

Democracy without Democracy?: Can the EU's Democratic 'Outputs' be Separated from the Democratic 'Inputs' Provided by Competitive Parties and Majority Rule?

Richard Bellamy

Various EU analysts suggest that although a democratic deficit exists from the perspective of 'input' democracy, democratic processes such as competitive parties and majority rule are neither necessary nor suitable to secure democratic 'outputs' of the kind the EU delivers. This article disputes this claim. 'Input' arguments are vital to the legitimacy of decision making in the EU's policy areas and the non- and counter-majoritarian mechanisms these analysts advocate have perverse rather than beneficial effects on the quality of 'outputs'.

Democratic deficit, majority rule, 'input' and 'output' democracy

Notwithstanding Schattschneider's famous remark that 'modern democracy is unthinkable save in terms of political parties' (Schattschneider 1942, p. 1), political theorists and political scientists have come increasingly to think the unthinkable. Normative theorists have long been tempted to distinguish the ideal of democracy from the modern reality, favouring the various ideas Joseph Schumpeter lumped together as the 'classic theory' of democracy over his 'other model' of 'that institutional arrangement for arriving at political decisions by means of a competitive struggle for the people's vote' (Schumpeter 1976, p. 269). While these scholars view this alternative as an accurate account of actual democratic practice, they regard it as normatively limited (e.g. Duncan and Lukes 1963). Meanwhile, declining party membership and voter turnout has begun to challenge the descriptive value of this model, prompting a number of political scientists also to return to the 'classic theory' as a source of democratic ideals that might be better realised by somewhat different democratic practices to those found in most working democracies (e.g. Dalton 2004).

The EU has offered particularly fertile ground for such thinking (Cohen and Sabel 1997; Majone 1998, 2001; Moravcsik 2002; Sabel and Zeitlin 2007). With the traditional forms of competitive party democracy and majority rule proving harder to

establish and more attenuated at the EU level than in any of the member states, it has become a veritable laboratory of new modes of democratic governance. The basic normative claim of these schemes has been to see democracy in terms of ‘outputs’ rather than ‘inputs’. ‘Input’ considerations relate to the democratic character of the decision procedure, and in particular the right of all citizens to participate on an equal basis in political decision-making. By contrast, ‘output’ considerations relate to the degree to which the substance of the decision can be said to promote collective interests in a manner compatible with the democratic goals of equal concern and respect (Scharpf 1999a, pp. 2, 6-13). Their proponents argue that the ‘actual existing’ model of majoritarian, party democracy may have reasonable, if weakening, credentials on ‘input’ grounds, but what counts are democratic ‘outputs’. These might be achieved better by more idealised forms of democratic decision-making that possess limited conventional democratic ‘input’. Indeed, such limitations may be necessary to obtain democratic ‘outputs’ due to distortions in the standard ‘input’ process.

What follows explores the merits of ‘input’ and ‘output’ democracy in relation to the EU. I start by outlining the basic arguments for democratic ‘input’, noting how they are broadly met by a system comprising majority rule and competing parties. I then examine two versions of the ‘output’ argument found in both the literature, and the EU’s structures and policies. Neither can justify curtailing democratic inputs. The conclusion briefly proposes how ‘input’ and ‘output’ considerations might be met within the EU given the persistent difficulties experienced in establishing the former.

‘Input’ Democracy

Some commentators suggest ‘input’ arguments carry no independent weight apart from their contribution to a certain kind of ‘output’. Thus, Fritz Scharpf in his influential use of this distinction within EU studies argues that ‘modern input-orientated theorists rarely derive legitimacy primarily from the belief “that the people can do no wrong”. Instead, they insist that policy inputs should arise from public debates that have the qualities of truth-orientated deliberations and discourses’ (Scharpf 1999b, p. 269). He suggests ‘input’ assumes not just ‘participation’ but also convergence on a ‘consensus’ that reflects the general will – itself only likely among a demos sharing a strong cultural identity, so that ‘the justification of majority rule must be considered as the crucial problem of input-orientated theories of democratic

legitimization.’ (1999a p. 7) However, this argument misrepresents much mainstream work in democratic theory (e.g. Dahl 1989, Weale 2007), while overlooking why we might value ‘input’ in itself. Liberal societies regard people as entitled to go their own way, even at the expense of making mistakes. True, part of the reason is so they may learn from their errors. But more significant is the importance of treating individuals as responsible agents, the empirical difficulties as well as the problematic moral justifiability of others defining what is right for someone else, the dangers posed by even an enlightened despotism given human fallibility and so on. None of these issues imply individuals can do no wrong, merely that it is more legitimate for them to take decisions – even wrong ones – than for others to take them on their behalf, especially given these others may err about what is good for them too. Such factors motivate the ‘input’ account of democracy as much as considerations about good ‘outcomes’.

