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Dilemmas of Political Legitimacy in the European Union: A Contractarian Analysis

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1. From Eurocrisis to Legitimacy Crisis

At one time the Lisbon Treaty was thought to mark an end to disputes about the political legitimacy of the European Union. When the treaty came into force, there was a widespread hope that the negotiations over EU institutional and political reform that had dominated European discussions for over twenty years were now at an end. In the words of one text-book on European Union law 'after nearly a decade of complex negotiations and often bitter disputes, the outcome of the constitutional reform process initiated at Nice and Laeken is that the TEU and TFEU (as revised by the TL) now provide the fundamental legal framework for the institutions and activities of the European Union' (Dashwood *et al.* 2011: 20). If the first decade of the new millennium had begun with the high, but ultimately failed, hope of establishing a democratic and functional constitution for the European Union, it might at least end with a set of working institutions enabling the Union to conduct its business in a reasonably efficient and effective way. Within this framework the growing powers of the European Parliament, the increased scrutiny of proposed legislation by national parliaments and the potential inherent in the citizens' initiative might all be seen by many as democratic elements within the decision making processes. Moreover, the Commission's attempts to improve governance, following its 2001 White Paper, involving greater openness and transparency in respect of interest-group representation, provided, according to some, another route for enhancing political accountability and responsibility. Whatever the merits or demerits of particular clauses of the Lisbon Treaty, it might have seemed reasonable to hope that the institutional and constitutional discussions that had come to dominate the EU since the original 'no' in the Danish referendum of June 1992 were now accommodated within a political settlement that would last for a generation. If it had not established the institutions of a fully functioning constitutional democracy, the EU should have secured increased political legitimacy.

In the same year that the Treaty of Lisbon was negotiated and agreed, the first signs of the global financial and economic crisis began to emerge. In the United States some sub-prime mortgage underwriters filed for bankruptcy and there were downgrades of mortgage-backed securities by credit-rating agencies. The German bank IKB had to be supported by a government-owned development bank because it was dependent upon such loans. Inter-bank lending arrangements broke down and in the UK the Northern Rock bank suffered a massive run eventually leading to its take-over by the government. The need to

control credit led to the bursting of the property bubble that had been allowed to develop in such countries as Spain and Ireland. As the depth of loan indebtedness became apparent, a number of private banks either required governmental financial bailouts to meet their obligations or had to declare themselves bankrupt. In consequence, the pressures of the crisis shifted to the public finances of the Member States, since those states stood as the de facto guarantors of banking liabilities. To avoid financial panic, private liabilities became public obligations. However, in a number of countries, the state of the public finances was such that the governments were not on their own capable of absorbing the spending required. In addition to the banking liabilities transferred to the public purse, some Member States had been under-recording their government debt over a number of years, whilst others had spent unproductively, so that debt and deficit levels were much higher than was required by the Stability and Growth Pact. A number of governments were thus unable to roll over their bond financing. In the same month in which the Lisbon Treaty came into force, the Greek government admitted that its public debt amounted to 113% of GDP, compared to the 60% required by the Stability and Growth Pact, and after much negotiation the EU agreed to provide up to 110bn Euros in emergency loans to Greece in May 2010. In November 2010, the Irish government secured 85bn Euros worth of loans and in May 2011 the Eurozone countries and the IMF provided a 78bn Euro bailout to Portugal. Spain and Cyprus were to follow. The financial crisis had disrupted the era of institutional and constitutional stability before it had begun.

In response to the financial and economic crisis, the EU and its Member States have had to improvise a series of institutional and policy measures in an unprecedented way. Measures have included the strengthening of the Stability and Growth Pact, the creation of the European Semester with the aim of coordinating economic and fiscal policy, agreement on the Treaty on Stability, Coordination and Governance, as well as the establishment of the European Financial Stability Facility and its successor, the European Stability Facility. EMU II differs substantially from EMU I (Begg 2013), raising issues of a political and constitutional character that have engaged a number of national constitutional courts, most notably Germany's Federal Constitutional Court (Federal Constitutional Court 2011, 2014a and 2014b).

