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MPIfG Working Paper 07/3

Fritz W. Scharpf

Reflections on Multilevel Legitimacy

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Max-Planck-Institut für Gesellschaftsforschung, Köln
Max Planck Institute for the Study of Societies, Cologne
July 2007

MPIfG Working Paper
ISSN 1864-4341 (Print)
ISSN 1864-4333 (Internet)

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Abstract

The function of legitimacy is to ensure voluntary compliance with unwelcome exercises of governing authority. Since practically all European law needs to be implemented and enforced by the governments and courts of the member states, the EU does not have to face its citizens directly. It follows that the legitimacy of European governance ought to be conceptualized at two levels. At one level, the legitimacy of member states is decisive for the compliance of individuals and firms, regardless of the ultimate origin – international, European or national – of the rules that demand this compliance. At the other level, the legitimacy of the European "government of governments" is decisive for the voluntary compliance of member states with the obligations imposed on them by the EU. What should be worrying however is the impact which EU governance – especially the rules of negative integration defined by politically non-accountable actors – may have on the legitimacy of member states, and ultimately on their capacity to comply.

Zusammenfassung

Legitimität hat die Funktion, die freiwillige Befolgung unwillkommener Autoritätsakte zu sichern. Da das Europarecht fast vollständig von den Mitgliedstaaten und ihren Gerichten umgesetzt und durchgesetzt werden muss, kommt es nicht zu einer unmittelbaren Konfrontation der EU mit ihren Bürgern. Deshalb sollte auch die Legitimität des Regierens in Europa als Zweistufen-Konzept diskutiert werden. Auf der einen Ebene bestimmt die Legitimität der Mitgliedstaaten die Reaktion der Bürger auf unwillkommene Regeln oder Entscheidungen, ohne dass es dafür auf deren internationale, europäische oder nationale Herkunft ankäme. Dagegen entscheidet die Legitimität der EU als „government of governments" darüber, ob die Mitgliedstaaten ihrerseits ihre europäischen Verpflichtungen freiwillig erfüllen. Anlass zu Besorgnis gibt allenfalls die Rückwirkung des europäischen Regierens – insbesondere der von politisch nicht verantwortlichen Instanzen definierten negativen Integration – auf die Legitimität der Mitgliedstaaten und letztlich auf deren Fähigkeit zur loyalen Umsetzung europäischer Regeln.

Contents

1 Democracy and multilevel polities

Ever since I started out as a political scientist in the late 1960s, I have worked on issues of democratic legitimacy and multilevel government, off and on. But I never did focus systematically on the relationship between the two. In my work on multilevel policy-making in German federalism, this relationship played only a marginal role – and I think for good reasons. In Germany, parliamentary democracy is institutionalized at both levels, national and regional. But German politics is so much focused on the national arena that Länder elections (which directly shape the party-political profile of the federal second chamber) have mostly become "second order national elections" – with the consequence of increasing the pressures of democratic accountability on the national government. Political scientists, it is true, tend to worry about the lack of political transparency under conditions of the "joint-decision trap" (Scharpf 1988), since the responsibility for national policy choices is shared among the federal majority and Länder prime ministers. But since dissatisfied voters are not obliged to be fair when they punish a government, blame avoidance is not a very promising strategy in German politics. So while I could talk about many things that are wrong with German federalism, a lack of political responsiveness to voter dissatisfaction would not be on my short list.

In my work on Europe, democratic legitimacy does indeed play a role (Scharpf 1999). I have no reason to retract anything that I have written on the subject – and I certainly will not bore you with a restatement. But I acknowledge that readers may have found my normative arguments somewhat inconclusive – and I tend to agree. The reason, I suggest, is that my arguments – in common with most of the literature – were focused on the European level, rather than on the implications of the multilevel characteristics of the European polity.