Three related arguments play a key role in justifying democracy: considerations of political equality; the reasonableness of political disagreement and the proneness to fallibility of most human decision-making; and the need to ensure politicians are accountable and responsive to the public interest (Weale 2007, ch. 3). All three reinforce the importance of ‘input’ considerations as vital to, and to some degree having a quite independent force from, ‘output’ considerations.

Many accounts prioritise autonomy rather than equality (e.g. Lakoff 1996, p. 163; Held 2006, ch. 10). However, viewing democracy as a system of self-government proves hard to sustain (Christiano 1996, ch.1; Weale 2007, pp. 106-115). All but the most civic minded will experience some tension between their pursuit of personal autonomy in the private sphere and participation in public decision-making.. Private autonomy may depend on a public system of rules, giving us an instrumental incentive to play a part in shaping them – a point central to the third argument for democracy. Yet, seeing these collective arrangements as expressions of individual autonomy requires fairly stringent demands be met that amount to a form of anarchism unlikely to be realisable (Wolff 1970). Not only is it improbable that all public decisions could reflect a consensus on what each citizen regards as necessary for their private autonomy, but also designing a decision making procedure in which such a result could theoretically be achieved is practically impossible, given that it would have to include the opportunity to vote on all conceivable options for any potential collective decision. Some accounts that adopt this model seek to overcome these difficulties by employing perfectionist reasoning about the goods and rights

needed for individuals to be ‘truly’ autonomous. These theories tend to shade into ‘outcome’ versions of democracy – stipulating so many preconditions for citizens to exercise their private and public autonomy that little remains to be decided by the democratic process (e.g. Held 2006, p. 282). Indeed, their democratic credentials seem circular, stipulating what kinds of ‘output’ would be democratic and making these pre-conditions of the democratic process. By contrast, an ‘input’ perspective distinguishes a process that accords each person equal standing as an autonomous reasoner about our collective life from one that produces decisions that might correspond to and not inhibit the autonomous decisions of each and every citizen. Whereas the latter may be impossible to achieve, the former follows from any process that accords us an equal weight in making and contesting decisions.

The second argument enters here, noting how democratic procedures reflect the need to make collective decisions in the ‘circumstances of politics’, where those concerned have valid differences about the justification or advisability of different policies based on potentially incommensurable and incompatible normative and empirical judgements (Weale 2007, pp. 12-18; Waldron 1999, pp. 107-13). As Rawls noted, not all political disagreements arise out of, malign, selfish, or myopic thinking. Most result from ideological divisions that reflect reasonable disagreements stemming from the ‘the burdens of judgement’: namely, ‘the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement in the ordinary course of political life’. (Rawls 1993, pp. 55-6) They involve both the empirical difficulties within complex and open societies of weighing up evidence, identifying causal processes, and estimating the consequences of different decisions and policies, and the normative difficulties of assessing which factors are morally relevant or how moral factors of different kinds might be combined or prioritised, overcoming the vagueness of our concepts, especially when it comes to hard cases, and reconciling the divergent moral and political views that people’s different life experiences may lead them to adopt (Rawls 1993, pp. 56-7). Accordingly, a consensus is unlikely on what course of action best promotes the public interest on any given issue. Rather, people will hold numerous alternative and potentially equally valid points of view. Consequently, democracy cannot be defined by ‘outputs’ that supposedly enshrine the democratic values of equal concern and respect. Instead, we need equitable ‘input’ processes for reaching and contesting decisions – including

decisions about these very processes – that ensure all views obtain an equal hearing and policies can be reviewed in the light of evolving views and experience.

Finally, political equality and the ‘circumstances of politics’ require rulers to be accountable and responsive to the ruled. If political equality demands all citizens be treated equally in their capacity as autonomous reasoners and sources of information about their collective life, while the circumstances of politics suggest they will often disagree, make mistakes and change their minds, then we need mechanisms to encourage rulers regularly to consult the ruled and accord them equal concern and respect. These incentives come from institutionalising ways of screening politicians to select those inclined to respond to public views in an even handed and effective way, and sanctioning them when they do not, are incompetent or their policies prove flawed.

