



TARGETING SOURCE AND ADDRESSING PLURALITY IN EUROPEAN UNION LEGITIMACY: PROCEDURE VERSUS SUBSTANCE

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Legitimacy is defined as a justification to exercise governance or authority over a body of citizens. It is argued that the same standards of legitimacy that apply to States cannot be applicable at the level of the European Union. However, the European Union carries out State like functions and is involved in governance. The question of its legitimacy therefore needs to be addressed. In seeking to enhance its legitimacy the European Union has focused mainly on procedural means. There has emerged the presence of interests groups and a European civil society to help in this quest for legitimacy. The Union has also provided for initiatives such as the Citizens' initiative and the European Transparency Initiative in order to provide opportunities for participation, representation and transparency. There are theoretical bases for the focus on procedural legitimacy. Jurgen Habermas and Seyla Benhabib are two scholars who focus mainly on procedural legitimacy. Besides the fact that these measures focus only on input and on enhancing democratic procedures the results from the implementation of these measures are themselves imperfect and not always beneficial. They therefore do not provide adequate means of enhancing the legitimacy problems of the Union. Even theories that focus on substantive legitimacy have limitations. The European Union needs to focus on legitimate governance which includes not only procedural legitimacy but also substantive legitimacy.

Introduction:

Beginning from the early 1990's the issue of the European Union's Legitimacy has actively engaged politicians, academicians, students and everyone concerned about governance in the Union. Notwithstanding this, the concept of legitimacy means different things for different persons. More particularly, legitimacy is often conflated with legality with some academics supporting the view that as long as an authority has been established and functions in accordance with the accepted rules, that authority is legitimate (See Moravcsik, 2002). This is referred to as procedural legitimacy even though procedural legitimacy is not limited to legal rules. However, although compliance with legal rules is one way of justifying an authority and thereby making it legitimate, it is not the only way, nor is it the most important way of legitimising an authority (Bodansky, 2008). If legitimacy were tied solely to legality then the European Union which is treaty based will obtain its legitimacy solely on account of the treaties which accord it competence to act in various areas.

Legitimacy is normally looked at from either an empirical perspective or from a normative perspective. Weber associates a legitimate authority with one that has obtained the acceptance of its citizens. Such acceptance is based on the fact that the citizens believe the authority to be legitimate (Merquior, 1980). In academic literature this type of legitimacy is often referred to as social legitimacy. From this point of view one may therefore conclude that the European Union is not legitimate from the fact that, as evidenced by opinion

polls, it has had a low acceptance rating especially in some countries. In doing so one would be taking an empirical approach to the legitimacy of the Union whereby the existence of dissent and non-acceptance by citizens is evidence of lack of legitimacy.

On the other hand legitimacy may be approached from a normative perspective. In this regard scholars outline concepts and criteria for assessing the legitimacy of a political authority. This normative legitimacy is the type of legitimacy that is applicable to political organisations and is associated with a justification to rule (Follesdal 1997). It answers the question 'what justification does a particular authority have to exercise governance over a group of citizens? As stated before, such justification comes not necessarily from treaties and other legal sources only, but includes the performance of the political authority and participation of citizens. It is also related to identity and belongingness, since a shared identity among citizens and with those in authority builds solidarity and promotes the justification of authority (Baykal 2005).

Whilst the empirical approach to legitimacy is not totally divorced from the normative aspect¹, the value of taking a normative approach to assessing the legitimacy of the union comes from the fact that being a new entity which is

¹ See Hurrelmann et al in *Legitimacy in the age of Global Politics*, where they say that political actors and social scientists can be both authors and observers of legitimacy evaluations. In this way they firstly define appropriate criteria for acceptability and then these criteria are applied to existing political orders.

involved in governance there is no precedence to follow through which to determine whether it is legitimate or not. This explains why National standards are largely used to assess the legitimacy of the Union and why at least some academics have called for new standards and new criteria for assessing European Union Legitimacy (Majone 1998).

