprise dozens or even hundreds of people, some argue that deliberation "can at best mean discussion among a small number of speakers before an audience rather than discussion among all members of the assembly" (Elster 1998a: 2). Such a change in the structure of discourse implies that persuasion becomes an important instrument, because speakers, rather than engaging in truth-seeking, will feel compelled to try to persuade the audience. Consequently, they will talk *about* each rather than *to* each other (ibid.; Jorgensen, Kock & Rorbech 1998). It might therefore well be the case that secrecy "enhances the quality of whatever deliberation takes place" (Elster 1998b: 110) because speakers may more easily back

down from a position if they have not stated that position in public. Unfortunatley, secrecy and exclusiveness come at an unacceptable price and are no options in any normatively sound approach. The fear of some liberals that deliberation "can displace real citizen preferences with preferences that politicians, coaxed by interests and the press, mistakenly impute to citizens" (Stokes 1998: 136, cf. Przeworski 1998: 148) can only be countered convincingly if the deliberative process remains beyond the control of political institutions and in the public realm. Thus, the most pressing challenge for normative approaches is to identify the conditions under which the epistemic quality of deliberation can be reconciled with broad participation and under what conditions its pathologies become dominant. One may ask, for example, how knowledge is organised in a given setting. Do all stakeholders have similar access to existing knowledge and do they have a fair chance of supporting their preferences with available expertise? Does the argument of a powerless state count as much as the argument of a powerful state? Can we find procedural mechanisms which enable economically weak actors to gather the data and knowledge needed for formulating convincing arguments? The normative deliberative approach suggests that we can find positive and convincing answers to all of these questions. The empirical challenge still remains, however, to provide evidence that real-world conditions exist under which the promise of deliberation holds true.

## 3.2. Rationalism

Rationalist approaches on deliberation generally draw on the idea that political actors are motivated by self-interest only. Politics is understood as the realm of interests and asymmetrical distributions of power in which preferences are exogenous to interaction. Conflicts of interests are accommodated by bargaining and voting and leave little space for deliberation and learning. Assuming that actors have an intrinsic interest in understanding why other actors have a particular point of view, conviction or belief is hard to square with rationalism.

### 3.2.1. The Argument

Rationalism and deliberation, however, do not live on different planets. Inspired by the analyses of Elster on deliberation in constitutional assemblies, rationalism has started to work with discourse analytical concepts. An early point of departure for rationalist analyses of deliberation was to inquire whether the concept of deliberation can be applied to interaction in the EU at all. In most political theories, the idea of deliberation refers to interaction among individuals and assumes that these individuals show at least a certain degree of willingness to "give a hearing to all other points of view regardless of the number or power of their supporters, to understand why they are of value to those who hold them, and to state one's own arguments in a form that exposes their assumptions to challenge" (Lord 2003: 22). European politics, however, is not about the interaction of individual actors but about collective actors who represent a combined interest that is the product of foregoing collective decision-making (Moravcsik 1998). As opposed to individual actors, the representatives of collective actors hardly have the authority to deliberate whether the interests they represent are legitimate or appropriate. They are expected to question the legitimacy of the concerns and interests of other

actors, but not of their own constituency. One may argue therefore that deliberation among representatives is a contradiction in terms. Can we expect a representative with a mandate to state or defend the case, views or interests of particular groups to be open to the arguments of others and to engage honestly in a reflexive process of truth-seeking?

Most rationalist approaches to deliberation take these concerns seriously. They start with a normatively less ambitious analytical concept of deliberation (cf. Magnette 2004, Schönlau 2003, Maurer 2004) and ask for the conditions under which actors engage in deliberation. The concept that is most often used is borrowed from Jon Elster and includes only the elements of publicity and justification but excludes the requirement that actors have to behave honestly or are willing to be swayed by the force of the better argument (cf. Elster 1998a). Actors are not conceived of as being primarily interested in understanding one another but as having independent utility functions and aiming at maximizing individual benefits. Deliberation, therefore, is not something which is expected to be the standard mode of behaviour. It is only likely to occur when an actor believes that he or she can advance his or her interest sufficiently well by justifying, explaining and persuading (cf. Schimmelfennig 2001, 2004). For explaining how deliberation comes about under conditions of self-interested actors, Elster emphasises the existence of a social norm according to which speakers should not take a position that cannot be justified in terms of benefits to the group: If speakers do not want to appear selfish (though they actually might be), they are forced to couch their self-interests in terms of some impartial standard or norm of appropriateness. Clearly, this does not imply that speakers must renounce their self-interests "but only forces or induces speakers to hide them" (Elster, 1998b: 111). Hiding such base motives, however, requires proposals to be subject to a number of constraints which may modify them quite substantially (cf. Elster 1998b: 104-105). The first constraint is the 'imperfection constraint', which implies that proposals must show less than a perfect coincidence between private interests and impartial arguments in order to be perceived as good arguments. Arguments must also be in accordance with positions that have been formulated at an earlier point in time and be maintained even if they no longer serve the speaker's interests (consistency constraint). Otherwise, a speaker will easily be viewed as acting opportunistically and lose his or her credibility. And, finally, arguments must abstain from making claims which can easily be shown to be incorrect (plausibility constraint). Together, all three constraints both work as a filter against openly selfish claims and civilize interaction by forcing disputants to engage in argumentative interaction.

### 3.2.2. The Research Agenda

Most rationalist approaches to deliberation are interested in assessing its empirical significance and in understanding the reasons for its occurrence. What makes self-minded actors deliberate? Under what conditions do actors believe that deliberation is an effective instrument for realizing their preferences? What kind of enforcement mechanisms can be observed in the institutional reality of the EU and how effective are they in terms of promoting deliberation? Rationalist approaches are also interested in the effects of the political environment in which deliberation takes place (Magnette &

Nicolaïdis 2004). They analyse, among other things, how types of policy, types of actors, and the intensity of preferences impact upon the likeliness of deliberation.