Taken together, these three arguments give citizens an interest in processes that respond to their concerns in ways that are fair and impartial. Meanwhile, they need not regard the results as ‘right’, merely as legitimate. What counts is being included in the process, having their views treated on a par with everyone else, and not feeling permanently excluded from consideration. If a core function of democracy is to allow necessary binding collective decisions to be made despite valid disagreements and uncertainty about their potential effects, these qualities seem vital. In addition, they promote mutual respect and reciprocity among citizens. For the losers in any vote are not being told they are mad or bad, merely that they have been outvoted. Moreover, they can hope to win in future – a possibility that invariably gives them some influence even when they lose.

The case for the Schumpeterian model of democracy that characterises the 20 or so ‘working democracies’ worldwide lies in its capacity to meet these three ‘input’ criteria to an adequate degree (Bellamy 2007, ch. 6). Indeed, those that perform best on Freedom House measures tend to be the democracies with the least deviations from this model towards ‘output’ democracy of the sorts examined below (Dahl 2002, pp. 164-5). The Schumpeter model has two basic elements: majority rule and party competition. Together they promote political equality, respect the circumstances of politics, and ensure decisions are both responsive and accountable.

Majority rule offers a fair and impartial equal weighing of votes that is anonymous, neutral and positively responsive as well as decisive (May 1952). Moreover, the Condorcet jury theory suggests that if there is a better than even chance

people are more right than wrong, then the probability is that the majority view will indeed be right too – with that probability increasing dramatically the higher the majority (Condorcet 1976). What about the problems Condorcet revealed of cyclical majorities, and the related Arrowian issues of instability, incoherence or manipulation? Mackie (2003) has shown, though logically possible, these phenomena are rare - not least because party competition socialises voters so their preferences resemble each other sufficiently for cycles to be unusual and eliminable by relatively simple decision rules. Competition in a two dimensional space also promotes convergence on the median voter, which is generally the Condorcet winner (Ordeshook 1986, pp. 245-57). In these respects, elections do work as a process of ‘truth orientated deliberation’ that precedes the simple aggregative phase. Moreover, the fact that most majorities within pluralist societies are shifting coalitions of minorities, means that the proneness of any ruling coalition to cycling gives it an incentive to reach out beyond its immediate membership to excluded groups to retain power (McGann 2004, pp. 56, 71).

These standard features of a Schumpeterian ‘actually existing democracy’ promote political equality because they instantiate the status of voters as political equals – none has a lower status than anyone else and all are potentially involved in decisions. It meets the ‘circumstances of politics’ because majority voting on the basis of one person, one vote offers an impartial mechanism for resolving disagreements that is neither biased towards any view nor assumes the superiority of any one of them. However, the dynamics of party competition also encourages equality of concern as well as respect through instituting a ‘balance of power’ between both different sections of the electorate and rulers and ruled. The need to construct majorities from shifting coalitions of minorities while converging on the median voter means that voters are effectively forced to compromise with each other. Party programmes involve trade-offs between millions of voters that involve either bargains that seek to split the difference between different sets of preferences or identifying agreed second bests. Because an alternative government always waits in the wings, governments must engage in an almost daily referendum, whereby policies are updated in anticipation of a future election. As a result, they are responsive to and accountable for changing attitudes and conditions and policy failure (Bellamy 2007, ch. 6).

None of the above means majoritarian, competitive party democracy works perfectly or even, given voter decline, is in good health. Merely, that when it functions reasonably well - with either a plurality or some proportional electoral system - it has the capacity to reflect a coherent set of 'input' criteria. Moreover, these 'input' qualities invariably have positive benefits for the quality of 'outputs'. It is against this background that the adoption of pure 'outcome' approaches needs to be assessed.

'Output' Democracy

Scharpf defines 'output' democratic legitimacy as collectively binding decisions that 'serve the common interests of the constituency' (Scharpf 1999b, p. 268; 1999a p. 11). Differentiating such decisions from those that result from standard democratic 'inputs' turns on one of two claims (Scharpf 1999a, pp. 12-13,16; Majone 1998, 2001). On the one hand, 'non-majoritarian' arguments suggest an appropriate process exists for determining substantive democratic outcomes, at least in certain well defined domains. These render 'input' arguments unnecessary and possibly even subversive of democratic ends. On the other hand, counter-majoritarian arguments seek to correct supposed distortions of the 'input' process so that these favour more equitable outcomes – something especially necessary in culturally diverse societies that do not share a national political identity. Both mechanisms are rampant within the EU. The ECJ, ECB and a host of standard setting bodies are allegedly 'non-majoritarian'. Co-decision procedures and consensual or qualified-majority voting in the Council of Ministers are counter-majoritarian in requiring super-majorities on the grounds that only in this way will the common interests of all concerned be addressed in an equitable manner.