The political and policy consequences of the financial crisis have revived and intensified long-standing questions about the political legitimacy of the EU. Prior to the crisis, the relevant arguments in the literature involve three distinct claims. Firstly, there was a normative assumption that rightful political authority in the modern world is given solely through democracy. Associated with this claim was the view that party government, by which governments derived their authority through their winning in the contest of free and fair elections, was an adequate way to secure democracy. A second element in the critique of the EU's deficit of legitimacy was that the institutions of the EU do not possess the characteristic institutional features that would make them democratic in the sense in which the institutions of the Member States are democratic, a view nicely expressed in the familiar observation that, if the EU itself applied to join the EU, it would be rejected as being insufficiently democratic. Thirdly, it was

argued that the operation of the EU threatened the democratic operation of political institutions within the Member States, not only in respect of their constitutional powers but also in respect of their ability to engage in ‘the authoritative allocations of values’ (Easton 1953: 129-34) that yields fair and socially acceptable solutions to problems of public policy (for a good summary of these arguments, see Goodhart 2007).

To say that there are serious issues of political legitimacy within the EU is not to say that all that all claims by the EU are illegitimate. Indeed, in some ways, the most striking feature of the powers and responsibilities that have accumulated under the *acquis communautaire* has been their general acceptance. Over a number of years, the EU has successfully set standards for occupational health and safety, environmental protection, and non-discrimination in employment. It has made and enforced competition policy. It negotiates with the WTO and other international bodies on behalf of Member States and EU citizens. It promotes regional development, educational exchange and the arts. It provides agricultural support and sets fishing quotas. It has a peace-keeping force. In short, it does many things that its Member States have undertaken, sometimes in addition to those Member States, sometimes jointly with them, and at other times instead of them. The claim of the EU to political authority is not merely formal but has real world effects, not least because the EU’s right to make certain sorts of rules and pursue its policies is generally accepted by Member States and their citizens. The EU successfully secures revenue to finance its expenditure, and has never been threatened by bankruptcy as some states have been. When there are disputes about the legitimate authority of the EU or its institutions, say in relation to the relative roles of the Commission and the Council, there are accepted methods of resolving those disagreements and the parties to the dispute accept the resolution. If political legitimacy requires a minimum degree of acceptance and compliance by key actors over whom legitimate authority is claimed, then the EU has that legitimacy.

Yet, even allowing for this qualification, the crisis of the eurozone has raised profound questions about the political legitimacy of the EU. Economic and monetary union has been central to the dynamic of European integration, but it requires a fundamental transfer of political authority from the level of the Member States to the level of Europe. Since, among the central functions of the state in the modern era has been the right to be the monopoly supplier of money, agreeing to monetary union means that Member States were ceding political authority of a major kind. If the eurozone crisis has prompted a crisis of political legitimacy for the EU, how are we to understand what this involves and the conditions under which the crisis can be resolved? Legitimacy is rightful authority. It is a claim not just about the *de facto* ability to make and enforce rules but also about the *right* to make and enforce rules. To say that an agent has *de facto* power is to say that their rules are generally acceptable. To say that an agent has rightful power is to say that the rules they make are acceptable from a normative point of view. In any viable and continuing system of political authority, it is typically only necessary to understand the extent to which

rule-making authority is accepted, since stable political systems rest on a basis of authority that is broadly acceptable. However, in times of crisis, it is necessary to link political authority to normative principles of political legitimacy, to show how those subject to authoritative rule-making have good reason to accept the obligations that the rules imply.

The purpose of this paper is to offer a normative analysis of the problem of political legitimacy in the EU. To this end, it uses contractarian political theory. According to contractarian theory, political authority is to be understood as stemming from a contract agreed, either explicitly or implicitly, among political agents, the contract defining the terms and conditions of their association (Buchanan and Tullock 1963; Gauthier 1986; Ostrom 1990). Contractarian theory is a useful intellectual construct by which to understand the EU, because the EU itself can be thought of as a compound polity (Fabbrini 2007). A compound polity is a union of states joined together in their capacity as representatives of their peoples. In such a polity, political authority is dispersed horizontally, among differing governing institutions, and vertically, among different levels of governance. To create a compound polity requires states to join with one another on the basis of their being able to make credible commitments to one another about their complying with the terms of the inter-state contract. However, it also requires those same states to make their commitments in representative capacity. Representation means more than authorisation; it also entails the ability of those states to embody the collective will of their peoples in a way that retains what Rawls (1999) called the 'fair value of political liberties'. The problem of the EU's political legitimacy is then the securing of that legitimacy at two levels: the level at which states interact with one another and the level at which states interact with their peoples.