This paper focuses on Legitimacy which is based on justification of governance at the level of the European Union. I argue that the legitimacy of the European Union must be adequately made out to the correct source and that source should be related to the persons most affected by its policies. In so doing focus should be not only be on legitimising the European Union through procedural means by trying to enhance input mechanisms of participation discourse and consultation, but that focus should also be on substantive legitimacy and should address output. I use mainly a normative approach by examining some of the theoretical ideas developed in relation to legitimacy in a supranational setting as well as in a diverse polity.

In section A of the paper I outline why it is important to address the legitimacy of the union. Section B outlines the distinction between procedural legitimacy and substantive legitimacy and traces the emergence of the legitimacy debate in the European Union. I highlight the fact that much of this debate has been centred on the democratic legitimacy of the Union. Sections C and D address theoretical perspectives of legitimacy by critically assessing the theories of

Jurgen Habermas and John Rawls and their application at the supranational level of the European Union. These sections also make suggestions about possible changes to the approach that is used to address European Union Legitimacy.

Section A: Much ado about nothing?

Is there too much unnecessary rhetoric about legitimacy in the European Union? Beyond the fact that the Union has formal legitimacy through its treaties is there a need to apply the concept of normative and social legitimacy to the European Union in the same way that we apply it at the national level? Some academics claim that despite the fact that European Union may be distant from individuals and despite the fact that it lacks a common history, culture and identity, this is not enough to support claims that it lacks legitimacy (Moravcsik, 2002). Moravcsik further claims that if utopian expectations are set aside then one should not expect international systems to function in the same way as an ideal National system (See also Majone 1998). I argue that whilst national standards of legitimacy may not be applicable to the European Union as a one size fit all or as an exact replication of national strategies at the European level, it is true that the Union is involved in State like functions, even though it is not classified as a European super State. Further the European Union is not merely engaged in regulatory activities as suggested by scholars like Majone (Majone, 1998) but is involved in governance.

Traditionally, governance has been associated with the presence of a formal political authority in the form of a Government which uses military means to enforce commands (Czempiel, 1992). Rosenau and Czempiel have, however referred to the concept of governance without government which involves shared goals and activities that are not always backed by legal enforcement mechanisms. It involves the performance of functions whether or not there are formal governmental institutions responsible for performing them.

As pointed out by Hirst, the concept of governance without government allows for control and influence in important areas of citizens' life without the ability to exercise formal control over the authorities carrying out such functions or without the means of assessing the democratic functions of such authorities (Hirst, 2000). This type of governance is mostly applied to International Organisations which create policies that need to be implemented by member States. These policies constantly erode the authority and sovereignty of such States and impact more and more the lives of citizens in those States. The European Union, though not a super state, is involved in governance and needs to be legitimate. The need for legitimacy is not dependent upon whether authorities function at a national, international or supranational level but is dependent rather upon the function that is carried out. As observed by Bodansky, the greater authority an institution exercises, and the more competences an institution has in decision making, the more demands will be made for its legitimacy (Bodansky, 2008). Further there is also the question of

'moral force' of law above the State. Unless law at the supranational level is legitimate it will lack 'moral force'. Citizens will feel no duty to obey and may also question whether domestic institutions should be framed in such a way as to give weight to the requirement of such International Obligations (Kumm, 2004).

Section B: Procedural versus Substantive Legitimacy

In addressing the legitimacy of the European Union there is a tension between procedural means of legitimising the Union and substantive means. Procedural legitimacy is the term often used to refer to input legitimacy or formal legitimacy. It also refers to legality. According to Barnard, 'procedural legitimacy defines the quality that makes "getting there" politically right' (Barnard, 2001). In this regard, one may regard the European Union as being procedurally legitimate as long as it adheres to all the formal and legal requirements of the treaties. More than this, the Union will be procedurally legitimate to the extent that it follows democratic procedures of elections, transparency, representation of citizens, participation by citizens and consent. For academics like Eriksen and Habermas, participation at the level of the European Union will include the creation of a public sphere to promote deliberation and discourse. The term 'democratic legitimacy' is also used in reference to the adherence to democratic procedures in order to enhance legitimacy of any authority.