These two arguments share the view that standard democratic 'inputs' distort decision making by registering false 'positives' or false 'negatives' (Pettit 2004, p. 60). Non-majoritarian mechanisms aim at avoiding false 'positives'. Their proponents fear electoral incentives could lead politicians to attend too much to unrepresentative groups, such as voters in marginal seats, actual or potential donors to their campaigns, or others able to exercise pressure disproportionate to their electoral strength through their place within the economy, media or other potential sources of social influence on voters' behaviour. Or they may sacrifice long term goals to short term electoral advantages – for example, by promising tax cuts that undermine the capacity of future

governments to pay for infrastructural improvements. Politicians may also be in a position to skew elections in their own favour, thereby avoiding electoral accountability – say, by manipulating constituency boundaries. In such cases, if the criteria of a fairer and more efficient ‘output’ are widely agreed, and the means for achieving it technical matters where what counts is expertise rather than political support, then ‘depoliticising’ strategies that remove such decisions from the influence of democratic ‘inputs’ may be in the public interest. Counter-majoritarian mechanisms aim at false ‘negatives’. This danger arises with consistent minorities. Even in systems of proportional representation (PR), the logical possibility exists for a majority to exclude minority views from the agenda. Counter-majoritarianism seeks to give them a hearing.

Unfortunately, neither of these mechanisms proves better at tackling the respective problem each address than standard ‘input’ mechanisms, while risking creating the difficulty they neglect – false negatives in the first case, and false positives in the second. Their failings derive from both possessing parallel vices to the virtues of ‘input’ democracy: namely, not respecting political equality, overlooking the ‘circumstances of politics’, and being unresponsive and lacking accountability (Bellamy, 2009).

Non-Majoritarian

There are two forms of non-majoritarian, non-party democracy. The first appeals to deliberation among experts, the second to direct deliberative democracy among the people as a whole or some selected sub-set. Each claims to be more ‘truth-orientated’, because better designed to weigh impartially all aspects of a problem, than majoritarian democracy. Neither effectively grounds that claim.

Democratic expertise has supplied the main argument for the non-majoritarian account of ‘output’ democracy (Majone 1996, 1998, 2001; Scharpf 1999a, pp. 15-16; Moravcsik 2002). This case turns on a distinction between ‘redistributive’ and ‘regulatory’ policies and arguing that majoritarian or counter-majoritarian measures may be appropriate for the former but are unnecessary or even pernicious for the latter (Majone 1996, pp. 294-6). In the regulatory arena, citizens look for Pareto-efficient improvements that correct for market failure. Such measures are the bread and butter of the EU but, being win-win and highly technical, are uncontroversial and consequently have low electoral salience. These policies require expertise, equity and

efficiency - qualities best provided by experts representing national interests yet isolated from short-term electoral considerations or powerful pressure groups, which tend to produce suboptimal solutions and raise transaction costs as various influential interests get bought off.

There is a weak and a strong version of this non-majoritarian argument. The strong version resembles what Dahl calls guardianship (Dahl 1989, ch. 4). It assumes the availability in certain areas of something like a science of the public good, and that only specialists will possess such knowledge. The weak argument suggests merely that experts are more likely (or, in an even weaker version, are as likely) to make conscientious and informed decisions about certain policies because they are freer from some of the potentially malign incentives that exist in a system of majority rule.

Given their distinction between redistributive and regulative measures, Majone and Schapf apparently grant that we have no epistemological grounding for our moral ontological claims to compare with a mathematical proof or the experimental method in natural science. The difficulty is that most 'purely' technical decisions raise normative issues and are often less clear-cut empirically than is claimed (Bellamy 2006, pp. 734-42). Even policy decisions that rest on reasonably well-attested natural scientific arguments cannot be decided by scientific experts alone. Thus, scientific arguments for global warming still leave open a wide range of moral and political choices about how it might best be tackled, with experts disputing the equity, efficiency or effectiveness of particular measures. Social science invariably yields even less clear cut policy advice... Social scientists may be experts on particular policy areas, but can never fully account for – and lack expertise in – knock on effects in other areas, many of which are unpredictable innovations, behavioural changes, acts of God and the like. Expert judgements inevitably rest on assumptions about the way of the world, how things work or people behave that are at best gross if necessary simplifications, at worst not very rigorous guesses. Consequently, it is hard to think of a technical decision without discretionary elements. We know, for example, that differing economic theories or divergent best guesses about how the world economy is going lead economic advisors to central banks often to disagree about interest rate increases or decreases (McNamara 2002).