The literature already provides a number of hypotheses concerning these questions. With regard to policy, a common distinction is drawn between regulatory policy on the one hand and redistributive policy on the other. While the former is expected to produce outcomes that are beneficial for everyone (pareto-optimal), the latter is often conceptualised as a zero-sum game in which winners and losers out-balance one another. Accordingly, deliberation is hypothesised to occur in regulatory policy more often whilst it is not expected to be dominant in issue areas with a redistributive character (Scharpf 2000: 221-225). It is also common to distinguish between elected politicians and appointed technocrats (cf. Adler & Haas 1992, Majone 1999, Gehring 1999). Politicians are assumed to serve a particular constituency and to gain reputation to the degree that they promote their agenda. The main goal of politicians therefore is not to improve a collective well-being but to realize a particular interest independently of the effects on the over-all conditions of a situation. Technocrats on the other hand have a far stronger concern for the issue at stake, are less concerned with serving a domestic constituency and can thus be expected to be more open to engage in truth-seeking. A third distinction refers to the intensity of preferences. As Haas (1992) has shown, the truth-oriented discourse of epistemic communities can have a significant impact on politics when governments have not yet identified their "national interest" due to (a) a lack of information on the nature of a problem; (b) unstable domestic interest coalitions; or (c) a lack of knowledge of the implications of different policy options on broader governmental objectives. If these conditions apply, governments are likely to be open to advice from experts and adopt arguing rather than bargaining as the prevailing mode of interaction (cf. Rittberger 2001).

### 3.3. Functional Approaches

Functionalism is a theoretical approach that explains the existence of a particular feature of a polity – a policy or an institution – in terms of its very function for the polity. Correspondingly, from a functional perspective, deliberation is explained by its positive effects for realizing efficient, effective and legitimate governance in the EU. It is a crucial element of supranational governance which carries the burden of holding the EU together despite the great diversity of interests and its lack of both a coercive central enforcement authority and a functional equivalent to a national ideology or religion.

#### 3.3.1. The Argument

The functional argument holds that any non-coercive political order must build on communicative interaction and collective efforts at political problem-solving if it is to be efficient and effective (Neyer 2004). As opposed to most functional theories, functional deliberative approaches are sensitive to normative concerns, too. Starting from the assumption that the opinions and views about what is 'right' and 'good' differ widely in the EU, Lord argues that any decision which is capable of overcoming the differences must be "the result of procedures that are either capable of producing

convergence in underlying beliefs about the rightful exercise of power, or, failing that, of satisfying even those who lose out that their legitimation preferences have only been set aside for 'good' or 'fair' reasons" (Lord 2003: 171). Because the political discourse in the EU is often incapable of delivering convergence in underlying beliefs, the EU has a strong demand for deliberative procedures. Lord proceeds to interpret the whole institutional set up of the EU as being "organised for deliberation" (2003: 188). The non-hierarchical character of the EU, therefore, is not a problematic condition that should be overcome but must be understood as a necessary "incentive for constitutional deliberation" (Lord 2003: 189).

The incentive for deliberation build into the political system of the EU is not limited to questions of legitimate decision-making. Deliberation is also functionally important for the efficiency, effectiveness and quality of European decision-making. If the preferences of governments are only influenced by domestic concerns without being accommodated by supranational deliberations, negotiations often break down or deteriorate into "bloody-minded" bargaining (Scharpf 2001: 6). With 25 member states each insisting on not having to adapt to the preferences of other member states, it is hard to find common denominators. Deliberation offers a way out of the likely stalemate by reducing the number of acceptable policy options to those which are compatible with the general interest. It is true that deliberation does not necessarily lead to only one solution or policy option for a problem. It is often the case that different and mutually incompatible proposals can be justified as being in accordance with the general interest. In any case, however, deliberative procedures provide a filter that at least narrows the set of possible solutions and therefore makes political compromise more likely.

Deliberative procedures also help to overcome some of the difficulties of enforcing compliance in the EU. Safeguarding compliance with European law has often been described as the 'achilles heel' of effective European politics due to the EU's lack of non-legal enforcement mechanisms (Zürn & Neyer 2005). Empirical analyses underline that the degree of member states' compliance in the EU is related to deliberate administrative procedures (Zürn & Neyer 2005: 206). Only deliberative procedures provide an institutional frame for voicing concerns and for adapting rules to changing preferences and technological innovations. Deliberation, finally, has a greater capacity than bargaining to produce high quality-policy outcomes. In a bargaining mode of interaction, outcomes must be pareto-optimal to be accepted by all addressees. In contrast to bargaining, deliberative decision-making allows more than pareto-optimal outcomes by prioritising consented basic objectives over governmental preferences. It is the collective good that becomes the benchmark against which policy proposals will be assessed. Under a deliberative procedure, governmental preferences are not treated as intrinsically legitimate expression of domestic democratic processes but must be justified against the collective good as defined by European treaty law. Preferences loose their legitimacy if they fail to withstand that test. Thus, deliberative procedures also have the chance of producing policy outputs that would be out of reach in a purely strategic mode of interaction. Deliberation, so to say, expands the Pareto-frontier towards collective optimality.

### 3.3.2. The Research Agenda

The functional research agenda is interested primarily in understanding the institutional set up of the EU and in explaining it as an implication of the functional need to facilitate inclusive deliberations. An important research topic therefore is to interpret the institutional structure of the EU as a means for providing systematic incentives towards inclusive forms of deliberation and disincentives towards exclusive bargaining or voting. One way of conducting such an interpretation is to explain the EU's highly legalistic character and the central role of the European Court of Justice as means for transforming power-based negotiations into rule-based deliberations. Viewed in such a way, the most important functions of European law are to establish a binding standard of rationality which allows distinctions between good and bad arguments, and to exclude all ways of arguing and acting which cannot be coherently justified in terms of a legally codified rationality. Although the ECJ's formal mandate is to interpret the EU's treaty base and secondary legislation, the court must also be understood as a provider of incentives for arguing and acting only in compliance with a codified (legal) rationality. In the legal order of the EU and under the supervision of the ECJ, all arguments and actions that are incompatible with the legal rationality will invite legal challenge, are consequently burdened with additional costs, and will, if possible, be avoided. Similarly, the extension of the competencies of the European Parliament and the inclusion of hundreds of advisory and executive committees in the European political process can be interpreted as reacting to the fact that a non-coercive form of governance will only have a chance of being effective if the addressees of the rules have a say in the formulation of those self-same rules. To be sure, the EP and the committee system formally have very different tasks. Both, however, are similar, in that they aim at including the affected parties in the process of rule-making, enabling inclusive discourses, and providing incentives to abstain from using extra-legal means of political action. Understood as such, important elements of the institutional structure of the EU can be interpreted as showing that non-hierarchical governance must emphasise inclusive and law-based deliberations (and de-emphasise majoritarianism, elitism and closed-door diplomacy) if it is to perform efficiently, effectively and lead to more than pareto-optimal outcomes.