Substantive legitimacy refers to output legitimacy and is concerned with the policies of political authorities and how these policies affect citizens. Focus is on outcomes rather than on democratic procedures of participation, election, representation or transparency. In other words a political authority will have substantive legitimacy if the policy outcomes affect citizens in a positive way and promote their common welfare (Scharpf 1999).

The difference between procedural and substantive legitimacy or input legitimacy versus output legitimacy is often described in terms of government *by* the people or government *for* the people (Scharpf 1999). However, until recently reference to Legitimacy in these terms have been restricted to state centred situations to assess the legitimacy of National governments. With regard to the European Union the issue of Legitimacy became current mainly after the ratification of the Maastricht treaty. The ratification led to many debates about the increased competence of the European Union, the erosion of the sovereignty of Member States and about the lack of involvement of citizens. Since then there has been much theorising about the Legitimacy of the European Union with much of the debate being centred around whether the focus should be on procedural or substantive legitimacy and on whether the same legitimising measures that apply to National Governments should apply to the European Union. One important element of focus in the legitimacy of the European Union is that traditionally authorities at the International and supranational levels have been legitimised indirectly by Member States. The

birth of the Liberal tradition which has affected the way States are judged for their legitimacy has not had the same influence on institutions above the State (Kumm 2004).

Before the late Middle Ages authorities were legitimated on the basis of the divine right of kings, whereby the source of legitimacy came from God². This eventually gave way to liberalist ideas and to the emergence of theories such as the Social contract theories which were based on the consent of citizens as the basis for right to rule. Social Contract theories were based mainly on the idea that citizens transferred their authority to a political entity and it was that transference (which represented consent) that legitimised the ruling authority.

Whereas this citizen source of authority developed at the National level it did not occur at the International Level. The European Union following in the tradition of other International institutions started out on the basis of a 'permissive consensus' whereby citizens were presumed to have given their consent through their National Governments and their member States. The Union therefore has indirect legitimacy. As long as the Union was seen merely as one established to promote peace, security and economic prosperity in accordance with the objectives of the European Coal and Steel Community, this 'permissive consensus' continued without challenge from citizens.

² The descending theory

The events following the ratification of the Maastricht treaty showed that this permissive consensus was no longer enough to legitimise the Union which now has increased competence and which makes policy decisions in the areas of citizenship, monetary policies, education and health. These increased competences came amidst the fact that the European Parliament being the only institution elected by citizens was still weak in comparison to the Commission and the Council.

The ratification of the Maastricht treaty did not only lead to numerous debates and challenges to the legitimacy of the Union but there were also legal challenges in the Danish Supreme Court and in the German Constitutional Court. In the case before the Danish Court³ the plaintiff claimed that the transfer of sovereignty that came as a result of Denmark's ratification of the Treaty not only violated the principles of Democracy but also failed to provide any detailed specification of powers that were transferred to the union⁴. Whilst upholding Denmark's right to ratify the Treaty, the Supreme Court stated that this did not prevent it from determining any time in the future that the EC had exceeded the limits granted to it in the transfer of sovereignty.

Similar pronouncements were made in the legal challenge brought in the German Constitutional Courts when Germany's ratification of the Maastricht

³ Ugeskrift for Retsvaesen, H 800. Supreme Court of Denmark, April 6th 1998

⁴ According to section 20 of the Danish constitution powers may be delegated to Internal organisations but these powers must be specified in detail

treaty was also challenged in the case of *Brunner vs The Treaty of the European Union*⁵. These legal challenges and other debates were the beginnings of the many questions concerning the Union's Legitimacy. Moreover, it threatened the existing 'permissive consensus' and led to the realisation that European Union legitimacy must emulate at least one thing from national legitimacy and that is that its legitimacy must be made out to the correct source. That source must be the citizens who are the real stakeholders in European Union integration.