It is sometimes claimed that their disagreements can nonetheless be resolved more consensually as result of their engaging in a more deliberative and 'truth

orientated' discursive process than, say, legislatures. Whereas the latter involve self-interested bargaining and block votes, the former employ a more public model of reason giving that reflects clear norms of argumentation deriving from shared criteria about a 'good' argument (Pettit 2004; Sunstein 1993, pp. 24-5). Jorges and Neyer (1997) defend comitology on these grounds as deliberative fora where a problem-solving approach overcomes national bargaining to produce agreements that favour the supranational public interest. However, not only are electoral campaigns and debates in legislatures and committees not devoid of deliberation, but the argument also over estimates the epistemic qualities of deliberation itself and the degree to which it takes place (Pollack 2003). Experts can be particularly susceptible to 'group-think', which may be reinforced rather than challenged by such processes. Insider, expert norms can be self-serving products of an entrenched paradigm within a given professional community that may have become immunised from critical scrutiny and/or the legitimate concerns of citizens. Even if deliberation is full, open and critical, valid disagreements may remain - as participants in any seminar know. When a collective decision is needed, these disputes are generally resolved by the much derided majority vote. We have no reason to believe that the votes of expert bodies are less prone to cycles. Indeed, given the small numbers involved, so that whoever chairs is more likely to know the preference orderings of his or her colleagues, they may be much more liable to arbitrary manipulation arising from agenda setting and voting schedules (Bellamy, 2009; Janis 1982; Gambetta 1998).

The weaker version enters here, claiming these expert bodies are nonetheless better informed than the average citizen on such matters. As Moravcsik remarks: 'We do not expect complex, legal or technical decisions to be made by direct popular vote.' (Moravcsik 2002, p. 344) True – but the 'input' argument never suggested they should be, merely that voters be able to choose between various packages laid out before them in terms they can understand and hold to account those who fail to deliver. For voters can register 'policy spill-overs' a given expert body lacks the competence or feedback to tackle or appreciate. Politicians regularly seek expert advice and have proven able to formulate sophisticated policies in such areas as taxation. Yet they must also respond to citizens who, though not economic experts or criminologists, feel the broad effects of a poorly performing economy or rising levels of crime. Most domestic non-majoritarian regulators are embedded within majoritarian systems. It is not just that elected politicians can influence domestic

regulatory bodies through various formal or informal screening and sanctioning mechanisms, such bodies are also subject to public opinion through the media. Courts, Banks, medical bodies all find it hard to buck sustained national majorities. Such pressures are much less evident in the EU because its public sphere is vestigial and political control and responsiveness more muted.¹ Worse, the possibilities of regulatory capture may be increased by the closeness of EU regulation to various ‘stakeholders’, notably business and unions (Cohen and Thatcher 2005, pp. 341-42.), while the relative obscurity of their decision-making processes allows national politicians to engage in blame shifting to an anonymous ‘Brussels’.

Direct-deliberative democracy through referenda or special consultative forums with civil society groups has been offered as a corrective both to the presumed self-interested bargaining of party democracy and self-serving or selective technical expertise. Many advocated them as mechanisms for legitimising the failed Constitutional Treaty – the convention was a small deliberative forum, the ratification process – usually advocated as a pan-European affair - was to have been an act of popular deliberation. Yet, as has been noted with lobbying by civil society groups more generally (Warleigh 2001; Kroger 2008), the Convention involved considerable political bargaining and lobbying by unaccountable and unrepresentative groups. No incentive structure existed to consider the public interest as articulated by the public themselves, merely the interests of those with access. Civil society groups could focus on a single issue without having to balance their concerns against those of others as part of a public programme. Instead, they could simply push an arbitrary agenda. Meanwhile, that agenda set the terms of the referenda. The broader electorate had no mechanism for ensuring the Treaty responded to the broad range and balance of public concerns except by rejecting it altogether (Castiglione et. al. 2007).

