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Discourse and Order in the EU. A Deliberative Approach to European Governance

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ABSTRACT

The paper combines recent discourse theory with an analysis of European governance. It conceptualises the European polity as a heterarchical political structure, which ties together the domestic, the governmental and the supranational level of the EU. For being efficient, effective and leading to a high quality, policy making in this structure must be based on policy deliberation. Important institutional features of the EU can be explained as reflecting this insight and as efforts to realise the necessary institutional preconditions of deliberation. A deliberative perspective on governance finally informs normative concerns by highlighting the need to put additional emphasis on accountability, a broad representation of societal actors and a legalisation of political interaction.

Keywords: governance, integration theory, joint decision making, multilevel governance, participation, political representation, supranationalism

1. WHO GOVERNS IN THE EU?

Most modern political theories agree that non-coercive public order presupposes a discursive interaction both among different parts of society, and the society at large and government.[1] Majoritarian decision-making and the delegation of power to a ruling actor or institution is only accepted by citizens if the ruling majority is obliged to publicly justify their policies by reference to broadly consented norms and if it does so in an open and unlimited discourse (Habermas 1992, Rawls 1971). As opposed to modern political theory, European integration theory has little sensitivity for the linkage between political order and discourse. Same as international relations theory, it tends to situate governance structures on a continuum of power concentration that ranges from hierarchy on the one side to anarchy on the other, without placing the analysis of discursive structures at the centre of a given political structure. To be sure, the anarchy/hierarchy dichotomy has proven to be a powerful heuristic device for political science because it fostered understanding of the structural differences between international and domestic politics, equating hierarchy with (domestic) order and anarchy with (international) disorder. If applied to the analysis of the European Union (EU), however, it is difficult to make sense of the distinction. Socio-economic interdependence and political internationalisation has propelled a process, in which nation-states increasingly pool their sovereignties (Keohane and Hoffman, 1991) and empower supranational institutions to cope with those tasks they are no longer able to deal with autonomously. “Governance without government” (Rosenau and Czempiel, 1992), “governance beyond the nation-state” (Zürn, 2000), the emergence of “law above the state” (Volcansek, 1997; Neyer, 1999) and a “legalisation of international politics” (Abbott et al., 2000) are eminent features of the EU. Political interaction no longer follows the logic of strategic bargaining only but becomes sensitive to "inappropriate" behaviour (March and Olson, 1998). “Constitutionalisation” has become an important term for describing the new reality of European governance (Alter, 2001; Pernice, 1999; Weiler, 2000), pinpointing the embeddedness of a formerly diplomatic mode of interaction in a binding formalized legal structure.

Neither the concept of intergovernmental anarchy nor of supranational hierarchy is able to analytically grasp these new phenomena. Intergovernmentalism too easily disregards the dependence of governments on supranational institutions for realising governmental interests (Sandholtz and

1.The paper is a revised version of two seminars given at ARENA in Oslo at 22 January 2002 (Neyer, 2002) and the EUI in Florence at 14 February 2002. The author is grateful for helpful comments by the participants of the seminars, Rebecca Steffenson, Erik O. Eriksen, Andreas Follesdal and the two anonymous reviewers of the EUI working paper series. The usual disclaimer applies.

Stone Sweet, 1997). It tends to overlook that the EU describes a legalised venture in which powers and sovereignties are pooled, legal authorities are established and states are no longer free to pursue whatever policy they deem to be in their interest (Weiler, 1991; Alter, 2001). Mutual regard for the concerns of other member states and respect for the binding character of European law are essential elements of participating in a joint exercise of European governance.

The idea of a supranational hierarchy with the Commission and/or the ECJ as de facto governing bodies, however, is equally misleading. The EU lacks a central actor with powers to individually legislate and enforce. Even in issue areas in which the Commission has broad discretionary powers, it still must respect that it has no power to coerce member states and that it must safeguard its decisions to keep them acceptable to its member states and the member states' publics (Neyer and Zürn, 2001). Open cases of non-compliance, such as in the infamous BSE case, or less dramatic cases of silent non-implementation of EU law (Börzel, 2002) underline that the effectiveness of postnational governance rests on the precondition that member states „accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination" (Weiler, 2000: 13). Although it is true that the legitimacy of courts is based not least on the application of legal reasoning (deducing decisions from general normative rules in an argumentative manner, cf. Dworkin, 1991; Mattli and Slaughter, 1998), it also is hardly imaginable that the political status of the ECJ in the European institutional system would not suffer if its decision were a permanent political affront to the member states (Garrett et al., 1998).

The aim of this paper is to sketch an approach to European governance that places the analysis of discursive structures at its centre. According to such a perspective, postnational governance must be understood as a heterarchical political structure which encompasses the domestic, the governmental and the supranational level (infra 2). It is neither restricted to a supranational vertical order nor to an intergovernmental horizontal order but accepts both elements as being essential parts of one political structure. Because combining vertical and horizontal means of interaction can neither rely on pure bargaining nor on the issuing of commands, its basic means of political interaction must be policy deliberation, which is as a mode of problem-solving functionally superior to bargaining (infra 3). Important institutional features of the EU can be explained as reflecting this insight and as efforts to realise the necessary institutional preconditions of deliberation (infra 4). A deliberative perspective on postnational governance finally informs normative concerns (infra 5) by highlighting the need to put additional emphasis on accountability, a broad representation of societal actors in postnational political institutions and a legalisation of political interaction.

2. THE EU AS A HETERARCHICAL STRUCTURE

Because neither international anarchy nor supranational hierarchy are appropriate concepts for understanding and describing the European polity, recent integration theory has witnessed a great number of efforts to formulate new concepts. Most prominent among them is the concept of "multi-level governance" (cf. Jachtenfuchs, 2001) with its emphasis on norms and ideas (Finnemore and Sikkink, 1998; March and Olson, 1998), the crucial importance of transnational networks (Eising and Kohler-Koch, 1999) and the relevance of argumentative interaction (Risse, 2000; Müller, 2001). There can be little doubt that the governance concept has opened up a new conceptual space for thinking about political order beyond anarchy and hierarchy. It has stimulated a great number of empirical studies, which have shown that the effective regulation of social and political relationships can indeed be realised without having to rely on coercive institutions or on power-based bargaining (Kohler-Koch, 2002; Neyer and Zürn 2001; Grande and Jachtenfuchs, 2000). What the governance approach still lacks, however, is its grounding in an alternative principle of political order that substitutes the two concepts of anarchy and hierarchy. Therefore, it is still very much limited to pinpointing those elements of the empirical reality which do not fit into the former two concepts without positively identifying for which type of political order they stand and why one should not be surprised to observe them (cf. Jachtenfuchs, 2001: 258-260).