Section C: The Habermasian approach to Legitimacy in the European Union

Normative legitimacy theories have historically focused on what makes authority at the National level legitimate. Rousseau focused on participatory democracy since he believed that the sovereignty comprised the citizens who needed to be involved in all decision making. Hobbes and Locke focused on the need for consent from citizens as a legitimising factor. However, recent theories have attempted to address legitimacy at the level above the State. In doing so the traditional theories of participation, representation and consent have not been abandoned, but have been modified to relate to a polity that is diverse. In the case of Habermas he extends the idea of participation to the creation of a diversified public sphere where citizens will have a chance to

⁵ Case 6/64 1963 ECR 1. Although upholding the constitutionality of Germany's ratification of the Maastricht Treaty the German Constitutional Court held *inter alia* that any acts of the Union that exceeds its competence will not be binding on Germany

participate in political life. This idea is based on the fact that at the supranational level issues that affect legitimacy include the fact that political authorities are faced with a diverse citizenry with diverse cultural backgrounds and moral and religious beliefs. Many scholars believe that the way to address legitimacy in such a setting is by focusing on procedural legitimacy.

Theories that address the issue of diversity are to be considered in light of the fact that older version of social contract theories and theories based on participation in political life were developed in the context of homogenous societies. The European Union is comprised of various States and of citizens that possess diverse cultural and linguistic backgrounds. This diversity becomes greater as the Union becomes larger. Attempts to encourage the same level of participation at this level will not achieve the same results that can be achieved in a homogenous polity.

Habermas is one of the major contributors to procedural legitimacy. He sees political legitimacy as only being attainable where there is a diversified public sphere where interest groups engage in discourse and in opinion and will formation. This approach is based on an input/output formula where discourse and communication give rise to opinions and ideas which are then fed to institutions which use these as a basis for outputting policies. The aim is that the opinion and will formation involved in this communicative exercise would not only monitor the use of political power but also inform their decisions. The communicative system reacts to problems facing society and generates public

opinion which is then fed to administrative decision making bodies so as to influence administrative decisions (Habermas 1996:300).

A political authority is legitimate when it is governed by laws which are a result of adequate discourse which ensures that everyone's interest is considered. Such laws must be derived in accordance with 'the procedures of democratic opinion-will-formation that justify the presumption that outcomes are rationally acceptable'. (Habermas 2006:128). This communicative process must be institutionalized and must be an ongoing process which is constantly adapted to meet new situations and to give those who did not previously participate a chance to take part in the deliberative process. Deliberative democracy⁶ views Constitutional principles as a means of institutionalising communicative framework in order for it to be successful. It further excludes all norms which cannot obtain the assent of all concerned. Such norms are invalid so that valid norms consist only of those which can obtain the consensus of all persons concerned (Habermas 1990).

Deliberative democratic theory is particularly relevant for plural societies as a diversified and autonomous public sphere is seen to make up for the fact that social integration based on shared values is no longer possible (Habermas 1996:99). According to this theory the answer to the dilemma of legitimising governance in a plural society is proceduralism. Although Habermas does focus on outcomes it is only to the extent that it is the input of discourse and

communication that will make the outcome legitimate. In other words there is a 'presumption' that outcomes following such a procedure are legitimate. The theory is not a procedure for generating valid norms but a procedure for testing norms that have been proposed (Habermas 1990:103) Even though reference is made to the content of norms, it is the deliberative and communicative process that makes the norms valid and hence an authority which is based on this communicative process is legitimate because its laws are exposed to scrutiny and debate in the public sphere.