## 4. A Promising Research Paradigm

The overview provided here reports only some options of bringing the theoretical reflections of deliberative approaches to the analysis of the EU. Many alternative options for making use of deliberation exist. The purpose of this overview, however, is less to provide a complete picture but rather to show the richness of deliberative approaches and to stimulate researchers to use them for empirical work. Table 1 provides a brief – and somehow stylized - summary of the review given above. On the horizontal axis, it distinguishes between the different approaches of the deliberative family. On the vertical axis, the table lists three crucial questions that distinguish the three approaches most clearly.

Table 1: Approaches to Deliberation

| | Approach | | |
|---|---|---|---|
| | Normative | Rationalist | Functional |
| What is deliberation? | Truth-seeking in an ideal speech situation | Instrument for advancing preferences | Means for providing for efficient, effective and legitimate governance |
| Main assumptions and propositions | Deliberation is good in itself, promotes learning and is crucial for legitimacy | Deliberation is hard to realize but possible under certain conditions | Functional effects of deliberation are key to understanding EU polity and politics |
| Research question | Empirical approximations, scope conditions | Empirical significance, scope conditions | Reconstructing EU polity as implication of functional needs |

The second purpose of the review was to underline that deliberative approaches have become a promising alternative to more established approaches. The strength of deliberative approaches is that they provide normative guidance to integration studies, open up a new research agenda for the analysis of interaction and offer innovative interpretations for understanding the institutional design and the policy process of the EU. Although the deliberative turn is still a young phenomenon, it already has generated a rich and diversified spectre of theoretical analysis. Deliberative approaches also have stimulated a great number of empirical analyses and significantly changed the way we think of the EU today. That alone is reason enough to treat deliberative approaches as a promising avenue for the next generation of integration studies.

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# II.
# European Law as Conflict of Laws*

Christian Joerges

The objective of this restatement is not just a third defence (see, previously, Joerges 2000 & 2001; 2002) of the notion of 'deliberative supranationalism', which Jürgen Neyer and I presented a decade ago in two versions, one written for a legal audience (Joerges & Neyer 1997a) and a second one for political scientists (Joerges & Neyer 1997b). Instead, it will be an effort at a re-conceptualisation which reflects both the criticisms we have received and our own learning processes. My restatement will proceed in three steps. The first step will situate the 1997 article in the state of the art as we understood it at the time and rephrase our objectives in that light. The second step will contain self-criticism, rejections of misunderstandings, and some rejoinders. The third step will present the restatement, an effort to respond to the critics of deliberative supranationalism constructively and to develop this notion into a more comprehensive theory. The concluding considerations, however, underline that this renewal of deliberative supranationalism rests upon contingent circumstances no theory can control.

## 1. Aspirations

The notion of 'Deliberative Supranationalism' was developed in the course of a project which was concerned with what, at the time, was an under-researched phenomenon, namely the existence and rapid expansion of 'governance arrangements' which supported the functioning and completion of the 'Internal Market'.. The project was financed by the *VolkswagenStiftung* under a deliberately clumsy title: 'The assessment of the safety of technical consumer goods and the health risks of foodstuffs in the practice of the European committee system ("Comitology")' (Joerges 1995). The intentions underlying this heavy title were twofold: the project was to explore widely unknown territory and hoped to derive new theoretical insights from its enquiries. This was an innovative move. 'Comitology',[2] by now a well-developed field of research in

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[2] The term has a well-defined technical legal meaning. It designates nothing else than those committees which have been established to support the European Commission in the implementation of European secondary legislation (see Commission Decision 1999/468/EC, OJ 1999 L 184/23).

both law and political science (for example, Vos 1999; Christiansen & Kirchner 2000; Trondal 2001; Tröller 2002), which even textbooks have to cover (see recently Hix 2005, 52-56; Chalmers *et al.* 2006: 158-167) was then a scarcely known phenomenon: very few legal essays had started to take note of it (but see in particular Cassese 1987; Blumann 1988); the only empirical study, undertaken by the *Institute für Europäische Politik* in Bonn was unpublished (IEP 1989); only the European Institute for Public Administration in Maastricht devoted substantial attention to Comitology in the seminars that it regularly offered to public administrators (see Pendler & Schaefer 1996 and previously Cassese 1987).

The less visible theoretical ambitions of the project had a twofold basis. One was the experience gained in many previous studies on the interdependence of market integration and product safety regulation in the field of technical goods. Europe had managed to 'complete' its internal market. It had accomplished this objective against the countless non-technical barriers to trade constituted by national product safety legislation, safety at work regulation and national standardisation. But it had sophisticated and intensified, rather than abolished, the European regulatory machinery. Its 'new approach to technical harmonisation and standards'[3] had led to the adoption of a web of European legislative frameworks, the intense co-operation of national and European standardisation organisations, and the establishment of links between the Commission and national administrative bodies responsible for the safety of workers and consumers. These complex arrangements were held together by committees and, as Roethe (1994) had suggested in a pioneering study, worked not only smoothly but also with amazing responsibility. Why, so we opined, could this not be equally true in other neighbouring fields such as foodstuffs regulation?