Because the problem of two-level legitimacy is a problem of securing credible commitment among the Member States at the international level, whilst at the same time ensuring that the commitment is acceptable at the domestic level, the legitimacy demands of the EU can be constructed as a normative two-level game (Savage and Weale 2009). Understanding the development of the EU as a two-level game has been a feature of inter-governmentalist accounts of European integration and the model has also been applied to international agreements more generally. However, these analyses have been empirical, using the concept of a two-level game as an heuristic device to determine why some international agreements are accepted and others fail, by showing that acceptance requires that any putative international agreement be in the win-set of the status quo for all those – domestic actors as well as international partners - who are veto-players in the game. The theory of normative two-level legitimacy, by contrast, looks beyond what is accepted by players in a two-level game to the reasons that agents have for adopting their preferences, evaluating the justifiability of the practical reasoning that leads actors to take up whatever positions that they do. In the case of the EU, such a theory highlights the importance of mutual credibility among Member States and the political accountability of Member States to their domestic populations.

Understood from this normative point of view, the central problem of the political legitimacy of the EU arises from the conflict between the principle of inter-state commitment, which in the limit requires the irrevocability of the political contract among Member States, and the principle of popular sovereignty, which, together with the idea of ‘the fair value of political liberties’ (Rawls 1999: 194-200; Rawls 2001: 148-50), can at best only justify a delegated authority to supra-state institutions.

2. Contractarian Political Legitimacy in the EU

The European Union rests upon a political contract among its Member States as the representatives of their peoples. The EU has developed through the 'grand bargains' (Moravcsik 1998) incorporated in the successive treaties beginning in the Paris Treaty of 1951 and culminating (to date) in the Lisbon Treaty of 2007. Various accounts have been offered for the motives of the Member States entering into these treaties, but the two dominant explanations in the literature refer either to the economic interests of the key actors – at least as understood by political elites and the political coalitions that influenced them – or the idealism of a generation of politicians intent on ending the legacy of war in Europe. Whatever the precise balance of explanation between these competing accounts, a large number of countries found it advantageous to participate in the political project that has become the European Union. If we think of the process as a political contract, then the treaties and the *acquis communautaire* define that contracts terms and content.

As a lawful political regime exercising the political authority derived from the contractual association of the treaties, the EU claims political legitimacy. Since the political contract on which it rests is among governments as political representatives of peoples, the legitimacy of the EU has to be secured at two levels. It must be secured at the European level among the Member States who are parties to a political contract in which they recognise the rights and obligations each is taking on under the contract. It must also be secured at the domestic level through the processes by which governments explain and justify to citizens and the institutions of constitutional control why the European political contract is worthy of support and therefore why it should be ratified and supported either by parliament or by the people. Any European political contract has to satisfy simultaneously these twin requirements of the inter-governmental legitimacy of credible commitment of states to one another and the domestic legitimacy of governments accountable to their populations.

At the inter-state level, the parties to the contract have to make commitments to one another forming the basis for their agreement to mutual advantage. Historically, within the EU, these commitments have primarily concerned the removal of barriers to trade, environmental and social policy measures and, most

importantly, monetary union with its associated budgetary disciplines in the Stability and Growth Pact. A political contract defines the terms and conditions under which the parties are willing to cooperate with one another. In this sense the obligations of the parties to the contract are contingent upon the performance of the parties. The parties to a political contract are contingent compliers. This can be understood in both a positive and a negative sense. If one has entered a contract committing oneself to a particular course of action provided that others perform their part, then there is an obligation to play one's part. Conversely, if others do not perform their part then the obligation of compliance falls. Understanding this contingent compliance of an inter-state political contract is illuminated by considering the logic of contractual association as defined by social contract theory, particularly in the version developed by Gauthier (1986).