Other academics have followed this trend in focusing on procedural means of legitimising the European Union. Eriksen sees the public sphere as being non-coercive, secular and rational and as equipping citizens with rights against the State (Eriksen 2007:25). The focus on these procedural means of legitimisation may be attributed to the perceived impossibility of linking legitimacy to outcomes in a diversified polity such as the European Union. Benhabib feels that to obtain legitimacy it is necessary to promote collective deliberation among free and rational persons. She argues that proceduralism is the answer to conflicts at the substantive level since 'we cannot resolve conflicts among value system and visions of the good by re-establishing a strong unified moral and religious code without forsaking fundamental liberties' (Benhabib, 1996). It is further felt that in trying to enhance legitimacy there is no need to focus on a

⁶ Often used to mean the same thing as discourse ethics, or discourse theory. However Van Aaken et.al have identified subtle differences: see *Deliberation and Decision: Economics,*

convergence between political rightfulness and moral rightfulness but merely to focus on the observance of rules regardless of beliefs and morals (Barnard 2001).

This preoccupation with procedure revitalises the scepticism of academics like Scharpf who argue that as the distance between citizens and their representatives increase participation does not yield results that would legitimate the Union. He further argues that such type of participation in political life is difficult in the face of cultural diversity (Scharpf, 1999). It is felt that there is need for a common identity and shared cultural background in order to participate and engage in discourse at the political level. This view is however criticised as taking a communitarian view of deliberation and of the public sphere and of comparing it to a National setting where citizens discuss private issues of common concern. It is argued that the public sphere should be seen as aiming to construct a post national identity which recognises difference and can engage in public debate despite differences in culture (Eriksen, 2007).

No doubt a public sphere which emphasises discourse and communication can result in a Union of diverse cultural background where difference is celebrated and where there is solidarity with different identities. However this is a separate issue from the legitimacy of the Union. Those who promote this procedural

aspect of legitimacy are obviously drawing example from the kind of participation and discourse that should take place at a National Level in an ideal situation. As stated earlier, the historical basis for this is the participatory democracy promoted by Rousseau which stated that laws be created with the involvement of all citizens which would then ensure that all such laws are just. In agreement with Scharpf I argue that an authority can only be legitimate with this kind of participation where the society is small and homogenous enough to ensure that laws resulting from such participation will indeed be representative of the concerns of the citizens. For various reasons, some of which I outline, this type of participation and involvement in larger, and more diverse societies, though necessary for other reasons, is not enough to ensure the legitimacy of the authority.

Firstly, what is ignored is that despite the level of consent, participation and discourse that is present in a national setting, the legitimacy of a National government is also judged by its output. No matter what procedural mechanisms are put in place, if a government fails to ensure basic needs, if it fails to protect citizens and to solve basic coordination problems, it cannot be said to be legitimate. In spite of the argument that the same National criteria should not be used to assess legitimacy at the European level, citizens in Europe or in any governance structure for that matter, will question the performance of that authority and make assessments in terms of whether the output of that authority impact their lives in a positive way.

Secondly, and as an extension of the first point, the main reason for theorising about increased participation in the European Union is the recognition that the stakeholders are not merely member states but also citizens. There is therefore need to replace the 'permissive consensus' with actual consent of citizens. If citizens are the stake holders in the European Union, then it cannot be assumed that merely providing opportunities for greater participation and discourse will suffice to lend legitimacy without focusing on the outcomes of policies and decisions made at that level and which affect citizens directly.

Thirdly, although procedural legitimacy where persons are given the opportunities to be involved in deliberation and communication, seems theoretically sound, the flaw is that there is no guarantee that policies and decisions that follow such input will be just. Yet the European Union seems to have bought into the idea of using procedural means to enhance its legitimacy. The perception that more participation and representation is needed has facilitated the emergence of interests groups and civil society groups. As noted by Kohler-Koch, these groups did not emerge in a bottom up process but rather in a top down process under the initiative of those in power. The resultant discourse therefore seemed 'engineered' (Kohler-Koch 2007).