By focusing exclusively on the legitimacy of governing at the European level, we are tempted to refer to criteria that are also employed in defining the legitimacy of the democratic nation state. And once the issue is framed in these terms, we are inevitably involved in a comparative evaluation – which, depending on our meta-theoretical preferences, can then be conducted in a critical or an affirmative spirit.

In the critical mood, we will emphasize everything that European political structures and processes lack in comparison to (usually highly idealized) models of democratic constitutionalism at national levels (e.g., Greven/Pauly 2000; Follesdal/Hix 2006). The arguments, running from the fundamental to the more contingent, are too familiar to require elaboration: the lack of a European "demos" or of a "thick" collective identity, the lack of a common political space, the lack of a common language and of Europe-wide media of political communication, the lack of a political infrastructure of Eu-

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This paper was the keynote address on the occasion of receiving the "Award for Lifetime Achievement in the Field of European Union Studies" at the Tenth Biennial Conference of the European Union Studies Association on 18 May 2007 in Montreal, Canada.

rope-wide political parties, the absence of Europe-wide political competition, the low political salience of elections to the European Parliament, the limits of EP competencies, and hence the lack of parliamentary or electoral accountability for European acts of government. In short, the European democratic deficit exists and cannot be repaired in the foreseeable future.

In the affirmative mood, by contrast, we will emphasize features where the EU compares favorably to a more realistic view of political structures and processes in real-existing member states (e.g., Majone 1998; Moravcsik 2002). Institutional checks and balances at the European level are more elaborate and provide more protection against potential abuses of governing powers than is true in most member states. Moreover, many of the governing functions of the EU belong to a category which, even in the most democratic member states, is exempted from direct political accountability. On the other hand, explicitly political EU policies continue to depend on the agreement of democratically accountable national governments in the Council and on majorities in the increasingly powerful European Parliament. At the same time, EU institutions are likely to provide more open access to a wider plurality of organized interests than is true of most member governments. In short, the alleged deficit of democratic legitimacy exists mainly in the eyes of its academic beholders.

As you may have guessed: in my view, many of the arguments on either side have considerable *prima facie* support in empirical and normative terms, but most of them are also vulnerable to empirical and normative challenges. Moreover, they are not generally in direct contradiction to each other, but tend to be located on different dimensions of a political property space – so that, even in the case of empirical agreement, the pluses and minuses could not be aggregated in a single evaluative metric. This may explain the ambivalence of my own arguments, and it surely must also affect the evaluation of EU legitimacy by other authors who are not committed *ex ante* to either a critical or an affirmative position.

2 Legitimacy – functional, normative and empirical

What I now want to add to this reinterpretation is the intuition that the ambiguities could be reduced, though not overcome altogether, if discussions of political legitimacy in the European polity were explicitly located in a multilevel framework. To make my point, however, I also need to distinguish between three perspectives on political legitimacy – the functional, the normative, and the empirical.[1]

1 Hurrelmann (2007) also proposes a multilevel framework, and he also focuses on "normative" and "empirical legitimacy." Since he pays no attention to the functional perspective, however, his operationalization of empirical legitimacy differs from mine.

In my view, the functional perspective is basic in the sense that it must also provide the reference for concepts of normative and empirical legitimacy. It addresses the fundamental problem of political systems – to find acceptance for exercises of governing authority that run counter to the interests or preferences of the governed (Luhmann 1969: 27–37). Such acceptance may be motivated by an expectation of effective controls and sanctions or by widely shared (and hence socially stabilized) beliefs that imply a moral obligation to comply. Both motives may or may not coexist. But in political systems that cannot also count on voluntary compliance based on normative legitimating beliefs, effective government would depend entirely on extensive and very expensive behavior controls and sanctions, and perhaps also on the repression of dissent and opposition. In other words, legitimacy is a functional prerequisite of efficient and liberal forms of government.

In the normative perspective, therefore, political philosophy and public discourses will propose and criticize arguments that could support an obligation to obey under conditions where compliance would violate the actor's interests and could be evaded at low costs. In modern, Western polities, such legitimating arguments tend to focus on institutional arrangements ensuring democratic participation, the accountability of governors, and safeguards against the abuses of governing powers.