Firstly, according to modern social contract theory, a successful social contract represents an agreement relative to a baseline point of non-agreement. Such a point of non-agreement yields to each potential party to the contract the best that they can secure in the absence of agreement. In the traditional versions of contract theory to be found in Hobbes, Locke and Rousseau, this point of non-agreement is identified with a 'state of nature', that is to say a state of society without government. However, the baseline point of non-agreement does not have to be thought of in that way. For example, the idea of a baseline point of non-agreement can be applied in the context of resource conservation in which the non-agreement point would be a situation in which those using resources, for example grazing stock or fishing, have no common rule that constrains their appropriation of the resource. Each agent appropriating natural resources may allow others freedom to appropriate, but none accept any common rule to which all should conform (Ostrom, 1990; Weale, 2013). Analogously, in the context of international relations, the non-agreement point may sometimes be a state of war or latent hostility, akin to the Hobbesian state of nature, but equally it could a state in which, whilst there was no aggression among nations, there was no cooperation on such matters as safety standards for products or the control of cross-border diseases. The key idea of social contract theory is the need for agreed rules to enable actors to move beyond the baseline point.

Secondly, in order for there to be scope for negotiation over the terms of a social contract, the baseline non-agreement point has to be sub-optimal from the point of view of the agents involved. If there is no possibility for improvement in the well-being or interests of the agents by adopting a set of rules within a social contract, then there is nothing to agree about to mutual advantage. A social contract would have no point. By acting together all agents can do better than if each agent acted independently. The fact of disadvantage at the point of non-agreement is not sufficient to create the conditions for a contract. There also has to be the possibility of improvement. Note that the possibility of everyone gaining does not imply that the baseline point of non-agreement is an out-of-equilibrium point. Equilibrium in this sense means that each player is making the best move that he or she can given the moves of the other players.

As the well-known example of the Prisoners' Dilemma game shows, players may be locked into a sub-optimal equilibrium (Ordeshook 1986: 206-10)

Thirdly, a distinctive feature of the social contract approach is that the improvement has to be from the point of view of each participant (Gauthier 1979). A social contract cannot rest upon the claim that the majority, even the vast majority, of agents would be better off were some rule to be adopted, if this means that some agents, even a small minority, have to carry uncompensated costs in order for that benefit to be secured. Thus, it is not simply that some agents can improve their situation over the baseline situation of non-agreement; it is also that each agent can improve his or her situation only provided that others can do so as well. This does not mean that once a rule is agreed within a social contract it will always be to the advantage of an agent to follow that rule. On particular occasions, compliance may well be disadvantageous in the particular instance. The social contract provides rules the general effect of which are generally to the advantage of each, although sometimes an agreed rule may be to the disadvantage of some. For example, agents as a group may adopt the rule of majority rule in the making of collective decisions, because each person thinks that he or she will be better off if the costs of collective decision making are reduced from those that they would be under unanimity. In particular instances, however, an agent may regret that such a rule is in operation. Thus, on some occasions particular Member States operating under the rule of qualified majority voting in the Council of Ministers will find that a rule agreed by others will be disadvantageous to themselves. Nonetheless the all-round gains of the rule being in operation mean that it is better to enter into the agreement than not, and of course in the council of ministers the rule of seeking as much consensus as possible mitigates any disadvantageous effects the qualified majority may have. The principle is not that every agent should always find it to be advantageous to follow the rule, but that each agent should find it advantageous to make an agreement with everyone else to follow the rule (Grice 1967: 100).