One way of overcoming this deficit is to combine the governance approach with the notion of a heterarchy (cf. Ladeur, 1999, for an application of the concept to legal theory). In a heterarchical structure, political authority is neither centralised (as under conditions of hierarchy) nor decentralised (as under conditions of anarchy) but shared, which means that the units of a system pool their authorities with the purpose of a shared execution of governance. Likewise, the structure of interaction follows neither a vertical logic (as in a hierarchical setting, in which an author of a rule issues commands, monitors and eventually enforces compliance), nor a purely horizontal logic (as in an anarchical setting, in which each individual actor must look unilaterally for ways and means to interact with other actors) but combines both elements into an integrated mode of interaction. Political interaction therefore is in permanent need of cross-border and cross-level communicative processes with the purpose of accommodating the preferences of the constituent units (both horizontally and vertically). Therefore, emphasising the heterarchical character of the EU means accepting the formal sovereignty of the nation-state while arguing that complex interdependence requires rules for the conduct of interaction and an inclusion of non-governmental actors in processes of postnational policy-making.

The concepts of anarchy, hierarchy and heterarchy of course refer to ideal types. Empirically it will hardly be possible to observe them in purity. An empirical approximation to a heterarchical structure, however, may be found in the first pillar of the EU with its parallelism of legislative competencies shared between the Commission, the Council and the European Parliament, and the sharing of competencies between the Commission and the Member States in the implementation of rules. In this setting, none of the involved actors can unilaterally pursue its goals without finding the approval of all other actors. It is not only that the member states must co-ordinate their preferences among each other to find enough votes for a qualified majority. The need for co-ordination also applies to the European institutions. The Council cannot act without a proposal on the part of the Commission, and again needs the Commission to promote its implementation. The Commission likewise must formulate its legislative proposals in a way that is likely to pass the scrutiny of the Council and the Parliament and must secure member state approval in Comitology for its implementing measure. Furthermore, because the Commission has only limited capacities to enforce European law, it invests much effort to safeguard broad political support for its proposals, to consult with as many interest groups as possible and to postpone disputed decisions rather than to vote on them. Successful political interaction in the first pillar of the EU therefore is strongly characterised by a demand for a shared and co-operative exercise of governance among the member states and the European institutions.

As these brief explanations already imply, governance (i.e. the intentional formulation and implementation of inconvenient rules) in a heterarchical multi-level context requires an inclusive and co-operative mode of interaction. And indeed, empirical evidence underlines that political interaction in the EU relies very much on deliberation (Joerges and Neyer, 1997; Lewis, 1998; Gehring, 1998; Eder, 2000) and uses strategies of bargaining or voting only as instruments of last resort. As Eriksen and Fossum report, in 1994 only fourteen per cent of all decision adopted by the Council were voted upon. In all other cases, decisions were adopted unanimously (Eriksen/Fossum 2000: Fn. 7). Much of European integration theory, however, is highly critical of the empirical relevance of deliberation. Authors such as Schneider (1995), Moravcsik (1998) or Tsebelis and Garrett (2001) describe a European polity that is by and large dominated by monological actors who have little regard for the concerns of others. So how is it that deliberation can be an important mode of interaction in multi-level contexts? Is deliberation among representatives not a contradiction in terms? Or, to say the least, a form of interaction which is largely restricted to expert communities with low political salience and which becomes immediately trumped by bargaining if “real” concerns with significant cost implications are involved?

This is not the place to produce a systematical collection of empirical data on the relevance of deliberation in postnational constellations. It is, however, the place for discussing why and under what conditions cross-level and cross-border deliberation can be expected to be a dominant mode of interaction and heterarchical political structures be assumed to perform well. For doing so, the paper will in the following distinguish between bargaining and different types of arguing, point out that the specific conditions of the EU produce incentives for the member states to prefer arguing over bargaining, and show that they have the means for facilitating it. I will finally take issue with the puzzle that bargaining still seems to be an empirically more significant mode of interaction than this approach suggests by pointing to some of the political costs of deliberation.

3. BARGAINING AND DIFFERENT TYPES OF ARGUING

It has become common in the literature to distinguish between two basic forms of political interaction, namely arguing and bargaining (cf. Elster, 1998; Habermas, 1992; Risse, 2000). Both types of interaction can be understood as modes of communication, which consist of an exchange of speech acts that aim at motivating other actors to accept own preferences as a guideline for collective action. A basic difference between the two types of interaction lies in their illocutionary content: While bargaining relies on the use of promises and threats (including threats of exit),[2] arguing rests on claims of factual truth and/or normative validity.[3] Arguing is a mode of communication in which actors are required to state their reasons for advancing claims by referring to consented norms (Elster, 1998), such as Treaty law (in the EU or the WTO), a constitution (in a constitutional democracy) or standards of scientific proof. In so doing, a sample of different interpretations emerges which are accessible for critical evaluation by third parties. Such evaluations can be conducted by a great variety of actors. In a democracy it usually is the parliament, which serves as a forum for critical discourse and as the institution in which demands for justification and coherence with basic norms are voiced. If these demands remain either unheard or if the reasons given by a ruling majority are unconvincing to the minority, it has the option to ask a constitutional court to declare a legislative act

2. According to Jönsson (2001: 218), "bargaining can be understood as the exchange of offers and counter-offers, concessions and retractions; as bazaar-like haggling in contrast to joint problem-solving".