Thus, non-majoritarian devices cannot really substitute for an ‘input’ majoritarian process. They fail to overcome the basic case for such mechanisms given by the three arguments explored above. Mechanisms relying on expertise regard ‘political equality’, accountability and responsiveness as inappropriate because they contend the ‘circumstances of politics’ do not apply to certain types of technical decision, thereby ignoring the obstacles posed by reasonable normative and empirical disagreements and fallibility to attempts to objectively define the common good even in these areas. In the process, they create false negatives that a democratic ‘input’ process would be more apt to correct for and register as many – if not more - false

positives. By restricting access, they increase the likelihood of decision-makers serving partial concerns. They may be denied vital information by foreclosing feedback from public opinion regarding the impact of their decisions, exhibit professional bias, be unduly subservient to the politicians or others that select them, and be more open to regulatory capture. For example, devolving the setting of interest rates to central banks can insulate from public scrutiny the neo-monetarist content of orthodox monetary policy choices by presenting them as the product of ‘sound’ economic management. Yet, such choices may serve financial institutions better than the economy at large and be overly skewed to serve their interests – a prime instance of the sort of ‘false positive’ problem this mechanism was supposed to guard against (Hay 2007, pp. 113-18). Selective consultation with ‘stakeholders’ creates a parallel dilemma, with the agenda potentially getting set by the very groups whose interests regulation should be seeking to harmonise with the public interest. Finally, there is nothing particularly deliberative about referenda –its simplistic alternatives between ‘yes’ and ‘no’ on a question set by elites on the basis at best of partial consultation lies in stark contrast with the deliberative process of electoral politics, where a constant dialogue gets institutionalised between the multifarious views of different sections of the electorate in the effort of rival parties to build a winning coalition of support. None of the above denies that such mechanisms might occasionally supplement standard forms of ‘input democracy’, as is the case in many member states. However, they are directly or indirectly controllable by formal or informal political channels that respond to majoritarian politics and public opinion. Thus, central banks have to deal with widespread discussion of their decisions in the media and the governors are often accountable to and removable by politicians. By contrast, no pan-European public sphere exists capable of generating an equivalent pressure in the EU, while political control of the ECB is substantially weaker.

Counter-majoritarian

‘Counter-majoritarian’ mechanisms tackle the basic ‘input’ case more directly by seeking to highlight voices liable to go unheard within a majoritarian democracy (Majone 1996, pp. 285-7; Sunstein 1993, ch. 1). These too come in strong and weak forms. Strong forms offer democratic mechanisms for defining the common interest by forcing consensual decision making. Weak forms merely constrain majoritarianism to correct ‘input’ bias or protect particular ‘outputs’. However, giving extra weighting

to potentially excluded voices or ‘false negatives’, risks their becoming over represented ‘false positives’ that exclude equally important voices in their turn.

Some common political devices are sometimes mischaracterised as counter-majoritarian. So PR has been contrasted to majoritarian electoral systems. But the contrast is with plurality systems, PR being merely a more accurate way of calculating the majority. Likewise, federalism and other mechanisms for devolving power simply designate the appropriate community for majority decision-making. They only become counter-majoritarian when particular groups or different federal units are given special weighting, so that collective decisions between different communities have to be made consensually or by supermajorities. Most EU decision-making – both in the Council and the Parliament - requires consensus or supermajorities, with co-decision procedures exacerbating these effects to make it among the most systematically counter-majoritarian political systems in the world, second only to the United States (Fabbrini 2004).

Strong versions of counter-majoritarianism claim a unanimity condition offers a perfect democratic procedure for defining the common interest, ensuring no collective measure gets adopted that does not outweigh the costs, however they are distributed (Buchanan and Tullock 1965, 12, 14). However, this multiplying of veto points is biased towards the status quo, and unless the base line conditions are entirely equitable, may entrench great injustices (Rae 1969, 1975). Indeed, it is largely advocated by libertarians keen to protect property rights. Within the EU, unanimity voting within the Council offers the prime instance of strong counter-majoritarianism. At one level, it can be justified as ensuring the EU only operates in spheres genuinely mutually advantageous for all member states. Of course, that could mean policies that would benefit the majority of European citizens fail to get adopted. It depends on whether it is more legitimate to view citizens primarily as members of states or members of the EU. Even in the former case, a state might manage to block a reform beneficial to the other states. Moreover, if decisions by state representatives are insulated from domestic majoritarian pressures, they may only respond to sectional interests lobbying on a given issue. CAP offers the prime example, remaining the largest area of EU expenditure despite a decline in the importance of the agricultural sector and external pressures for reform. Each of those with a primary say in the decision – the ‘iron triangle’ of agricultural ministers, agriculture officials in the commission, and European farming interests – has a vested interest in supporting the

other, while the costs of mobilising consumers against CAP is greater than the average cost to each taxpayer (Keeler 1996; Nedergaard 1995).