From an empirical perspective, finally, what matters is the compliance with exercises of governing authority that is based on legitimating beliefs, rather than on threats and sanctions. The focus of empirical research may thus be either on beliefs or directly on compliance behavior. In both cases, however, empirical findings will encounter problems of theoretical validity. In the first case, the notoriously loose coupling of professed beliefs and actual behavior should make us hesitate to put too much weight on Eurobarometer data suggesting general support for, or trust in, EU and national institutions.[2] By contrast, actual compliance behavior might be caused by the fear of effective sanctions as well as by strong legitimating beliefs. That would be less of a problem with data about non-sanctioned political behavior expressing greater or lesser support for governing authority. Thus, falling electoral participation rates, growing electoral volatility, more rapid government turnover, the rise of radical or system-critical political parties and an increasing incidence of violent protest could all be taken as valid indicators of declining political legitimacy. But since legitimacy should sustain actual compliance even in the absence of effective enforcement, one might also interpret increasing tax evasion, corruption and rising crime rates as indicators of declining political legitimacy.

If we now try to make use of these perspectives in evaluating political legitimacy in the multilevel European polity, it is clear that normative criteria can be discussed by reference to either the European or the national level. In the empirical perspective, however,

2 Hurrelmann (2007) shares these reservations and relies on comments in the quality press instead. This permits more differentiated analyses, but is even further removed from compliance. behavior.

the situation is different. While public opinion data may include questions referring to both levels, the quality of the responses and their causal significance remain dubious at best. Information on the behavioral indicators, by contrast, which would be of obvious causal relevance, seems to be available only for national polities. Worse yet, it seems practically impossible to define behavioral patterns from which theoretically valid inferences of the greater or lesser acceptance of the Union's governing authority could be derived. Upon reflection, the reason appears clear: the EU does not have to face the empirical tests of political legitimacy because it is shielded from the behavioral responses of the governed by the specific multilevel characteristics of the European polity.

In contrast to federalism in the United States (where the national government has its own administrative and judicial infrastructure at regional and local levels), practically all EU policies must be implemented by the member states. Yet, unlike German federalism (where most national legislation is implemented by the Länder and communes), political attention and political competition in Europe are not concentrated on the higher (i.e., European) level. European elections are not instrumentalized by political parties to shape European policy choices, and they are not perceived by disaffected voters as an opportunity to punish the EU government. In short, with very few exceptions (mainly where the Commission may prosecute business firms for a violation of competition rules), the EU does not have to confront the subjects of its governing authority, neither directly on the street nor indirectly at the ballot box.

Instead, it is national governments who must enact and enforce European legislation. In the BSE scare that had been badly mishandled by the EU (Vos 2000), it was they who had to slaughter and destroy hundreds of thousands of healthy cows when EU rules did not allow the export of meat from herds that were inoculated against BSE – and of course it was they who had to call out the police when protesters tried to block the massacre. As a consequence, two national ministers had to resign in reaction to rising voter dissatisfaction[3] – just as national governments must generally pay the electoral price if voters are frustrated with the effects of EU rules on food standards, state aids, public procurement, service liberalization, takeover rules or university admissions.

By contrast, the EU is not directly affected either by an erosion of political support or by an erosion of voluntary compliance among the target population of its governing authority. Since that is so, it is essentially correct to say that, in relation to private citizens, the empirical legitimacy of the EU's governing authority depends entirely on the legitimacy resources of its member states.

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3 See Imort (2001). Germany had committed to destroy 400 000 cows, but after violent protests by animal protection groups (and some recovery of the beef market) only 80 000 cows were ultimately killed. A play-by-play chronicle of the BSE crisis in Germany is provided in <www.netdoktor.de/feature/bse/creutzfeldt_jakob_chronik.htm>.