3. By conceptualizing both deliberation and bargaining as forms of communicative action, I do not follow proposals to treat only deliberation as a type of communicative interaction and bargaining as a non-communicative form of interaction. Elster (1991) Müller (2001) and Schimmelfennig (2001) have convincingly argued that deliberation can also be of a strategic intention if it is chosen because it promises to provide better individual results than bargaining. It is likewise inappropriate to conceptualize bargaining as a non-communicative form of interaction because it is conducted by an exchange of speech acts.

to be anti-constitutional and void. Likewise, any member state in the EU can ask the ECJ to give an opinion on the integrity of legal actions by any European institution or member state and demand to declare that action to be incompatible with the Treaties. In a scientific deliberative setting, finally, it is the community of scientists, which assesses produced arguments and evidence and which affirms or rejects them. Although there is broad consensus in the debate on these basic conceptual orientations, the literature is highly controversial concerning the conditions under which a deliberative discourse is to be expected. Whilst some establish very high requirements in terms of individual cognitive dispositions (cf. Miller, 1995), others focus on institutional requirements (Elster, 1998b), a legalized setting (Joerges and Neyer, 1997) or take it as a general phenomenon of public discourse (cf. Habermas, 1992; Risse, 2000). One of the major reasons for this controversy is the fact that it is at least three different concepts of arguing, which are used in the literature and which each builds on a specific understanding of the role of discourse in politics.

3.1. Knowledge Based Arguing, Value Based Arguing, and Institution Based Arguing

A first approach to arguing stems from the work done on the influence of epistemic communities (groups of non-political experts or scientists who work in the same profession and share a common problem understanding) in international politics and conceptualises arguing as a *knowledge-based* mode of interaction. As Haas (1992) has shown, epistemic communities can have a significant impact on international politics if governments have not yet identified their „national interest“ due to (a) lacking information on the nature of a problem, (b) unstable domestic interest coalitions or (c) lacking knowledge about the implications of different policy options on broader governmental objectives. If these conditions apply, governments are relatively open to non-political advice by experts. Political interaction therefore is likely to be shaped by discursive processes among experts, by the application of standards of truth seeking and follows the logic of appropriateness rather than of strategic rationality. Although an epistemic community approach promises to underline the importance of arguing in international politics, it is at the same time highly sceptical concerning the overall relevance of arguing. By restricting its probability to situations in which information is scarce and governmental preferences are not yet identified, it implicitly denies it any central importance.

An alternative approach to arguing, which can be found in communitarianism, conceptualises it as a *value based* mode of interaction. As Miller (1995) and others submit, national communities can be separated from international communities by their shared notions of ethical values and principles. These shared notions are not the result of a mere contract among individuals (as contract theory would argue, e.g. Rawls, 1971) but of a long

historical process of nation-based communication. In political life, such shared notions of ethical values both give expression to idea of the nation as an ethical community and function as the prerequisites of arguments about the meaning of the common good and about the goals of political action. For the purpose of understanding communicative interaction beyond the state, a communitarian approach seems at first hand to be in sharp contrast to the idea of cross-border arguing. Because it connects arguing to shared ethical concerns, it rejects any claim that arguing beyond the nation-state can be empirically significant. As soon as we relax the assumption of an individualistic European world, however, a communitarian approach becomes more helpful. Assuming that the member governments have come to accept that the collective exercise of governance is a necessary means for realising individual member governments preferences, we have little difficulty to conceptualise governments as "dialogical actors who co-ordinate their plans through argumentation aimed at reaching mutual agreements" (Eriksen/Weigard 1997: 221). If we furthermore accept that the EU is not only a technical instrument for solving problems but also a political community in which shared ethical concerns (human rights, rule of law, democracy, etc.) are an important foundation of governance (cf. Schimmelfennig 2001), we also may think of the EU as a normatively integrated *life world* in which only those actors who act collectively responsible behave rationally. Arguing understood as a form of reasoning that applies shared normative standards and guides actors by providing incentives to behave "appropriately" (March/Olson, 1998) becomes plausible.

A communitarian approach, however, also has its limits. Because it views shared normative concerns as an attribute of a territorially defined social or political group, it offers little advice for explaining the variance of communicative rationality in different policy arenas. How to account at the same time for deliberative forms of interaction (e.g. in comitology or COREPER) and for the hard bargaining in intergovernmental redistributive issues such as the conclusion of new financial packages? And how to explain that newly established institutional requirements to justify own preferences by reference to legal norms make a difference in terms of modes of interaction? A clear example for the working of such institutional mechanisms is the introduction of the principle of mutual recognition in 1979. Before, legislation in the Council of Ministers was in permanent need to accommodate the preferences of the Member States in all and every detailed aspect of market making, and heavily relied on intergovernmental bargaining. To overcome the resulting inefficiency, the Commission began in 1980 to assume all national restrictions of the free movement of goods to be illegal if they could not be justified with reference to public health and safety.[4] Following this decision, legislation had no longer to

4. Communication of the Commission, OJ C 256/1980.

deal with any preferences that Member States may have, but only with those that could be formulated in legal language and by reference to well-substantiated health and safety relevant arguments. To be sure, market-making policy in the EU is still far from being an apolitical business. What it has achieved, however, is to transform intergovernmental bargaining into a deliberative mode of interaction by obliging member states to justify individual actions by reference to consented norms and to abstain from any action that cannot be justified in legal terms (cf. Joerges and Neyer, 1997).

If it is true, however, that legal requirements can indeed facilitate deliberative interaction without recourse to some kind of communitarian "we-feeling", it is only a small step to argue that the mode in which actors communicate can be conceptualised as a function of the opportunity structure of a given institutional setting. Understood such, it is not a common culture which is a necessary background for meaningful arguments but institutional requirements which provide incentives for justification and reason giving. Arguing then gives expression to the believe of an actor that he (or she) can advance her interest comparatively well by justifying, explaining and persuading, and thus by abstaining from using threats or promises. And indeed, actors may have good reasons to do so: in the EU, for example, good arguments do not only have the (sometimes rather small) probability of convincing other governments of the adequacy of one's own position, but (sometimes far more important) of making the Commission, the Court or the Parliament willing to join forces with oneself. Same as good arguments can be tools for tapping the support of institutional actors, so can bad arguments prompt their opposition. If, for example, a member government imposes trade barriers against imports from another member states, it is well advised to produce argumentative justification and give convincing explanations for the reasons for its actions. If it does so, its measures will be supported by the Commission (and, if necessary, the Court). If it acts without justification and convincing arguments, however, it will have to face the opposition not only of the affected government but also of the Commission (and, if necessary, the Court), and be confronted with the corresponding costs. Thus, the acts of giving reasons, of justifying a certain course of action and of behaving in a communicative mode of interaction may be strategically motivated and can very well be explained without reference to communitarian ideas. *Institution based deliberation* therefore neither depends on the existence of a historically established and collectively shared ethical concern (community) nor only on the condition that actors do indeed believe that their claims are in accordance with a collective norm (honesty) but is well compatible with a strategic disposition of actors, i.e. the motivation of political actions by self-minded interests.