In most Union documents which have been prepared in an effort to address the issue of legitimacy the focus has been on enhancing democratic procedures rather than on output. For instance, the white paper on European Governance was prepared in July 2001 after recognition that citizens felt alienated from the

Union. The proposal for enhancing the legitimacy of the Union included, more openness and better involvement, which would involve more National and regional representatives; better policy making by speeding up the legislative process and by simplifying laws. In addition the white paper outlined the five principles of good governance in the European Union which includes openness, participation, accountability, effectiveness and coherence (Communities, 2001). Following the White paper the Laeken Declaration of December 15, 2001 recognised the need for Europe to become more efficient, more transparent and more democratic. To this end there was a call for a better division of Competence in the Union, for simplification of the union's instruments and more democracy, efficiency and transparency. In relation to the latter, it was stated that the Union derives its legitimacy from the democratic values it projects, but that there was also a need for it to derive its legitimacy from democratic, transparent and efficient institutions. Issues to be addressed included how the President of the Commission should be elected, whether the role of the European Parliament should be strengthened, the improvement of decision making within the institutions and the implementation of decisions (CVCE 2008)

In the Commission's Green paper on the European Transparency Initiative some of the achievements of the White paper have been stated as including the enactment of Regulation 1049 of 2001 which allows for easy access to unpublished documents and the launch of databases that provide information regarding consultation groups and expert bodies that can advise the

Commission. The Regulation also mentions efforts to take account of the concerns of citizens and for providing for impact assessments and wide consultations before legislative proposals (Commission 2006/194). The European Transparency Initiative is further aimed at improving the consultation process by highlighting the need for 'a more structured framework for the activities of representatives and lobbyists'⁷, and by improving the standards for monitoring the consultation process, among other things.

In a further effort to address democratic legitimacy of the Union the Treaty of Lisbon amended Title 11 Article 8 of the Treaty of the European Union and makes provision for improved principles of democracy⁸. These include a statement that the Union will function on the principles of representative democracy and provision for the citizens initiative which will allow not less than one million European citizens to invite the European Commission to submit a proposal on any matter where citizens feel that a legal act of the union is necessary for the implementing of the provisions of the treaties⁹ (Union/C306/10, 2007).

⁷ The Green paper defines lobbyists to include persons working in law firms, NGOs, public affairs consultancies think tank and corporate lobby units who carry out activities aimed at influencing policy decisions of the European Institutions.

⁸ Prior to this Articles 257 and 258 TEU makes provision for the establishment and functioning of the Economic and Social Committee which consists of representatives of civil society including farmers, carriers, workers, craftsmen, professional occupations, consumers and general interests(<http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/>)

⁹See Title 11 Article 8 Treaty of Lisbon

These efforts represent ambitious efforts by the union to improve its democratic legitimacy. However, as pointed out by academics such as Beate Kohler-Koch and Fritz Scharpf, the strategies in the white paper aim to improve efficiency and effectiveness of the functioning of the Institutions rather than address normative political issues that have to do with the legitimacy of governance in terms of adequate participation together with substantive considerations. (Kohler-Koch, 2001) (Scharpf 2001). In addition to this, given the likelihood of elitism, self interest¹⁰ among civil groups and failure to actually represent the grassroots of the European citizenry it is doubtful that such efforts by themselves can enhance the legitimacy of the European Union (See Kohler-Koch 2007: 255-271). Paul Maignette also refers to the 'inequality bias of participation whereby such fora are dominated by experts and bureaucrats to the exclusion of ordinary citizens (Maignette, 2006).

The efforts made by the Union to enhance legitimacy by making provisions for increased participation, consultation and representation and by establishing the Economic and Social Commission shows a focus on 'institutional design and reform rather than on substantive goals and policies' (DeBurca, 1996). Further the measures follow the habermasian idea of exposing policies to scrutiny and debate to ensure that resulting policies will be legitimate. According to this model it is not the content of the policy that ensures legitimacy but the

¹⁰ For instance it is noteworthy that though the Economic and Social Committee which has been transformed as a representative body for civil society, is said to be independent, the Council is responsible for setting the allowance of the members. Arguably this takes away from the independence of the Committee (See Articles 257-258 TEU)

democratic process involved in creating the policies. There is therefore a presumption of legitimacy of the policies as long as the democratic process is followed. The weaknesses of these measures as outlined above require that efforts beyond procedural means be used to legitimise the union.