This assumption inspired our empirical and theoretical project design. It simply seemed to suggest itself – but it was at odds with the messages that dominated the debate on regulation in Europe, especially in the work of Giandomenico Majone. Ever since his arrival at the EUI in 1989, Majone maintained that the completion of Europe's internal market would not trigger off comprehensive de-regulatory practices, but that it would instead require regulatory reforms, and a new alignment between the reliance on market efficiencies and the regulatory responses to market failures (Majone 1989 and, summarizing, 1996). The comitology phenomenon seemed to confirm the first part of his message. But it was in stark contrast with Majone's institutional perspectives and their theoretical foundations. 'Independent European agencies' entrusted with regulatory powers were, in Majone's view, the adequate response to the regulatory needs of the internal market – the de-centralised world of national and European governmental and non-governmental bodies which the committee system co-ordinates is hardly ever mentioned in his work (some observations now in Majone 2005: esp. 78-79). The regulatory activities Majone expected such agencies to perform were by no means purely technical or mechanical activities. But he characterised them as non-political in one important sense: he conceptualised regulation as an activity which could, and should, be oriented by efficiency concerns, as opposed to redistributive or distributive objectives (Majone 1989, 284-301) – this was the second dividing line. In our perception, the regulatory activities performed by the comitology system had often to deal with politically quite sensitive issues; we were not prepared to subscribe to the

[3] Council Resolution of 07-05-1985 on a new approach to technical harmonisation and standards, OJ C 136 of 04-06-1985, 1

argument that a neglect of, or an abstraction from, distributional implications could sufficiently legitimate a technocratic approach. Our project was hence dedicated to a distinct agenda: we sought to describe and explain the functioning of a transnational, neither purely European nor purely national activity, and sought to answer the question of whether and when this neither genuinely legislative nor purely administrative 'political' activity might 'deserve recognition' (Habermas 2001: 113).[4]

## 2. Shortcomings, Clarifications, Rejoinders

Where could we have done better in our empirical research, in its interpretation and in the elaboration of our theoretical framework, in the presentation of our findings? There are, of course, shortcomings at all fronts. I will mention only two of them, the first, because we have to live with it, and the second, because it has contributed to misunderstandings.

### 2.1 Empirical work on a moving target

When we prepared and carried out our research, the knowledge about European committees was not only much more limited than today, it was also much more difficult to access. Many materials and much of the data which are accessible via the internet today, such as the agendas of committees, scientific reports, *etc*. could be obtained only through extremely demanding studies of scattered materials (still enormously informative, however, Falke 1996; revised in Falke 2000), the study of files, via questionnaires and expert interviews (Neyer 2000). The plausibility of our most important, partly daring and, in important respects, provocative findings and assertions on the 'quality' of the committee practices have, for the most part, been acknowledged (for example, Chiti 2002, 2003; Savino 2005a, 2005b; Bergström 2006). Others have also been questioning our findings on different grounds and with different weight. It is both true and inconclusive that the sheer number of opinions and implementing measures which the comitology delivers excludes intense deliberation on each and everything that gets adopted and decided (cf. Töller 2002).[5] The system functions remarkably smoothly indeed. This observation, however, is not a conclusive argument against our claims about the qualities of comitology. One has to take into account that our study was concerned with, and restricted to, long-term co-operative relationships on issues which mostly did not cause controversies and in which the Commission acted as a broker which sought to obtain consensus in contested issues.[6] Even if we have been

[4] Habermas' understanding of (normative) legitimacy converges with my use of the term 'constitutionalised'; see Joerges 2006.

[5] See D. Curtin (2007), referring to European Commission (2005): In 2004 the Committees produced 2,777 opinions and the Commission adopted 2, 625 decisions).

[6] But the term 'deliberation' with all its connotations to deliberative theories of democracy is not an adequate characterization of this phenomena, Follesdal (2006) objects. .It is difficult, however, to find a better one. We were looking for a term which would indicate what we had observed – namely, a surprising readiness to engage in transnational problem solving – and at the same time fit into our normative-legal perspective – namely, our quest 'that the committee system must be based upon, and controlled by, constitutional provisions favouring a "deliberative" style of problem solving' (Joerges & Neyer 1997: 282).

overly enthusiastic in our praise of 'deliberative' interactions, the emergence of an *esprit de corps* in the committee system ids unsurprising (Trondal 2001). However, it is no longer possible to improve our methodology, simply because the committee system which we observed no longer exists. Our core assertion was that the Committee system had achieved a change to the better, silently and behind the backs of the officially accountable actors. The Commission had accepted this co-operative arrangement because it needed the resources of national administrators in order to perform the function which the 'implementation' of Community law required. The Member States accepted it because they hoped to supervise the control of the Commission's practices. No principle and no agent had planned to establish the type of deliberative problem-solving that we had observed and described.

We should have emphasised with more precision and rigour the specific conditions which had favoured this unplanned and favourable institutional innovation in our account. This would have been all the more important after the contours of the BSE crises became visible subsequent to our investigations. The scandalous malfunctioning of the committees concerned did by no means get unnoticed (see Falke 2000: 117-127). But it did not irritate us fundamentally, because we were so well aware of the institutional differences between the veterinary committees operating in the framework of the European agricultural policy on the one hand and the much more autonomously organised foodstuffs safety policy on the other. In both fields, 'scientific' (advisory) committees had been established., to which 'standing' (policy) committees could turn for advice. In the agricultural sector, however, this duality had not ensured mutual sufficient independence.[7] Too dense were the links between 'experts' and policy-makers – the operation of these well-organised networks became apparent only in the aftermath of the BSE crisis (Vos 1999: 140-148; Krapohl 2003; Krapohl and Zurek 2006). In their reactions to the BSE scandal, the Commission re-iterated their reservations about comitology with new vigour: the European Parliament pleaded for more supervisory powers, while the European Commission would like to have become the head of Europe's regulatory machinery and work with 'executive' agencies rather than committees in which the Member States remain influential (see Vos 2006).[8] At the end of the day, a *tertium* was established, in that the European Food Safety Authority promised 'to ensure that consumer *confidence* and the confidence of trading partners is secured through the open and transparent development of food law'.[9] These changes

[7] The Scientific Veterinary Committee (SVC) which was set up as early as 1981 (see O.J. L 233/1981, 32), had established a BSE sub-group . That group was, as K. Bradley (1999) points out in his analysis of the BSE crisis, 'at all material times chaired by a UK member, and its meetíngs were numerically dominated by UK nationals' (at 87) The SVC tended to reflect the thinking of the British Ministry of agriculture. '…[O]n one occasion the Director-general of DG VI (Agriculture) of the Commission rebuked the German health Minister in stearn termas because German officials had refused to toe the Community line on BSE…' (at 78).