The discussion above has shown that it is necessary to be clear about what one actually means when using the term "arguing". Different notions of arguing refer to different modes of interaction and carry quite different implications concerning the scope conditions of its empirical relevance. If arguing is analysed as a mode of problem solving in heterarchical structures, however, one is well advised to focus on institution based arguing. An institution-based understanding of arguing has a number of strengths if compared with a knowledge and a value based understanding. In contrast to the former, its empirical relevance is not restricted to technical issues but covers all issues where it makes sense for individual actors to invest resources for trying to convince other parties. As opposed to a value based mode of arguing, an institution based mode of arguing is not limited to communities with a collective identity but can likewise be expected to be an important mode of interaction in European or international politics. Understood such, arguing is a mode of interaction that does not follow from some community-based we-feeling, but can be explained as a rational reaction to the incentives provided by a given institutional structure.

3.2. The Functional Superiority of Deliberation over Bargaining

After clarifying the meaning of arguing used in the remainder of this paper, a question which suggests itself for further reflection is to ask what kind of comparative performance arguing yields if compared with bargaining. For making the case that the member states of the EU have significant incentives to engage in arguing, it is necessary to show that arguing is indeed functionally superior to bargaining. Unfortunately, the theoretical literature on negotiation and bargaining is not too helpful for analysing the multilateral structure of the EU. As a number of authors have lamented, multilateral negotiations represent "one of the least developed areas in negotiation theory" (Hopmann, 1996: 244). As opposed to most game theoretic approaches, which deal with the rather simple situation of a two-actor encounter (chicken game, prisoners dilemma, battle of the sexes, etc.), multilateral negotiations are perceived as "a very messy affair, almost defying generalizations" (Holsti, 1982: 160). Correspondingly, systematic comparisons of different types of interaction with regard to their performance in terms of outcome are hard to find.[5] The next sections try to reduce this gap by comparing arguing and bargaining in terms of their efficiency (means-end relation), their effectiveness (goal attainment) and the quality of output they are likely to produce. Each of them will be discussed below.

5. For a very instructive overview cf. Jönsson (2001).

3.2.1. Efficiency

The efficiency of bargaining crucially depends on the preconditions that either the number of participants is small or that power resources are highly asymmetrical. The perfect setting for a bargaining procedure consists of a group of only two actors, of which one is strong and rich and the other one is weak and poor. In such a setting, the group will have little difficulties to arrive at a quick solution. The strong and rich actor will always be able to either threaten its partner with negative consequences in case it does not agree to a proposed solution or to promise to compensate him for any damage that a proposed solution may imply (Keohane, 1984).

Efficiency becomes a highly problematic issue, however, as soon as the number of actors and the symmetries in individual power resources rise. Imagine a setting of fifteen actors in which no single actor is able or ready to shoulder the costs of enforcing a deal by threatening others or by promising compensating side-payments. Under such conditions, any possible deal must satisfy the preferences of all fifteen actors and necessitate a time-enduring process of balancing individual preferences until one solutions has been identified which leaves no actor worse off than it had been before (Pareto-Optimum). To be sure, the practice of negotiations knows a number of ways to respond to problems of collective action such as coalition-building or issue linkage. None of the two, however, is without problems: although coalition-building simplifies the negotiation process by reducing the number of actors, it often entails intransigent negotiation positions, once consensus is reached within the coalition, and may thus intensify conflicts among members of opposing coalitions (Hopmann, 1996: 261). Linking issues with the purpose of allowing for side-payments or compromise (Haas, 1980) is likewise an often used but not costless technique: adding new issues to the set of problems already on the table increases the complexity of possible solutions and therefore tends to increase the amount of time needed for a successful negotiation process. It is little surprising therefore, that intergovernmental bargaining at Treaty reforming intergovernmental conferences (IGCs) or (even worse) at the Ministerial Conferences of the WTO necessitate intense preparations, and are nevertheless often close to collapse, leaving all actors exhausted until a deal can finally be struck.

Whilst bargaining easily runs into serious functional problems if the number of actors and/or the symmetry of power distribution rises, deliberation as a mode of interaction is far better equipped to cope with both conditions. Under conditions of deliberation, any individual preference can be assessed in terms of its coherence with consented basic norms (such as reciprocity, the principle of non-discrimination or the precautionary principle) and all those

preferences, which fail to withstand the test, are taken out of the sample of possible solutions. To be sure, deliberation does not necessarily lead to only one solution for a problem. It rather often happens that different and mutually incompatible proposals are justified as being in accordance with consented basic norms and that deliberative interaction does not lead to consensus. 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.

3.2.2. Effectiveness

A similar logic applies to the relative effectiveness of policy outcomes under a deliberative and a bargaining procedure. As opposed to policy outcomes that can be justified as implications of consented norms, bargains do have no independent compliance-pull (Franck, 1990) apart from satisfying temporary preferences. If bargains are the product of threats, all actors on whom an outcome has been enforced have a strong incentive to defect as soon as possible. Bargaining can thus hardly satisfy the need for effective norm application if either no individual actor exists who has the capacity and the readiness to safeguard adherence to the outcome of a bargain (by shouldering the costs of monitoring and enforcement), or if the number of actors is too high to allow for effective monitoring on the part of a single actor (Downs, Rocke and Barsoom, 1996). Furthermore, at least among democracies, the intergovernmental exchange of promises and threats quickly finds its limits of effectiveness as soon as those governments on which a deal has been enforced try to implement it domestically. In most democratic settings, governments will face serious difficulties to implement international rules if these rules find no social acceptance, or if they even contradict established normative concerns (cf. Neyer and Zürn, 2001). Enforced deals therefore are most likely to arouse public protest and make it highly difficult for governments to comply with them.