Section D: Democratic Legitimacy versus Legitimate Governance

Bearing in mind the argument of some academics that the European Union being a diverse polity can only be legitimated by procedural means and also bearing in mind that the European Union is a non state entity which does not necessarily need to be legitimated in the same way a Nation State is legitimate, one still needs to accept that the union is involved in governance. As outlined earlier, the term governance as conceived by Rosenau and Czempiel includes 'shared goals and activities' and 'the performance of functions whether or not there are formal governmental institutions responsible for performing them' (Rosenau and Czempiel 1992). Governance is not limited to democratic procedures, but includes outputs through which the performance of an institution can be assessed. It includes taking account of values and moral beliefs of citizens if outputs are to be in keeping with their needs. The European Union therefore needs to focus on enhancing legitimate governance rather than on only enhancing democratic legitimacy. This does not discount the importance of the proper democratic functioning of the European Union. However given the imperfections mentioned above it is inadequate as a legitimating factor.

Any theoretical framework for addressing legitimacy in the EU must therefore also address substantive output and policies in terms of the values morals and beliefs of citizens. This is so despite the fact that basing legitimacy on output seems tenuous in the light of cultural diversity. The difficulty is that despite the differences in language, culture and values within the Union, European citizens share the same governance under the EU. The main dilemma would be to determine what policies, values or outcomes would be acceptable to all groups of citizens. Another consideration is that in terms of policies and outcomes, the European Union is part of a multi level governance system involving member States which are already judged for their legitimacy on the basis of their output and in their handling of coordination matters. These challenges do not justify the singular focus on democratic processes since as mentioned above, efficient governance does not only involve adequate democratic procedures.

The Rawlsian solution

Rawls' proposed method for dealing with such cultural diversity is Political Liberalism. In addressing this issue Rawls asks:

How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical and moral doctrines? Put another way, how is it possible that deeply opposed yet reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime? What is the structure and content of a political conception that can gain the support of such an overlapping consensus? These are among the questions that political liberalism tries to answer? (Rawls 1996: xviii).

He advances 'a type of political justice that will suit a constitutional democracy which is characterised by a plurality of incompatible but reasonable values, doctrines.' (Rawls 1999: xviii). There must be a distinction between, on the one hand, principles and values that can be held by everyone and, on the other hand, those which cannot meet with the consensus of everyone and must therefore be kept private despite the fact that they are reasonable. Rawls refers to this as 'the overlapping consensus' which suggests that there are certain values and principles that all citizens can agree on. This is related to the distinction between 'goods' and 'rights'. Individual conception of the 'right' must be the same for each citizen even though they may differ in what they consider 'the good' to comprise of. It is the rights that are classified as political and form part of the political conception of justice.

Rawls' principle of overlapping consensus allows for unity when adherents of comprehensive religious, philosophical and moral doctrines can find common ground with the political conception which will in turn promote social unity (Rawls 2005:134). The overlapping consensus is such that citizens may relate to the conception for their own reasons. It is based on moral grounds in that citizens relate their own moral view to the view provided by the political conception. (Rawls 2005:147). Thus, from a substantive point of view legitimate policies will reflect this convergence of values, beliefs and principles. Bohman has stated that Rawls' overlapping consensus is a minimal condition that caters for diversity but is insufficient in dealing with wide ranging

differences in values. (Bohman: 2000:74). It caters for unity within plural society by providing for consensus on shared values. However, where there are increasingly deep cultural differences such a minimal requirement may not be sufficient. Though allowing for convergence of values that will promote unity and stability within a plural society, such unity and stability may not endure as differences become greater and cultural conflicts become deeper.