[8] The Draft Constitutional Treaty, in Articles 32-36, has adopted the recommendations of Working Group XI of the Convention on 'simplification' in which three types of non-legislative acts were listed: delegated regulations, European implementing regulations, and European implementing decisions to be adopted by the Commission. The Amato-Report – CONV 424/02, http://european-convention.eu.int/. 'Simplification' is hardly an adequate characterization of these proposed amendments. But the extension of judicial protection against the exercise of delegated powers would have been a beneficial change.

[9] Article 37(1) of Regulation 178/2002 of the European Parliament and of the Council, OJ (2002) L31/16.. See the analysis of Chalmers 2005a.

affect the descriptive side of 'deliberative supranationalism' as we presented it in 1997. However, they do not affect our normative perspectives – nor their critique, to which we turn now. Three types of objections deserve a particular mention.

## 2.2 Theoretical Risks

We had identified a n under-explored and sought to provide theoretical framework which would capture our observations and at the same time indicate our normative orientations. Such an exercise *needs* to be examined critically I the light of existing theories and competing projects. Three group of objections which seem of exemplary stand out.

*Legitimizing extra-legal developments?*

The institutions of the European Union are subject to constant change. How can one discriminate between 'legitimate' and Illegitimate' innovations. One should at least be very cautious with a phenomenon like comitology . Joseph Weiler (1999b: 340) has articulated this objection most pervasively:[10]

> 'Comitology is not a discreet phenomenon which occurs at the end of the decision-making process .... It is more like the discovery of a new sub-atomic particle, a neutrino or a quark, affecting the entirety of molecular physics which requires an account of both the phenomenon itself and the way it impacts upon the rest of nuclear understanding. Comitology argues for a rewriting of the entire decision-making field because of the importance of the committee particle in all its stages.'

One cannot refute such observations conclusively because they are inspired by theoretical premises and normative orientations which cannot be called 'wrong'. We would insist, however, that Weiler's critique is an unsatisfactory answer to the irresistible rise of the comitology phenomenon. This critique is clearly inspired by Weiler's path breaking analyses of the interaction between law and politics in the EU in which he identified an equilibrium between political 'intergovernmentalism' and legal 'suprantionalism' (Weiler 1981 and 1982). Weiler has of course not simply overlooked the emergence of *tertium* beyond intergovernmentalism and suprantionalism. Quite to the contrary, he has underlined the 'factual enormity' of a new world and offered 'a third paradigm to conceptualise Community government' namely 'infranationalism' (see Weiler 1999b: 338, 340 f.), 'which addresses a meso-level reality which operates below the public macro and the individual micro' (Weiler 1999b: 342; cf. 1999a: 98, 273). Can 'infranationalism' so characterised be called a 'paradigm'? In our analysis the comitology process is legally much more, albeit still imperfectly, structured than 'infranationalism' is and our suggestions concerning it 'constitutioalisation' seek to strengthen its potential of 'deliberative' problem-solving. It is at any rate quite widely acknowledged that comitology proceedings tend to be based upon well-elaborated, nationally legitimated positions before the Commission suggests a solution for which it expects consensus (Landfried 2002: 273; Haltern 2005: 155; Trondal). Our hopes may

[10] His critique has been endorsed by many, perhaps most prominently by Mestmäcker (2003: 69-71).

still turn out to be unrealistic. Can one conclude that the notion of 'deliberative' supranationalism' must be a 'semantic *faux pas*' indicative of its proponents' failure to 'grasp the real implications' of their suggestions? (Weiler 1999: 347). This suggestion has too much of *Palmström*'s logic.[11] 'Deliberative supranationalism', as presented in 1997, has deficiencies to which we will return.[12] The effort to address and conceptualise a highly important and under-theorized phenomenon is not heretical *per se.*

*A technocratic regime?*

The prevailing account of comitology in recent analyses tends to reiterate an older understanding of European governance, namely its perception as a 'technocratic regime'. That perception is deeply rooted in the history of the European project. Suffice it here to point to the first textbook on European law in German by Hans-Peter Ipsen (1971: 176 ff. and earlier Ipsen 1964). Ipsen, a constitutional lawyer who started to study European law at the age of 50, was seriously troubled by Europe's 'democracy deficit'. This is why he conceptualised the (then three) European Communities as 'special-purpose associations of functional integration'.[13] These entities were supposed to deal with questions of 'technical accomplishment', *i.e.*, administrative tasks that could – and even should! –be conveyed to a supranational bureaucracy.[14] This coneptualisation remained alive especially in political science (Wessels 1998; Bach 1999; most importantly Majone, for example, 1996). The comitology system with its strong reliance on scientific (and other) expertise lends itself to such an interpretation (see Weiler 1999b; 345; Haltern 2005: 152-163 with many references). The *problélmatique* of that interpretation is very similar to the divide between 'infranationalism' and 'deliberative suprantionalism' just discussed: Jürgen Neyer and I (1997) had presented comitology as an institutionalized alternative to Majone's vision of a European 'regulatory state' (see also Joerges 1998). Their *Kafkaesque* appearance, notwithstanding, we had argued then and later, 'committees do not just have the so-called 'implementation' function of Community framework provisions to deal with ('comitology proper'); they also operate much more comprehensively as *fora* for political processes and as co-ordinating bodies between supranational and national levels and between governmental and social actors (Joerges 2002: 141). But one can of course not deny that both regulatory and scientific committees, and even advisory committees supposed to represent 'social interests', are composed of experts of all kinds (Vos 1999: 148-152). 'There is a deficit on the output as well as input side, since [European] legislation is implemented only through national, regional and local authorities', Habermas (2001: 24) concluded (similarly Brunkhorst 2006). The answer to this argument has to be postponed for a moment.[15]

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[11] Christian Morgenstern's *Palmström* famously concluded, '*dass nicht sein kann, was nicht sein darf*' – a normativistic fallacy more drastic than Weiler's who only fails to consider that his account is determined by categories which foreclose dimensions of the object uner scrutiny.

[12] Section III *infra.*

[13] H.-P. Ipsen, 'Der deutsche Jurist und das Europäische Gemeinschaftsrecht', *Verhandlungen des 43. Deutschen Juristentages*, 1964, Vol. 2 L 14 *et seq*.