Fourthly, where there is the possibility of a rule being contrary to an agent's interests on any particular occasion, even though the general effect of the rule is advantageous to all, each party must be in a position credibly to commit to the agreement. If actors believe that others will not keep their side of the bargain, they have no incentive to incur the costs of agreement as the price of securing the gains, since they have no assurance that others will not exploit their compliance. Compliant actors will calculate that they will lose the returns they could have gained without cooperation and suffer the disadvantages of compliance with a set of rules that others are breaking. It is sometimes possible that some agreements will require only general, and not universal, compliance, some 'small' actors being able to free ride on the compliance of others, acting outside the rule with no detrimental effect on the general agreement. However, parties to a social contract would more often than not find it imprudent to allow such exceptions, and would insist on compliance being universal. Yet, if there is a threat to the agreement

from the temptation to free ride by any one party, then the credible commitment of all parties is needed in order for the agreement to be secured.

Credible commitment in a social contract is a fundamental problem. For natural persons there are various ways of acquiring the capacity of credible commitment. One device is to develop a reputation as someone who is known to keep promises. A significant line of argument in the literature on social contract theory is that one can only reliably develop such a reputation provided that one has genuinely acquired a disposition to keep one's promises (Gauthier 1986). On this line of analysis, credible commitment is only possible when one has the disposition to keep one's word and one is known to have this disposition, for then, when any one occasion on which one can shirk one's obligations arises, one will act on one's disposition rather than according to one's short-term advantage. It might seem to be irrational to keep one's promise when it is to one's own (possibly significant) disadvantage on any one occasion, but this consideration can be countered by observing that unless one is known to be the sort of person who keeps promises, others will have no reason to entertain the idea of an agreement. The disposition to keep one's word, and the reputation of being someone with this disposition, enables one to have opportunities that would not otherwise be available. Trustworthy states entering into international agreements may have more room for manoeuvre in difficult circumstances than states that are thought by others to be untrustworthy.

A second way for agents to make a credible commitment to others is to enter into an agreement by which they submit themselves to monitoring by other others. In the context of the European Union this possibility is illustrated by the European Semester and its associated disciplines. However, the monitoring of policy performance is inherently difficult and not easily observable. The assessment of performance depends upon the information that is typically supplied by each party, and with some forms of public policy there are so many variables affecting performance that it can be impossible to know whether fault arises from poor performance or random external disturbance, a feature that has been illustrated in the reluctance of the Commission to apply the Excessive Deficits Procedure according to the letter.

A third device is to delegate a third-party with the capacity to enforce the agreement. This is the classic Hobbesian technique of endowing a sovereign with sufficient power to keep all agents sufficiently in awe that they have an incentive to uphold their commitments in respect of one another. In effect, creating a third-party with this power is a way of changing the incentives that confront agents at the point at which they are tempted to break their promise. At the point at which a promise is costly to comply with, a punishment will add a countervailing cost on the other side of the balance sheet, tipping the incentives – if the punishment is well-designed – in favour of compliance. Notice, however, that punishments can be costly to administer even by an independent sovereign.

Given the constraints of the above conditions, it is necessary that parties can make an *ex ante* credible commitment to a social contract. It is important that these conditions are met *ex ante*. It is not just that the agents have a willingness to abide by the terms of the contract. They also have to be able to commit credibly to compliance as a condition for entering into the contract, otherwise the contract will never be formed or will exclude those who cannot make the *ex ante* commitment. However, there is nothing in the logic of social contract theory that says that their contract has to be completely specified in the sense that all possible contingencies can be foreseen. A contract can be *ex ante* rational for each of the parties if, taking into account all the foreseen contingencies, it is still more advantageous to enter the contract than not.

What happens when a social contract, presumed to be supported by credible commitments by participants, turns out to be broken? In effect, this was the case with monetary union, where the no bail-out rule of Maastricht strengthened by the Stability and Growth Pact, turned out to be unsustainable. The logic in such a situation is either for the agreement to be abandoned, or, if abandonment is very hard, for the requirements of monitoring and punishment to be tightened. This is what happened with the rules on monetary union, with developments through the European Semester, the Six Pack, the Two Pack and the Treaty on Stability, Coordination and Governance in effect employing ever more stringent contractarian devices to impose discipline upon participants (Weale 2015). The strictest form of commitment is an irrevocable commitment. Beyond the initial steps there is no turning back.