As opposed to policy outcomes conducted by means of bargaining, deliberative norms are part of an overarching normative framework, in which the coherence of basic norms with more specific norms implies that non-compliance with a specific rule equals non-acceptance of the implications of basic rules. Non-compliance with the outcome of a deliberative procedure therefore not only rejects a specific deal but implicitly opposes the whole normative structure of which the specific norm is part. Therefore it is a far more serious issue, which may trigger broader implications for the defecting party. Furthermore, if a government can sell an unwelcome and costly international outcome by referring to broadly accepted norms, it will find itself in a much easier position and will most probably have to face much less domestic political costs when complying with it.

3.2.3. Quality

Bargaining is notorious for its weakness in safeguarding a high quality of policy outcomes. As a decision-making procedure, there are no safeguards for normative concerns outside of the individual actors' preferences. Quite on the contrary, the set of possible solutions to a bargain is defined by the congruence of a solution with the preferences of all powerful actors with a de facto veto power (cf. Putnam 1988). Because the win-win set narrows down the more the larger the number of actors involved is, the more unlikely it becomes that concerns who are not represented by actors with a de facto veto power, will be taken seriously. Bargaining is already hard enough and win-win sets are already small enough to prohibit any further complications of the process. By implication, policy outputs will be the more according to political calculations the larger the number of actors involved and the less according to substantive concerns such as their problem-solving capacity. Thus, a bargaining mode often frustrates all those who are concerned with the problem-solving capacity of governance. The efforts to realise a sound international environmental policy (or to harmonise capital taxation in the EU are both telling examples. In both cases it was the veto of individual players (the US with regard to international environmental policy and Luxembourg with regard to taxation), which prohibited anything but an outcome that satisfied no one. In contrast, any policy outcome under a deliberative procedure must comply with consented basic objectives and can be legally challenged if it fails to do so. Deliberative procedures therefore have the probability not only to improve the efficiency and the effectiveness of decision-making but also to ensure that diplomatic concerns do not trump policy relevant concerns.

In sum: if (1) no actor is able or willing to impose its preference on other actors and to pay the costs of necessary threats or promises (both in terms of legislative and executive actions), and/or if (2) a group is large, bargaining is functionally inferior to deliberation in terms of efficiency, effectiveness and the quality of policy-output. Therefore, if (3) actors have an interest in the co-operative exercise of governance with the purpose of solving collective problems efficiently, effectively and with a level of material quality that can be justified publicly, bargaining can hardly be a preferred option. Under these conditions, one would expect that governments have significant incentives to engage in deliberative interaction.

4. INSTITUTIONAL PRECONDITIONS OF SUCCESSFUL DELIBERATIONS

Deliberative interaction, however, demands more than just the insight that it is functionally superior to bargaining. Governments, for example, may have strategic reasons to pursue their relative autonomy from public scrutiny at the international level as much as possible (Moravcsik, 1994; Wolf, 1999). The likeliness of an inclusive deliberative mode of interaction therefore not only depends on the insight that it is functionally superior to a bargaining mode of interaction but also necessitates an institutional frame which helps political actors to overcome narrow-minded political orientations and fosters an inclusive and disciplined political discourse. It is here again that an institution-based understanding of deliberation is helpful. Whilst constructive knowledge based deliberations depend on a social environment that restricts access to those individuals who command specialized expertise and is most often (and for good reasons) conducted confidentially until a result is publicly announced (Singer, 1993), institution based deliberations need no such elitism. Quite on the contrary: the more public an argument is made, the higher is the probability that institutional actors will feel forced to respond to the claims made and the more effective can an argument assumed to be. Institution based arguing is also less demanding than value based arguing: it works without a common identity of the participants, can be conducted in multicultural environments and does not presume that actors behave honestly or morally. They just have to accept the rules of the game as they are laid down in legal regulations or rules of procedure. Institution-based deliberation, however, presupposes a specific institutional design that works towards providing incentives to argue. Two of the most important (although neither necessary nor sufficient) features of such an institutional frame are openness for all important governmental and non-governmental stakeholders and a legalised mode of interaction.

4.1. Deliberation and Representation

A first and most important precondition of deliberation is the representation of all those actors who have important stakes in an issue. An emphasis on as much representation as possible not only meets with normative requirements (identity of those who author a rule and those who are affected by it) but also is important for functional reasons.

A first causal pathway that underlines the importance of representation for the generation of successful deliberation focuses on the degree to which affected domestic non-governmental parties accept international norms (social acceptance). The importance of a reasonably high degree of domestic acceptance of international norms is basically due to the fact that it is the public discourse that in all modern democracies determines the definition of the

common good. Being faced with a situation in which international norms meet with broad domestic opposition, governments will find it hard to legally implement or even enforce them. As actors who are in need of public support for their policies, democratic governments will hesitate to ignore public opinion and – if facing the decision – rather tend to satisfy their domestic constituencies than their international partners. A high congruence between international norms and public opinion therefore is not only important for reasons of democratic legitimacy but also for reasons of their effectiveness.

A second and interrelated pathway for the impact of representation on successful deliberation focuses on the degree to which governmental and non-governmental parties take part in the making of international rules (participation). Non-governmental organisations (NGOs) are of utmost importance for bridging the differences between governmental and societal understandings of problem identification and problem solving. Due to their dependence on voluntary funding by societal actors and the corresponding need to listen closely to public problem perceptions, NGOs are in direct contact with public opinion. They therefore have the potential to facilitate discourse between governmental and societal rationalities and to help avoid situations in which governments must decide between satisfying the preferences of their domestic constituency or those of their international partners.