Rawls' focus is on substantive means of legitimising political authority in the face of differences in culture, values and beliefs. Arguably, the focus on catering for diversity makes it adaptable to the European Union. However, it still leaves unanswered the question of values that do not form a part of the overlapping consensus. In this regard Bohman's observation is valuable in the sense that in an enlarged European Union, countries with diverse cultural differences may find such values irreconcilable even with the basic political conceptions of justice. Under Rawls' overlapping consensus such values will be avoided.

Yet it is debatable whether or not these discarded values need create any preoccupation for those concerned with promoting substantive legitimacy. Fritz Scharpf argues that this type of legitimacy can be attained even where there is thin identity and where 'constituencies' do not 'claim the exclusive or even primary loyalty of their members'(Scharpf 1999). In other words all that is needed is a certain degree of common interests and values, which is what is

envisaged in Rawls' overlapping consensus. The solution of common problems that will arise out of these common interests is what will form the basis for substantive legitimacy or as Scharpf terms it 'output oriented' legitimacy. Even if we accept that Rawls overlapping consensus is limited in providing a complete solution for legitimacy in a diverse European Union, it is valuable in promoting the idea that substantive issues are also crucial to legitimacy and to legitimate governance. It also provides a starting point from which to address the issue of output efficiency in the European Union. That starting point is that focus should be on output and such output must be related to the values and beliefs of the citizens. Clearly in adopting a theory for legitimacy at the European level neither a purely procedural theory nor a purely substantive theory will be sufficient.

Procedural legitimacy must be linked with substantive legitimacy in order for an authority to be legitimate. The link is not in the way Habermas assumes that outcomes will be legitimate as long as input is sufficient, it is a complete schema where input occurs to allow adequate participation and involvement in decision making but also the actual outcomes themselves must adequately reflect the needs of citizens for them to be legitimate. DeBurca refers to this as the public choice model whereby legitimacy is achieved 'through economically efficient results rather than through institutional processes and structures' (DeBurca, 1996). My argument is that process as well as substance is needed to achieve a legitimate union. Citizens of the Union will not only question how

democratic the Union is but will also ask, 'what is the European Union doing for me? How does it improve my life?' The Legitimacy of the Union is therefore not a one dimensional concept embodying only democratic procedures. It is rather two-dimensional since it also includes the requirement for efficient and effective performance. No doubt interest groups as well as initiatives such as the Citizens' initiative and the European Transparency Initiative help to improve the democratic functioning of the Union. However, rather than be seen as legitimising tools these measures should be seen as a way of providing interaction and feedback so as to inform outcomes and policy decisions so that they will be more efficient. Only then can the European Union be seen to be adequately addressing its legitimacy problem.

Conclusion

The European Union has taken steps through the creation of initiatives, and interest groups and through treaty provisions, to enhance its democratic legitimacy. Theoretically academics have promoted the idea of the creation of a European Public sphere to further enhance the democratic legitimacy of the Union. However, academics such as Kohler-Koch and Fritz Scharpf have pointed out the weakness of some democratic procedures. Some of these weaknesses include the threat of elitism among interest groups which do not adequately represent the needs of the grass roots and the fact that effectiveness of participation is reduced in such a diverse Union. Nonetheless, it is believed in academic circles that the very existence of a

culturally diverse Union is the reason why the Union can only be legitimised in a procedural way.

John Rawls, in his theory of overlapping consensus has, however focused on the convergence of values and beliefs of citizens which can allow for unity and consensus and form a basis for policy decisions. Though this theory is limited in the sense that only values that can find common ground with all citizens are included, it is a starting point for the fact that normative considerations of legitimacy should not disregard the importance of output or substantive legitimacy. We need therefore to regard the legitimacy of the union in terms of legitimate governance which includes the effective democratic functioning of the union as well as its performance which would involve taking into account the needs and benefits of the citizens. Legitimate governance of the Union therefore rests on procedural legitimacy as well as on substantive legitimacy.

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