Weaker versions are designed to protect what US constitutional discourse terms ‘discrete, insular minorities’, with little or no chance of allying with others to secure political influence. How far this is likely within the EU is debateable, and the degree to which the appropriate minorities are sets of member states rather than dispersed sub-national minorities within them even more so. Again, such arrangements risk making it harder for unprivileged minorities to overcome the entrenched position of privileged minorities, as the regressive effects of the USA’s system of multiple veto points starkly demonstrates (McGann 2004). Moreover, they favour concentrated over dispersed minorities. If minorities are not discrete and isolated, they have more to gain from being pivotal actors in alliance building than in seeking special protections that may work against them. Consociational arrangements can also give elites incentives to maximise rather than reduce their differences and to solidify group differences rather than allowing them to evolve or reduce (Barry 1975). Indeed, where the legitimacy of the state and the role of given groups within it takes precedence over all other issues, responsiveness and accountability on the quality of government gets severely reduced.

A number of weak counter-majoritarian arrangements exist within the EU, including Qualified Majority Voting in the Council, the need for final resolutions of EU legislation in the European Parliament to obtain a majority of all MEPs, and co-decision. These mechanisms favour a dominant coalition that is ideologically centrist and mildly pro-integration, though the dynamics differ depending on whether the issue has Left-Right or pro-anti integration as the main cleavage. Either way, super-majoritarianism gives power to the dominant partners – the EPP-PS grand coalition in the Parliament and the Franco-German alliance in the Council – and a small number of potential voting partners, depending on the issue, with certain groups permanently excluded (Hosli 1995, 1996, 1997). Once again, the logic of ‘input’ majoritarianism within the EU systems seems more justified than attempts to structure the system in ways that might produce more favourable outputs or that seek to privilege certain minority positions.

I have left to one side the role of the ECJ. Courts can be characterised as both non-majoritarian and counter-majoritarian. Their operation has been viewed as non-majoritarian, with multi-member courts like the ECJ, seen as models of deliberation,

while their effect has been deemed counter-majoritarian. These have been seen as desirable qualities for constitutional courts in particular (e.g. Dworkin 1996, 'Introduction'). However, their effects are often perverse (Bellamy 2007, Waldron 2006). Once again, the non-majoritarian aspect may register false negatives, and the counter-majoritarian aspect produce false positives. The only issues that can be legitimately discussed within a court are those affecting parties with legal standing who have a case as defined by law. These restrictions uphold the 'rule of law' by ensuring the equitable application of settled law to all, but become disadvantages in situations - common to constitutional courts - where court decisions effectively make public policy. For, the case under consideration may be untypical and decisions have knock on effects for important interests and persons whose concerns the court cannot consider. Moreover, those with access to the court and possessing the resources to raise the case may be highly unrepresentative groups.

The ECJ often operates as a de facto constitutional court, and suffers from these drawbacks. Partly because the EU's governance structures are so fragmented and its administrative capacity weak, while the move from national to pan-European networks means the parties involved are often unknown to each other, there have been incentives for actors to seek rule governed, legalistic approaches to regulation at the EU level (Kelemen and Sibbitt 2002). However, the strong judicial enforcement of formal public rules increases judicial discretion and many of the disadvantages of non-majoritarian decision-making. The court has a natural predisposition to reinforce the 'negative' integrationist, market-building agenda enshrined in the four freedoms of capital, labour, services and goods that lie at the heart of the European project. This tendency has produced the effective constitutionalisation of competition law, with the ECJ monopolising judgements on when 'public interest' restrictions apply and challenging the majoritarian decisions of national legislatures and governments - including the exemption of public sector jobs and services (Scharpf 1999a 54-8). Such changes can be in the interests of consumers and workers alike. But they respond less to such public 'interests' as the 'private' interests of those individuals and bodies possessing access to press for a ruling. Consequently, they risk registering false positives in the manner typical of counter-majoritarian arrangements. That need not always be the case, as in some kinds of public interest litigation (Harlow 1999: 49-52). However, legal avenues tend to be exploited disproportionately by corporate bodies (Harding 1992). Used excessively, litigation can also stunt the evolution of