[14] H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, 176 *et seq*.

[15] See Section 3 *infra.*

*Is Comitology Un-democratic?*

To argue that comitology is a technocratic type of governance implies its characterisation as a further dimensions of Europe's democracy deficit. The critique of 'deliberative suprantionalism' as a undemocratic concept reaches deeper. however. Schmalz-Bruns' (1999) was the first to develop this line of critique thoroughly. His core argument: The notion of deliberative supranationalism' which we had presented and defended must not be equated with the notion of democratic governance as institutionalised in constitutional states.(see later Gerstenberg and Sabel: 2002). Schmalz-Brun's observation is valid; But his critique does not do justice to our claims. Neither had we presented the 'deliberative' modes of interaction within comitology as the advent of deliberative democracy in the EU; nor had we tried to justify comitology *telle quelle.* But we have certainly failed to elaborate with sufficient clarity the distinctiveness of our argument and we have with our quest for 'constitutionalisation' apparently provoked a deeper misunderstanding of our argument, namely, that it would just require some further legislative acts or prudent judgments of the ECJ to transform comitology into a new model of transnational democracy. *Nostra culpa,* surely, but not entirely. One additional reason for the misapprehensions were the barriers to understanding created by both inter- and intra-disciplinary demarcation lines. Would it have helped to state: "'Deliberative supranationalism' needs to be understood as a conflict-of-laws methodology". Conflict of laws is a discipline which neither international relation theorists nor students of European integration, neither international lawyers nor European lawyers know much about in general; and hardly anybody can be expected to know about the specific tradition that 'deliberative suprantionalism' seeks to take up and to transform into a 'new discipline'. But the argument is indispensable and worth another effort (cf. on the following also Joerges 2006).

## 3. 'Deliberative Supranationalism' Revisited: European law as a new type of conflict of laws

It might have been better to take such detours,[16] but it is unlikely that it would have helped us to get through with our argument. We had, at any rate, stated its non-technical basis very clearly. The following restatement begins with the citation of the core passage before the implications will be developed further.

### 3.1 The Democratic Deficit of Constitutional Nation State Democracies

The notion of deliberative supranationalism denotes a long-term project which needs to be elaborated in two dimensions. It should be read as compensating the shortcomings ('failures') of constitutional nation-states and thus present a normative basis for supranational constitutional commitments; it should, however, also draw upon deliberative ideals in structuring supranationalism.

[16] I have done this in my response to Schmalz-Bruns (Joerges 2000/2001) and on other occasions.

> The kernel of our argument is that the legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If, and, indeed, because] democracies presuppose and represent collective identities, they have very few mechanisms to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes (Joerges and Neyer 1997a: 293).

This part of the argument is not particularly original (see, for example, Caporaso 1996; Zürn 1999). Grant & Keohane (2005), in a recent essay on the non-accountability of powerful states in international relations, trace it back to Jean-Jacques Rousseau.[17] What was arguably original in this argument was its application to the European constellation: "The legitimacy of supranational institutions can be designed as a cure to these deficiencies - as a correction of 'nation-state failures' as it were". This argument was hardly noticed anywhere. But it suggests a shift of paradigmatic dimensions in the debate on democracy in the EU, because it implies that we should stop complaining about the democracy deficits of EU and, instead, turn our attention to the democracy failures of the constitutional nation state. We went on to assert that the most important elements of European primary law and its claim to supranational validity can be interpreted in such perspectives. 'Thus, the non-discrimination guarantee of Article 6 can be read as aiming to compensate the particularism of national basic rights; similarly, the prohibition of protectionist policies by Article 30 [now 28] can be read as meaning that European nation-states must not try to resolve their economic and social problems at the cost of their neighbours. The constitutionalisation of such principles is in line with the ideals embodied in democratic constitutions, and legal supranationalism can thus be understood as complementing common features of national constitutionalist traditions' (Joerges and Neyer 1997).

In our re-interpretation, supranationalism achieved a new – democratic! – dignity, albeit one which was based on its compensatory function and not on the establishment of a new supranational order. 'Deliberative supranationalism' is concerned with the interaction of democratic nation states. It does not envisage the establishment of a new supranational state and thereby programme the deficits of the nation state into the new entity. Its legitimacy stems from the commitment to Europe's *proprium* which the otherwise not so fortunate Constitutional Treaty has defined has fortunately defined as a striving for 'unity in diversity'.[18] We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires. The legitimacy of supranational constraints imposed upon the sovereignty of constitutional states can, in principle, be easily understood. Extra-territorial effects of national policies may be intended; indeed, they are real and unavoidable in an economically and socially interdependent community. This raises the question of how a constitutional state can legitimise the burden that it unilaterally imposes upon its neighbours 'No taxation without

[17] I have used it first in an analyses of Europeanisation processes in private law (Joerges 1997: 390). For a similar, albeit original version, see Poiares Maduro (1998).

[18] See Article 1-8 Draft Treaty Establishing a Constitution for Europe, OJ C 310/1 of 16-12-2004.

representation' - this principle can claim universal validity; the very idea of democratic constitutionalism requires that constitutional states apply this principle to themselves. Thus, a supranational constitutional charter does not need to represent a new 'state' … What it does require is that the interests and concerns of non-nationals should be considered even within the national polity. In this sense, supranationalism does convey *political* rights and not just economic freedoms to Community citizens. Supranationalism is therefore to be understood as a fundamentally *democratic* concept. 'Supremacy' of European law can and should be read as giving voice to 'foreign' concerns and imposing corresponding constraints upon Member States. What supremacy requires, then, is the identification of rules and principles that will ensure the co-existence of different constituencies and the compatibility of these constituencies' objectives with the common concerns that they share. It is precisely about these issues that Community law needs to lay down a legal framework which structures political deliberation. It is a constitutional mandate of the ECJ to protect such legal structures and principles and to resolve controversies surrounding their contents' (Joerges & Neyer 1997a: 294).