NGOs, however, do not only have a constructive potential but can also negatively affect the prospects of effective postnational governance. If they are not either directly integrated in international policy-making and/or if their concerns are disregarded, they are likely to mobilise media or public protest and foster political opposition with the effect of shedding serious doubt on the legitimacy of postnational governance. In particular, the WTO has recently been harshly criticised for its non-participatory structure. In a statement authored by 1448 NGOs from 89 countries, a large non-governmental coalition (among them Oxfam, the BUND, Friends of the Earth and Germanwatch) expressed its deep concern with the non-participatory structure of the WTO and its effects on democratic governance.[6] Because the rules and procedures of the WTO are viewed as “undemocratic, intransparent and non-accountable”, any further extension of the WTO’s competencies is rejected and demands for a fundamental reform “with civil society's full participation” are raised. In the same vain, 60 NGOs (among them Greenpeace International, Oxfam and Friends of the Earth) authored in 1999 a “Joint-NGO General Statement” which demanded the inclusion of an international parliamentary chamber and the

6. Statement From Members of International Civil Society Opposing a Millenium Round or a New Round of Comprehensive Trade Negotiations, http://www.greenpeace.de/GP_SYSTEM/GPFRAM10.HTM

integration of the European Parliament.[7] To be sure, the potential of NGOs to directly oppose intergovernmental policies is often limited and countered by efforts of other NGOs who argue for quite the opposite. The wave of violent protests since the WTO's meeting in Seattle, however, should be taken seriously as giving expression to a widely held concern that postnational governance – both in the EU and at the international level - must not escape democratic demands for participation and representation if it the public perception of its legitimacy is not to suffer.

4.2. Deliberation and Legalisation

Although a high degree of representation of affected parties is an important condition for the generation of successful deliberation, it is by no means a sufficient one. Even without the participation of NGOs, postnational political processes have to cope with a multiplicity of diverging interests and preferences. They struggle to find collectively acceptable problem-solving philosophies and are permanently in danger of failing to achieve any results at all. It seems fair to assume therefore that a high degree of representation only translates into successful deliberation if it is accompanied by provisions which structure the discourse, help a social group to cope with its diversity and to make meaningful discourse possible.

One way of reacting to the problem is to take seriously the insight that modern societies have learned to cope with their increasing complexity by developing a new role for legal rules. While law traditionally acted as an instrument for realising governmental objectives by listing pre- and proscriptions for societal actors, much of modern law must be understood as an instrument which aims at enabling complex systems to engage in self-governance (Teubner and Willke, 1984).[8] Modern law aims at structuring societal discourses by establishing needs of justification, distinguishing between good and bad reasons for justifying actions and thereby forcing actors to enter a discourse about the appropriateness of behaviour. Its basic aim is not to identify the specific content of the common good by assuming a superior knowledge of a governing actor but to provide a normative support structure for self-governance.[9]

7. "The Case For Increased Scrutiny By The European Parliament"
http://www.foeeurope.org/trade/epwto_statement.htm

8. In the words of Jürgen Habermas (1992: 78, own translation): "The law acts as it were a transformer, ensuring in the first place that the network of socially integrative pan-societal communication does not break down. It is only in the language of law that normatively meaningful messages can circulate throughout society."

9. Even if without specified clear pre- and proscriptions, however, legally structured discourses may not be misperceived as non-binding forms of interaction.

It is not easy, however, to apply the concept of law to postnational politics. Traditionally, legal norms are defined by their authorisation on the part of a governing agent who uses its monopoly of power for guaranteeing compliance (e.g. Kelsen, 1966). In postnational settings such as the EU, no such monopoly of power exists. Does that mean that legalisation is a strategy that is suited for domestic politics only? Obviously not. A more promising alternative for conceptualising legal norms is to follow recent efforts to develop a gradualist understanding of law (Abbott et al., 2000). In such a perspective, legal norms can be distinguished from mere social norms by the degree to which rule addressees agree on institutional means for eliciting compliance with them. It is especially three institutional dimensions which are important and which refer to the monitoring of rule application, the legal effect of rules and the legal consequences in case of non-compliance. All three dimensions must be understood as being open to a great variant of different forms with differing degrees of intensity: Monitoring can vary from relying in the honesty of contracting parties to the establishment of reporting obligations (human rights regimes and WTO), and finally the establishment of a central institution with encompassing competencies to control compliance (as in the EU). Legal effect can likewise vary from a mere agreement (for example the non-proliferation treaty) to the setting up of international dispute settlement bodies (WTO) and can also mean giving direct effect to international rules and granting standing for individuals (EU). Legal consequences finally can take the form of announcing non-compliant behaviour (shaming), entail the authorisation of symmetrical retaliation on the part of a third party (as in the WTO) or allow for the imposition of lump sums or penalty payments (as in the EU).

Taken together, representation and legalisation must be viewed as important institutional requirements for facilitating deliberation. Broad representation widens the scope of participants in political discourses, enables stakeholders to pursue their interests by means of constructive discourse and provides incentives to abstain from extralegal political action. Legalisation is a necessary instrument to structure the discourse and to provide normative criteria against which preferences can be assessed. It formalises interaction, reduces problems of free-riding, settles disputes about the adequacy of individual action and provides (dis)incentives for (non)compliance.

4.3. Empirical Evidence

Although this paper is not the place for systematically gathering empirical proof for the validity of the nexus between legalisation and representation on one hand, and effectiveness and efficiency on the other (not to forget the intervening role of arguing), some well known features of the EU clearly militate in favour of it. If we compare, for example, the first and the third pillar of the EU, we see some striking differences both in terms of inclusion and legalisation on the one

hand and effectiveness, efficiency and quality on the other. The first pillar is characterised by cooperation between the Council and the Parliament, and the consultation of a great number of committees, ranging from the Committee of the Regions to the myriad of comitology committees. As is emphasised in the literature, interaction in this complex structure is rather rarely dominated by bargaining: The legalistic character of interaction among the institutions (cf. Weiler 1991) provides (not always but often) for an argumentative practice in which only well justified arguments have a fair chance to become effective. Interests remain important; for being taken seriously, however, they must dress in legal clothes and refer to consented norms (cf. Burley und Mattli 1993: 72). Doing so necessitates making an argument compatible with shared norms, which again implies to subject one's argument to the "civilizing force of hypocrisy" (Elster 1998b: 111). Furthermore, the complex institutional structure of the EU works both effective and efficient: Between 1980 and 1990, the Council adopted annually about 600 legal acts, which is about six times as much as was adopted in the same period in Germany (Beisheim et al. 1999: 328-329). In the years 1993 to 1998, all European institutions together adopted about 15.000 legal acts (Maurer, Wessels and Mittag, 2000: 3). Estimates from the end of the 1980s guessed that about 80 per cent of the economic law in the member states is of European origin (Delors, 1992: 12). Likewise, the compliance record (as a proxy for effectiveness) of the EU is astonishingly good: whereas in the WTO, for example, non-compliance with trade rules seems to be a systematic element of their application, the EU nearly always manages to elicit member states compliance (even it does sometimes take years to do so).[10] Against this background it comes as little surprise that one of the most efficient and effective elements of the first pillar is to be found in the highly legalized and transnationally structured comitology system. Only 11 per cent of all Union legislation enacted by the Council and EP since 1993 has been directly implemented by the Member States. The overwhelming majority of Union legislation is administered by the Commission (Dogan 1997: 38) and therefore subject to the comitology procedures.