democratic, collective problem solving, and divert attention to ultimately self-defeating forms of individual redress, particularly in the area of compensation and liability (Harlow 1996). Unfortunately, the EU has actively encouraged such moves to make up for the democratic deficit, often under the banner of citizenship rights. In so doing, the EU is fuelling a more Americanised and adversarial legal culture, which favours those with deep pockets over the resource poor, compensatory over redistributive justice, and individual over collective benefits. In the process, ECJ decisions can undermine the interpretation of rights that people have made as democratic citizens of the member states. For example, a decision like *Watts*, making health services subject to 'free movement' and allowing individuals to escape waiting lists and other domestic forms of rationing by shopping for treatments elsewhere, undercuts the capacity of states to plan and favours mobile and articulate individuals at the expense of the poor. It also places courts in the quandary of making substantive decisions about an individual's health needs without any obligation to consider their knock-on effects for health and other policies (Newdick 2006).

Conclusion

This paper has defended the virtues of 'input' majoritarian democracy and pointed to various vices of 'output' orientated non-majoritarian and counter-majoritarian democracy. I have not looked at whether majoritarian democracy is plausible for the EU. Many commentators doubt that it is, at least for the foreseeable future. Size, lack of a common language and media, the absence of shared identities and affective bonds, and the presence of very diverse and well institutionalised national political cultures within the member states, all present powerful obstacles, though over the very long term not necessarily insuperable ones (Scharpf 1999a, 9-10; Bellamy, Castiglione and Shaw 2006; Weale 2005). However, the current trend, found in all the member states, is for democracy to be devolved downwards, towards smaller and more culturally homogenous units, rather than upwards, to larger and more diverse political entities (Kymlicka 1999).

Therefore, let us assume that satisfactory majoritarian mechanisms are not available to the EU and unlikely to be so.² In these circumstances, are imperfect non-majoritarian and counter-majoritarian mechanisms the best we can get? I noted how some commentators contend that the EU mainly deals with issues that are neither best handled by democratic politics nor electorally salient (Scharpf 1999a, 11-13; Majone

1996; Moravcsik 2002). Though I demurred from this analysis, it contains a kernel of truth. If we conceive of the EU as primarily an organisation for cooperation between democratic states rather than as a mechanism for transcending them, then different standards may legitimately apply. One could argue that such situations require arrangements to be mutually advantageous but not that they reflect more stringent criteria of justice that might call for redistribution (Miller 2008, 394-6). The reasoning here is that each of these states has its own internal systems of social justice for which its citizens are co-responsible through their equal participation within majoritarian systems of democracy. To the extent the wealth and survival of these states depends on cooperation with other states, it seems appropriate to share the costs and benefits of these arrangements equitably. To provide such agreements with democratic legitimacy it will be sufficient that the citizens of each member state are satisfied that this is an area where interaction and cooperation is desirable or necessary – for example in order to set fish quotas so fishing will be sustainable or to promote trade. Moreover, the surpluses generated by such accords need only be Pareto-improvements, with each party gaining to an equal degree from the resulting benefits subject to compensatory measures for temporary losers so that a ‘no wealth effects’ condition holds. For this latter purpose, a mix of non-majoritarian and counter-majoritarian mechanisms between state representatives will be justified since nothing in such a system suggests any change is required with the status quo so far as the relative standing of the parties involved is concerned – quite the reverse. From this perspective, the democratic deficit within the EU brought about by the absence of effective majoritarian democratic mechanisms is twofold. On the one hand, national electorates and parliaments, where these systems function well, ought to have a more decisive voice in deciding the scope and extent of the EU and the spheres it enters (Mair 2007). On the other hand, attempts to move towards majoritarian democracy within the EU become illegitimate, because they suggest an inappropriate role for an EU ‘people’ in judging its own competences and seeking a more egalitarian distribution among them that transcends national borders (Bellamy 2008, Weale 2005). In sum, the non-majoritarian and counter-majoritarian mechanisms of the EU can be legitimised so long as their scope and operation is controlled by the majoritarian systems of the member states – with them taking over this role from the ECJ. However, when removed from such control, they cannot offer pan-European decision-making with anything but spurious and ineffective democratic credentials.

Biographical Note Richard Bellamy is Professor of Political Science, UCL, University of London.

Address for correspondence Department of Political Science, University College London, 29/30 Tavistock Square, London WC1H 9QU

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NOTES

¹ Hix 2000 suggests the EP might act as a 'fire alarm', but its 'in put' credentials are weak.

² For the alternative scenario of establishing majoritarian democracy in the EU, see Hix 2008.

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