### 3.2 European Law as a new Type of Conflict of Laws

Why should this reading of supranationalism lead us to an understanding of European law as new conflict of laws? This move should not be misinterpreted as being anti-integrationist. The discipline to which we refer is concerned with the differences between legal systems. Its vocation is – in my understanding[19] – the disciplining of conflicts arising out of these difference through law. This law is to transform international anarchy into what Kant has, however tentatively, envisaged as a cosmopolitan '*Rechtszustand*' (see Habermas 1998). In the case of the EU, conflict of laws 'juridifies' the Union through rules and principles which ensure the unity of its diversity. It is the constitutional law of the Union. 'Horizontal constitutionalism' might have been a more comforting, less *garstig* notion. 'Managed recognition' (Nicolaïdes 2004) might illustrate better the flexibility 'European Conflict law' must develop. Both notions would seem too narrow, however. The EU is continuously engaged in dealing with legal diversity – and the conflict patterns that it has to cope with vary considerably.

### 3.3 Three Patterns: Vertical, horizontal and diagonal conflicts

Traditional conflict of laws has to deal with legal differences between autonomous and comprehensive legal systems. In the realm of 'private' law, it sought criteria which would guide the selection of one of the potentially applicable (competing) laws. In the 'public' (administrative, regulatory law) realms, it used to restrict itself to determining the spatial reach of the law of the forum but did not, in principle, prescribe to apply the law of a foreign jurisdiction. European law has broken with these traditions. Tolerance of diversity and mutual recognition not just of private but also of public law are of

[19] Legal science is as pluralistic as any other social science. The one and only author who has used American conflict of laws for the interpretation of European law is referring to a very different of the American tradition (Michaels 2006).

constitutive (constitutional) importance. Furthermore, the Member States have delegated legislative competences – 'albeit in limited fields'. This is why responses to legal diversity often require a co-ordination of different, semi-autonomous levels of governance.

*'Supremacy' – a conflict of laws rules for hierarchical constellation.* 'Where national law is incompatible with Community law, the latter prevails'. This is a simplified version of the most famous of all European legal principles, the so-called 'supremacy' doctrine. The foundations were laid in 1963 with the doctrine of direct effect of EC law (ECJ 1963). The rules of the EEC Treaty, as long as they are sufficiently precise, are valid 'directly' and establish subjective rights.[20] The second building-block in this process was the doctrine of the supremacy of Community law. This was introduced as part of the *Costa/ENEL* decision as a logically imperative implication of 'direct effect' (ECJ 1964).[21] Two implications may be mentioned. Where Community law is directly applicable, it pre-empts Member States; they lose the right to act unilaterally. Furthermore, in order to ensure equal relevance of Community law in all Member States, the ECJ must have the final competence to rule on the limits of its application.

It has all been long accepted in principle, and the principles seem so clear. However, they are as indeterminate as all law is, and their application did, and does, pose difficult problems. How precise is 'precise enough'? Will secondary Community law and executive rule-making trump national constitutional law? Can the 'four freedoms' trump collective labour law? Can restrictive provisions of European product liability law pre-empt national legal systems from developing more stringent liability rules in their general tort law?

It is clearly impossible to reconstruct the handling of such issues by the ECJ in passing, or to describe the subtle relationships of the judiciary on which the acceptance of its judgments rests and depends. Suffice it to assert here that 'supremacy' is primarily an enabling doctrine, which authorises the ECJ to hand down prescriptions for the handling of legal diversity but not a *carte blanche* for the gradual building up of a comprehensive body of substantive European law provisions which would suspend Europe's legal diversity. However, this is not to suggest that the ECJ will always operate with sufficient sensitivity.[22]

*Horizontal conflicts* between national legal systems are legion in the EU. As just underlined, European law has departed in a nothing less than revolutionary mode from the traditions of conflict of laws. It cannot tolerate the principled refusal of 'international administrative and public law' not to apply another Member State's 'public' law. It even empowers European 'market citizens' with the right to expose the laws enacted by their own sovereign to judicial scrutiny.[23]

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[20] '…Community law has an authority which can be invoked by their nationals before those courts and tribunals….' Case 26/62, *Van Gend en Loos* [1963] ECR 1, at 12.

[21] Case 6/64,. *Costa* v. *ENEL* [1964] ECR 585

[22] For a comprehensive analysis of the handling of the pre-emption doctrine cf Furrer (1992); for a recent exemplary discussion of the ECJ's performance in the field of private law, see Schmid 2006).

[23] See text preceeding note 14 *supra* and, for an exemplary analysis, Joerges 2004: #

I use one legendary example which may serve to illustrate these contentions: in 1979, the *Cassis de Dijon* case[24] saw the European Court of Justice declare a German ban on the marketing of a French liqueur - the alcohol content of which was lower than its German counterpart - to be incompatible with the principle of free movement of goods (Article 30 EC Treaty, now Art. 28 EC). The ECJ's response to the conflict between the French and German policies was as convincing as it was trifling: any confusion on the part of German consumers could be avoided, and a reasonable degree of protection against erroneous decisions by German consumers could be achieved by simply disclosing the low alcohol content of the French liqueur. With this seemingly trivial observation, the Court re-defined its constitutional competence to review the legitimacy of national legislation which presented a non-tariff barrier to free intra-Community trade, a move that was of principled theoretical importance and had far-reaching practical impact.

To translate the argument into the language of conflict of laws, what the ECJ did was, in effect, to identify a 'meta-norm' that both France and Germany, as parties to the conflict, could accept. Since both countries were committed to the free trade objective, they were also prepared to accept that restrictions of free trade must be based on credible regulatory concerns. Chalmers (2005: 35-36) has rightly pointed out that the conflict was between German actors who pursued their interests through an instrumentalisation of EU law. This potential of European law is indicative of an erosion of national sovereignty and of the demise of conflict of laws. This objection is of fundamental importance. It is only if one believes in the actual survival and the normative merit of law generation in constitutional democracies that the conflict of laws perspective can be defended. This perspective is, as I have argued at some length elsewhere (Joerges 2005: 173-183) fully compatible with the granting of rights to citizens of the Union, which enable them to expose their own sovereign to constitutional review by the ECJ. Who is right and who is wrong depends on the performance of the European judiciary. As long as the ECJ respects the political autonomy of Member States to determine for themselves how to decide about legitimate regulatory concerns, the need for horizontal conflict resolution remains irrefutable. There are, at the same time, signals which point towards a much more rigid understanding of supremacy and the constraints that it imposes on the Member States. It is to this tendency that the concluding section will have to return. Its constitutional *problèmatique* is that it accommodates highly questionable manoeuvres. Chalmers' example is a case in point. The recourse of national actors to Community proceedings loses the legitimacy which we have ascribed to it by which national and European actors enter into 'Faustian bargains' (Peters & Pierre 2004: 76; 85) in order to arrive at a legal rubber-stamping of their particular interests.