10. To be sure, deficient compliance in European politics is not a marginal problem. In each of the years monitored the Commission had to send to the member states more than 1,000 letters of formal notice regarding supposed violations of regulations (first stage of the infringement procedure). Equally striking is that the ratio between formal notices and legal action is significantly deteriorating. Whilst in 1995 only 7.1 percent of all alleged violations were dealt with by the Court, this ratio has increased over the years and was in 1999 at 16.6 percent. Interpreting these data is, however, not easy. One reason could be an increasing reluctance of the member states to shoulder the domestic costs of adapting to intensified economic interpenetration; but the worsening ratio could also express a certain weariness of the Commission to conduct time-consuming negotiations with reluctant member states and therefore, as a result, an increasing readiness to rely on means of legal enforcement. More detailed comparative analyses can be found in Neyer and Zürn (2001).

As opposed to the first pillar, decision-making in the third pillar is purely intergovernmental and knows hardly any participation neither of the EP nor of affected non-governmental parties. Legalisation is embryonic at best; in most areas of the Common Foreign and Security Policy, member states can opt in and out as they like. It is little surprising therefore, that policy-making is most often described as neither effective nor efficient (Gordon, 1997; Zielonka, 1998). Comparing the two pillars with regard to the material quality of policy output leads to the very same picture. Although there can be little doubt that a number of EU decisions in the first pillar are to be criticized for being to protective (or not protective enough, if you prefer), few commentators assess the overall picture as being disastrous (cf. Eichener, 1997) – which, however, is exactly what one finds when reading analyses of the output of third pillar politics. The very same picture emerges when the focus shifts to IGCs. The poor outcome of the Nice summit, which intended to expand the decision-making capacity of the EU and ended up maximizing the blocking possibilities of the member states (Moberg, 2002), is a case in point. It underlines the limits of the problem-solving capacity of exclusionary bargaining and the need to substitute it with an inclusionary and deliberative mode of decision-making. Which is, by the way, exactly what the recently established Convention on the future of the European Union tries to realize.

Evidence for the soundness of the theoretical arguments developed so far can also be derived by using them for understanding some of the very specific institutional features of the EU. The highly legalistic character of the EU and the central role of the European Commission and the European Court of Justice can be interpreted as reflecting the insight that constructive non-hierarchical political discourses demand procedural discipline and institutions that promote it. Viewed such, the most important functions of European law are to establish a binding standard of rationality, which allows distinguishing between good and bad arguments, and to exclude all those ways of arguing and acting which cannot be coherently justified in terms of a legally codified rationality. Although the ECJ may look very much like being invested with the task of judging who is wrong and who is right, it might be better understood as a guardian with the task of providing incentives for the Member States and the European institutions to act only in compliance with a codified (legal) rationality. 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 likewise be interpreted as expressing the insight that a non-coercive form of governance will only have the chance to be effective if the addressees of rules have a say in the formulation of rules. To be sure, the EP and the committee system formally have clearly different task: whilst the former is an institution with the task of representing the European peoples and of cooperating in the making of law, the latter's role is restricted to advising the Commission. Both,

however, are similar to the degree that they aim at including affected parties in the process of rule-making, enabling inclusive discourses and providing incentives to abstain from using extralegal means of political action. Understood such, important elements of the institutional structure of the EU can be interpreted as reflecting the insight that non-hierarchical governance must emphasise legalism and participation (and de-emphasise majoritarianism and elitism) if it is to perform efficiently, effectively and lead to a high quality of output.

4.4. Explaining the Gap: Deliberation, Sovereignty and Accountability

Although the member states can be assumed to have both an interest in the facilitation of deliberation (under the conditions specified above) and the means to do so, the practice of European politics still has more significant elements of bargaining than this analysis so far predicts. The hard bargaining at Treaty reforming IGCs is a telling case, which even the most sophisticated analysis would have serious difficulties to dispute. A most important reason for this gap between what should be the case and what can be observed is the fact that deliberation does not come without a political price. In a deliberative setting, any individual preference counts as no more than a subjective claim of coherence with consented basic norms and may be rejected by the European partners if it fails to withstand discursive scrutiny. By implication, neither the idea of sovereignty that resides in a (national) parliament nor that of sovereignty of a (national) people is easily compatible with European deliberation. Because sovereignty can in a heterarchical context only be exercised in co-ordination with non-national political entities, it presupposes a multi-level understanding of sovereignty that is shared among national publics, parliaments and international institutions (cf. Pernice, 1999).

A closely related second reason for the gap between theoretically grounded expectations and the empirical reality is time. States and societies cannot be expected to be ready for implementing the necessary constitutional adaptations with the press of a button. A state-centred understanding of sovereignty lies at the heart of statehood and defines in large parts of the democratic world its identity. It therefore is only realistic to assume that the acceptance of a multi-level constitutional structure will only come about as the product of a long-term learning process that necessitates that both governments and societies cherish the promises of a postnational polity more than they fear its costs. That this exercise is far from automatic and smooth is underlined by the periodic popping up of anti-EU rhetoric in populist parties in Europe. Overcoming fears of a democratic deficit will very much depend on the degree to which international institutions are able to establish that kind of general trust on which national democratic governance rests. Although it is difficult to formulate easy recipes for dealing with complex issues such as trust-building in

non-hierarchical multi-level systems (cf. Slaughter, 2001), it seems obvious that any significant progress presupposes a huge leap towards increased transparency. It might seem banal to point to the relation between the ability to control and the readiness to trust but it nevertheless is worth mentioning: Only by giving the people (and therefore the media) the chance to directly observe what delegates are doing and what positions they formulate for what reasons, can they be expected to develop a degree of trust which matches domestic trust. A reversal of the still dominant tradition of closed-door negotiations and the opening up of European institutions for public and media scrutiny therefore is not only a normatively sound demand but also a major precondition for effective European governance.