Earlier I noted that the political and policy consequences of the financial crisis have intensified long-standing questions about the political legitimacy of the EU. In a political culture in which it is assumed that rightful political authority is given through the practices of democracy, then institutions of governance that are not democratic – and lack the capacity to become democratic – face a serious problem of political legitimacy. If one examines the above logic of credible commitment among states, then one can also see that they imply commitments to other states and not to domestic populations. Creating systems of monitoring or endowing third-parties with the rights of imposing penalties for non-compliance are intended to secure agreement from other states. But each state is a collective actor with its own system of political accountability. Although rational agents need to be able to make credible commitments in order to gain the advantages of cooperation, the domestic political accountability of collective agents calls into question the extent to which this can be done. To understand the implications of this fact requires us to understand the second level of the two-level normative contract that underlies the compound polity of the EU.

The Domestic Political Contract

Since the actors committing to the contract are Member States, who are irreducibly collective actors, they are necessarily involved in a two-level game. As political representatives they bargain with one another, according to the logic of credible commitment outlined in the previous section. However, they enter such bargains in the knowledge that any agreement has to be acceptable to their domestic constituents. They are thus involved in a negotiating relationship with their peers from other states but also in forms of accountability and control that are exercised by their domestic constituents. This two-level feature of the EU constitutional contract has two principal effects. Firstly, it limits the range of bargained outcomes that are available to negotiators at the international level. For any one actor, this does not automatically imply that their bargaining position is weakened. Indeed, since Schelling's (1960) work, it has been realised that the 'paradox of weakness' may bestow strength upon negotiators if they can convince others that they are subject to a genuine constraint from, say, their domestic constituents. Nonetheless, if we assume that the larger the number of veto-players, the smaller is the win-set of the status quo, then the requirement to satisfy the preferences of domestic constituents will impose tighter limits upon feasible moves from the non-agreement baseline than would apply were there not the constraint of domestic opinion.

The second principal effect of the two-level structure of the EU's constitutional contract is that it makes it more difficult for states to make credible commitments. Governments negotiating with other governments not only have to be able to bind their successors, but they also have to be able to secure implementation of matters that have been agreed at the international level. Thus, even if the negotiators have the disposition to commit to the terms of the agreement, they may lack the capacity to do so. This difficulty is highlighted by the fact that any agreement into which a Member State enters not only has to be acceptable to domestic constituents, but also has to be known by other states to be acceptable to those domestic constituents. If each must know that every one of the others can make a credible commitment, then each must know that all other participants have sufficient domestic legitimacy to ensure that they abide by the terms that they have agreed internationally. The reputational element of international legitimacy depends upon satisfying domestic conditions of political legitimacy.

The ability of Member State governments to make credible commitments at the inter-state level thus depends upon their being legitimate at the national level. The Member States negotiate the terms of the EU contract as representatives of their peoples. Representation has several dimensions (Pitkin 1967), most obviously ensuring that substantive interests are adequately weighed in the negotiating process. However, representation also has a dimension that involves authorisation, and from this point of view the most significant thing about representation is that Member States are making commitments on behalf of their peoples. An international treaty normatively binds those who are its parties, and to the extent to which the demands of the treaties fall upon citizens in Member States and not simply their governments,

so in signing an agreement a government is making a commitment on behalf of its citizens. However, such a commitment can only be credible provided that the government making the commitment were seen to be the legitimate representative of that body of citizens – otherwise other governments would have no reason to find the treaty commitments credible.

How then are we to understand this domestic component of legitimacy? If we simply take a behavioural approach, then we can interpret legitimacy as the settled disposition on the part of members of the population to acknowledge the authority of their governments. If governments enjoy legitimacy in this sense, then the task of understanding is simply one of seeing how the preferences of different social groups are aggregated to form a collective preference that is then fed into the conduct of international negotiations. For many international agreements such an approach makes sense. All governments have to know is that other governments have an accepted authority, and they can rely upon that accepted authority as being the basis of a reliable commitment. This logic has applied at various times in the evolution of the EU. Thus, it has been argued that the Single European Act and the Treaty on European Union reflect the agreed position of national governments whose preferences were in turn shaped by the dominant coalitions in domestic politics (Moravcsik (year)). The two-level game of treaty agreement then consists in finding those points in the policy space which, from the viewpoints of the relevant actors, are improvements on the status quo. From this perspective the only role for a theory of legitimacy is to provide an account of the framework within which the two stages of preference aggregation take place.