*'Diagonal conflicts' in the EU system of multi-level governance* are the most interesting category. They are unavoidable because they arise from the ordering of competences which is not just characterised by the fundamental principle of 'enumerated powers' according to which the Community can act only on the basis of explicitly conferred competences. To give at least one example: The Community is competent in the field of competition law. It is not competent to regulate the fairness of contracts between

[24] Case 120/78, [1979] ECR 649 - *Cassis de Dijon*.

businesses. This is why Community law and national law may, and indeed often do, say different things to the same distribution, e.g. where Community competition law accepts the contract as a pro-competitive arrangement whereas national contract law finds it to be unfair and hence invalid. The conflict is 'diagonal' because Community law and national law operate in distinct legal fields. The division of Community and national competences again and again creates constellations in which the interdependency of a European problem is at odds with the assignment of powers to politically (semi-)autonomous actors. Without doubt, the enumerated power principle has been stressed and eroded in many ingenuous and questionable ways to cope with such problems. Such twisting often responds to difficulties which the concerned actors feel legitimated to overcome 'themselves' simply because there is no given rule that they can invoke for an authoritative answer to their co-ordination problems. The term 'diagonal' conflicts (Joerges 1997b: 398-399; Schmid 2000) captures hence a structural characteristic of the European multilevel system. Neither the European level nor the national level is in a position to address a specific problem in its entirety. The alternative to 'twisting' and 'faustian bargains' is the search for a solution which mitigates between the interests and aspirations of the concerned actors – deliberation over a mutually acceptable solution which reflects common Community interests.

This answer will certainly seem overly normative and optimistic. However, the argument can be transferred into the world of political science. In order to cope with functionally interwoven problem-constellations, the generation of constructive responses will depend on communication between the various actors. This observation concerns something like a 'normative fact': it is not only reasonable but it is also not unlikely that the inter-dependence of the concerned actors will produce a normative fabric that can exert factual power. Not surprisingly, it is, in particular, Jürgen Neyer who posits that the EU-specific conditions for political action favour a deliberative mode of communication that is bound by rules and principles, in which arguments are only accepted if they are capable of universal application (Neyer 2003; 2004). Lawyers should refrain from entering into the methodological merits of such arguments. They can, however, point to many examples in which the handling of diagonal conflicts is fully compatible with the normative yardsticks of 'deliberative suprantionalism.[25] But what about the *Kafkaesque* nature of Comitology? Why does Europe resort to this 'underworld' (Weiler 1998) mode of governance? Let us rephrase this question in the perspective of deliberative supranationalism. How can Europe organise what its interdependencies require? How can it reconcile its respect for the legitimacy of democratic rule in the Member States with its request to each of them to take the concerns and interest of its European neighbours seriously? What is so scandalous about a system through which the representatives of these Member States inform each other and deliberate about commonly acceptable decisions? What is wrong with exit options in which essential legitimate concerns are at issue? This is not, of course, to say

[25] To name at least one: Case C-280/00, *Altmark Trans GmbH* vs. *Regierungspräsidium Magdeburg und Nahverkehrsgesellschaft Altmark GmbH*, judgment of 24 July 2003, *nyr*, concerned the tensions between the European concern for the opening of markets to foreign competitors and national or regional political actors (here the *Land* Sachsen-Anhalt) to ensure the provision of pubic transportation at laow prices. Is that an openly political question to be decided by the German *Länder* and communes, or a legal question for Community law to answer? The ECJ knew *not* to decide these questions definitively, but instead to design a legal framework which leaves room for political processes and decisions – and still protects European concerns, (see Joerges 2005: 187-189).

that this system is without defects. It needs to be 'constitutionalised' further (for some suggestions see Joerges 2003: 535-540). However, this project should respect Europe's diversity.

## Concluding Remark

'Deliberative supranationalism' and the understanding of European law as a new conflict of laws is not a pure fantasy. We ca quite safely assume that Europe will not transform into a unitary state or some kind of federation. It is instead likely to remain a multi-level system which needs to manage its affairs without a hierarchical order of political authority. It will have to organise its political action in networks. It will continue to depend on the communication between the various actors who are relatively autonomous in their various domains, but, at the same time, mutually dependent. The conflict-of-laws approach to European law that we have submitted here hence has its *fundamentum in re*: it is a means to 'constitutionalises' the unity-diversity paradox. The normative commitments and principles interpreted above as responses to the interdependence of the Member States of the Union cannot be portrayed as some remote wish list. They are well documented and even canonised in real existing European law.

'Deliberative supranationalism' reflects a second dimension of the 'state of the European Union'. 'Conflict of laws' is about the recognition of foreign law, the adaptation of domestic law to the co-operative needs and legal commitments and principles furthering co-operative problem-solving. Co-ordinated problem-solving in the European constellation requires a further step, namely a cognitive opening of the legal system for scientific and other expertise. The complexity of comitology and the committee system is not arbitrary but has good reasons. It is a responses to the need institutionalise a continuous fine-tuned co-operation.

An important proviso needs to be added. 'Deliberative suprantionalism' rests upon contingent conditions and comitology is a normatively imperfect institutionalisation of co-operative problem-solving. There are no in-built mechanisms or invisible hands which would guarantee the stability of the cooperative commitments on which the European decentralised system of governance depends. Nobody can be sure that the political system and the European judiciary will cure the normative failures of comitology and constitutionalise its management functions further. Events like the French and the Dutch referendum have an impact not on the further existence of comitology but on its relative importance. 'Comitology' is competing with lees formalised 'new modes of governance' on the one hand and rigidly neo-liberal integration strategies on the other. Predictions as to its political future are therefore risky.

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