3 Two normative implications

From a normative perspective, this empirical conclusion has two major implications. The first is that the legitimacy of the EU cannot, and need not, be judged by reference to criteria and institutional conditions that are appropriate for judging democratic nation states. It is true, as EU lawyers do not cease to emphasize, that the direct effect of EU law has bestowed directly enforceable *rights* on firms and individuals – first economic rights and now even citizenship rights. Yet if the function of legitimacy is to motivate compliance with *undesired obligations*, what matters for the EU is the compliance of governments, parliaments, administrative agencies and courts within member states – which, incidentally, has always been the focus of empirical compliance research, including the one that just received EUSA's best book award (Falkner et al. 2005; see also, Börzel et al. 2007).

Empirically, therefore, the EU is best understood as a government of governments, rather than a government of citizens. In that role, moreover, it is extremely dependent on voluntary compliance. Unlike national governments, which can and do reinforce normative obligations with the threat of effective and potentially very drastic enforcement measures, the EU has no enforcement machinery which it could employ against member governments: no army, no police force, no jails – even the fines which the Court may impose in Treaty violation proceedings could not be collected against determined opposition.

If this is acknowledged, the normative discussion of EU legitimacy should also focus primarily on the relationship between the Union and its member states and on the normative arguments that could oblige their governments to comply with undesired EU rules. Now if the same question were asked in the German multilevel polity, a sufficient answer would point to the superior input legitimacy of political processes at the national level. Länder governments refusing to comply with federal legislation would thus violate the principles of popular sovereignty and representative democracy. Since the same answer could not be given for the EU, considerations of output legitimacy would necessarily have greater weight here.[4]

From the perspective of member governments it would thus be relevant to ask in what ways and to what extent membership of the European Union increases or reduces their capacity to ensure peace and security and to improve the welfare of the societies for which they are responsible. If national discourses on European legitimacy were framed in these terms, much of the present sense of malaise might evaporate.[5]

4 Hurrelmann (2007) found that evaluations of the EU in the German and British quality press also emphasized output-oriented criteria.

5 On the crucial importance of national discourses on the EU for legitimacy at both levels, see Schmidt (2006, chapter 5).

My main concern, however, is with the second implication of the multilevel perspective on political legitimacy. If the Union depends so completely on its member states, then the potential effects of EU membership on their legitimacy should also have a place in normative analyses. These effects may be positive or negative. Most important among the positive effects is surely the maintenance of peaceful relations among European nations which, for centuries, had been mortal enemies. At the same time, European integration helped to stabilize the transition to democracy: first in West Germany and perhaps also in Italy, then in Greece, Portugal and Spain, and then again in the Central and Eastern European accession states (Judt 2005).

More generally, one should think that the EU is strengthening the political legitimacy of its member states because it is dealing with problems that could no longer be resolved at national levels. While this argument has analytical merit, it is surprisingly difficult to substantiate empirically.[6] In any case, moreover, it would need to be balanced against the possibility that many of the problems with which member states now must cope have been caused by European integration in the first place, and that these may weaken political legitimacy at the national level (Bartolini 2005). It is these possibilities to which I will now turn.

4 European constraints on the political legitimacy of member states

There is no question that the EU is imposing tight constraints on the capacity for autonomous political action on the part of its member states – in monetary policy, in fiscal policy, in economic policy and in an increasing range of other policy areas. But to think that these constraints could undermine political legitimacy at the national level still seems a surprising proposition. Given the central role of national governments, not only as "masters of the treaties" and as unanimous decision-makers in the second and third pillars, but also in legislation by the "Community Method" in the first pillar, in Comitology and in the Open Method of Coordination, one ought to think that these constraints are mostly self-imposed, and probably for good economic and political reasons (Garrett 1992; Moravcsik 1998; Moravcsik/Sangiovanni 2003). In other words, *volenti non fit iniuria*?