5. ON THE LEGITIMACY OF DELIBERATIVE GOVERNANCE

Whilst deliberative procedures carry the promise to transform international anarchy into a transnational discourse, it can hardly be overlooked that any progress towards more postnational governance meets with a number of serious criticisms. It has been pointed out that the internationalisation of politics threatens to strengthen the policy discretion of the executives, that international bargaining is superimposing democratic deliberation, that national Parliaments are increasingly bypassed and that public oversight is loosing in relevance (to name just the most important concerns). In sum, it is feared that the costs of an improved international problem-solving capacity are largely paid in the currency of the democratic content of politics (among many cf. Scharpf, 1999; Greven, 2000; Slaughter, 2001). Against this background, postnational governance seems to be a normatively ambivalent undertaking, torn between the need to re-establish problem-solving capacity and the fear of a reduced democratic content of politics (Dahl, 1994).

It is difficult, however, to assess the force of those concerns. Applying normative standards always presupposes to distinguish among different options and to choose the one, which is adequate for its object of concern (cf. Joerges, 2000). If, for example, intergovernmentalism is right, and governance beyond the state basically follows the lines of international co-operation with the purpose of identifying overlapping preferences and reducing transaction costs (Moravcsik, 1998), most normative concerns are highly exaggerated. Likewise, if we follow the proposal of Majone (1994) and treat postnational governance as being merely a kind of outsourced technical agency with the task of setting standards for the conduct of international trade in goods and services, we will have little problems in justifying it, apart from demanding even more insulation of policy making from the partisan concerns of majoritarian decision-making and to reject any demands for the integration of a redistributive element (Majone, 1998). If, however, early functionalists are right, and postnational governance follows the logic of ever closer integration (Haas, 1964), we might

be far more sceptical, demand the integration of a full-blown parliament and ask for institutional mechanisms to establish a system of checks and balances among the legislative and the executive branch of governance. What is clear is that any assessment of the validity of normative concerns depends on the identification of an adequate normative standard, which in turn presupposes to have an analytical concept of postnational governance.

This paper does not side with any of the camps mentioned but has employed a fourth analytical perspective according to which postnational constellations both imply the danger of a reduced democratic content of politics and the chance to promote a new political structure which is effective, efficient and leads to high quality outcomes. The corresponding recipe for dealing with postnational constellations focuses on the adaptation of formerly nation-state restricted democratic procedures to the changing socio-economic and political realities. It offers a third way of conceptualising political order beyond hierarchy and anarchy that centres on accommodating the different democratic systems of its member states by means of discourse without aiming to replicate the national state on a European level. Following a deliberative-heterarchical understanding of governance, effective and legitimate policymaking demand very much the same answer. Both can be promoted by a set of procedures that bind the three levels of governance into one discursive structure. At the intergovernmental level, a high degree of legalisation is necessary to provide an institutional frame with binding decision-making and – application procedures that allows for non-coercive enforcement. In its first pillar, the EU has already developed a long way along this road. The powers of the Commission to monitor the application of EU law and to sue member governments if they fail to comply, the right of the member governments to sue European institutions and to ask the Court to declare a legal act to be void in case of contradictions between secondary and primary law, and the legal duty to consult regional actors in case they have a relevant interest in the subject matter are some of the more important steps on this way.

Dangers, however, exist as well: the new emphasis on the European Council (and procedures such as the Open Method of Coordination (De la Porte and Pochet, 2002) threatens to disentangle intergovernmental policy making from the procedures described above. They represent a new reorientation towards strengthening inter-executive policy discretion and may be interpreted as elements of a creeping de-legalisation of the EU. At the transnational level, the integration of private interest groups is required to give voice to domestic concerns and provide for a critical reflection of predominant problem-solving philosophies. Although the EU has with regard to non-state actors realized a degree of inclusion far beyond that of any other international institution (e.g. the co-decision procedure and the many advisory committees), the most important

step still remains to be taken: if the Council indeed claims to be the primary chamber of the European legislation, it should open its doors to the European media and comply with the requirement that law making in a legitimate polity may not be a confidential procedure. The either direct or indirect participation of the public in European law making is crucial in order to relieve the tension between domestic and intergovernmental rationalities and to generate social acceptance for international regulations. Only informed citizens will trust their government and be ready to attribute it legitimacy. Therefore, what counts in the process of shaping post-national governance is the search for a complex set of procedures that can bring about a continuous discursive process among international organisations, governmental addressees and affected domestic parties on collectively acceptable regulations and the modalities of their application. Transparent multi-level deliberation is the first best means to realise that objective.

One may question whether such a political structure deserves the label "democracy". Maybe not. Maybe it only takes issue with legitimate governance rather than with democratic governance (cf. Joerges, 2000). That, however, must not be a weakness of the approach but can be defended for the reason that it is not yet clear how some of the crucial preconditions of a democratic polity can be realised in multinational multi-level contexts. Demands for a full-blown European democracy must take the concern seriously that democracy cannot exist without a living public sphere in which positions and preferences are exchanged and mutual learning takes place (Rawls, 1997). That, however, will be difficult to realise in the foreseeable future beyond the state (Greven, 2000). A deliberative heterarchical approach to European governance takes the principle of subsidiarity seriously by abstaining from any unnecessary relocation of authority and leaving the democratic nation-state as intact as justifiable. To be sure, asymmetrical power distributions in terms of material, normative and cognitive resources will even under conditions of deliberation remain important elements of the empirical world. As readers will know, making good arguments necessitates the investment of resources. An emphasis on deliberation therefore must go hand in hand with redistributive elements, aiming at spreading expertise and empowering actors to participate in communicative settings. Contributing to this process is not only in the interest of those who remain unheard today. If it is true that the public perception of the legitimacy of postnational governance becomes an increasingly important factor for its effectiveness, even powerful states will have incentives to transform power dominated diplomacy into transparent, fair and rule-oriented discourses.

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