However, such preference-based de facto legitimacy presupposes a stable political context in which domestic coalitions do not change quickly, such that an agreement emerging from a balance of preference aggregation is likely to reflect the influence of a parallelogram of political forces over the foreseeable future. The ever closer union of the peoples of Europe is in effect the ever closing union of the prevailing coalitions of domestic political actors sharing interests across national borders. In such a situation, the process of domestic political ratification and support are likely to be predictable, avoiding a situation in which fundamental questions of political legitimacy are raised. Normative political legitimacy – that is to say the reasoned agreement to a set of political institutions – comes to the fore, however, when the assumptions of the stable consensus on which domestic support rested are called into question.

Normative Legitimacy at the National Level

For some thirty-five years from the Treaty of Rome to the Treaty on European Union, the constraints of domestic political accountability on political representatives operating at the international level was relatively slight. Generally speaking the permissive consensus prevailed, and parliaments, peoples and courts respected the European ambitions of their government, with the notable exception of the Danish

folкетин after 1973 and the more limited role of the UK's House of Lords Select Committee on the European Communities. Until the Danish 'no' and the French 'petit oui' in 1992, even those countries that used referendums did not have problems with treaty changes (as distinct from the problems that some governments had with negotiating their terms of entry in the Union). In terms of courts and the legal system, the most striking feature was the positive role of the national courts in expanding the competence and scope of the European Court of Justice, as Weiler (reference) has noted.

The domestic consensus across a range of Member States that underlay the extension of EU political authority into the field of economic and monetary union rested on a number of elements. In terms of actors, it was made up of a pro-European growth business together with social movements who saw advantages to environmental and social protection through reregulation at the EU level. As Dyson and Featherstone (reference) have shown, there was a highly developed policy paradigm justifying closer economic union through the free movement of goods, services, capital and labour together with the creation of a single currency to reduce transaction costs, to make prices more transparent and to facilitate cross-border tendering in public procurement. This economic paradigm could be supplemented by appeals to the benefits of ecological modernisation, according to which the benefits of growth could be captured in the form of green technologies. The legitimacy of this coalition as its associated justificatory ideologies was reinforced by continuing support for agriculture (albeit in a reformed version) and a willingness to leave the social entitlements of domestic welfare states untouched, except for opening up their benefits to non-national EU citizens on a reciprocal basis.

In terms of de facto legitimation, the coalition succeeded as illustrated by the support and seeming success of monetary union in its early years. Normative legitimation takes longer to establish, however, as the testing of decision premises under different conditions takes place. There were always those who questioned the plausibility of European economic and monetary union on technical grounds, either because they held that the institutional design was poor or that the EU could not constitute an optimal currency area (for a useful summary see Bordo and Jonung 2003: 43-4; see also Feldstein 1997). Whether the policy developments that have taken place in the wake of the financial crisis – including the ECB's commitment to Outright Monetary Transactions, the moves towards a banking union and the requirements on EU states to run regimes of tight fiscal constraint – will resolve these difficulties is for time to tell. What the contractarian theory of EU legitimacy suggests is that any such legitimation must provide justificatory expression at the domestic level of Member States as well as at the level of elite negotiators. At present there is little evidence that this is taking place, as the growth of euro-sceptic attitudes among domestic electorates and the increase in strength of euro-sceptic political parties goes to show.

The requirements of two-level legitimacy are easy to state if hard to achieve. At the international level, they require Member States to make their commitments to one another credible by delivering on their promises of fiscal discipline. At the domestic level they require maintenance of the social entitlements of the welfare state, which in turn requires dealing with the problem of youth unemployment in many countries, most notably the southern EU states. The experience of economic and monetary union suggests that these two requirements will not be met unless decision premises can be tested for their plausibility in respect of their empirical assumptions and their acceptability according to the political values of domestic electorates. The construction of institutions to achieve these requirements is still a task in the making.

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