This is a fair argument as far as it goes. But it does not go very far for two reasons. First, the argument applies only to the "political modes" of EU policy making in which the

6 There is reason to think that political legitimacy in relatively poor accession states has been strengthened by the high rates of economic growth that could be achieved through a combination of European subsidies with unconstrained tax and wage competition. By contrast, the economic benefits of integration for the Union as a whole appear much more doubtful (Ziltener 2002; Bornschier et al. 2004).

governments of member states have a controlling role, but it does not apply to the "non-political modes" in which the Commission, the Court and the Central Bank are able to impose policy choices without any involvement of member governments, or the European Parliament for that matter (Scharpf 2000). I will return to this in a moment.

Moreover, even for political choices, the argument holds only the first time around, when the EU is writing on a clean slate. Here, unanimity or very high consensus requirements will indeed prevent the adoption of policies that would violate politically salient interests in member states. And if no agreement is reached, national capabilities – whatever they may amount to – will remain unimpaired. But once the slate is no longer clean, these same consensus requirements will lose their benign character. Now, existing EU rules – whether adopted by political or non-political modes – are extremely hard to amend in response to changed circumstances or changed political preferences. European law will thus remain in place even if many or most member states and a majority in Parliament would not now adopt it. This constraint may be felt most acutely by recent accession states who have had to accept the huge body of existing European law as a condition of their membership, and who have little or no hope of later changing those parts of the *acquis* that do not fit their own conditions or preferences.

What matters even more here, however, is how the high consensus requirements of the political modes increase the autonomy and the power of EU policy making in the non-political modes (Tsebelis 2002, chapter 10). In the case of the European Central Bank, it is true, the impotence of politically accountable actors was brought about intentionally (though perhaps unwisely) by the governments negotiating over the Monetary Union. The same cannot be said, however, for the non-political policy-making powers of the Commission and the Court.

Of course, the Court's responsibility to interpret the law of the Treaty and secondary European law was also established intentionally, as were the Commission's mandate to prosecute, and the Court's powers to punish Treaty violations. What was not originally foreseen, however, was the boldness with which the Court would establish the doctrines claiming "direct effect" and "supremacy" for European law (DeWitte 1999; Alter 2001) – and how these would then allow it to enforce its specific interpretation of very general Treaty commitments. What also could not have been known in advance is how the potential range of the Court's powers of interpretation could be strategically exploited by the Commission if and when it chose to initiate Treaty violation proceedings against a member state – and how successful prosecutions against some governments would then be used to change the political balance in the Council in favor of directives proposed by the Commission which otherwise would not have been supported by a qualified majority (Schmidt 2000).

Moreover, the substantive range of judicial legislation is greatly extended by the fact that its exercise is practically immune to attempts at political correction. If the Court's decision is based on an interpretation of the Treaty, it could only be overturned by an

amendment that must be ratified in all twenty-seven member states. Given the extreme heterogeneity of national interests and political preferences, this is not an eventuality that the Commission and the Court need worry about. Nor is the situation very different for interpretations of secondary EU law. In fact, the inevitable compromises between national interests favor vague and ambivalent formulations in EU regulations and directives that are effectively invitations to judicial specification. Attempts at political correction would then depend upon an initiative of the Commission and the support of qualified majorities in the Council, and if the Council should wish to change the Commission's proposal, it could only do so through a unanimous decision. As a consequence, the potential for judicial legislation is greater in the EU than under any national constitution.

5 Negative integration and empirical legitimacy?

But why should one think that the non-political powers of the Commission and the Court could interfere with the political legitimacy of EU member states? A general argument might point to the inevitable loss of national autonomy and control and the reduced domain of democratically accountable governing. Instead, I wish to present a narrower argument that focuses on a specific vulnerability of national political legitimacy to the rules of negative integration that are being promoted by judicial legislation.

On the first point, I return to the distinction between normative and empirical perspectives on legitimacy. In normative discourses, the focus is on the vertical relationship between governors and the governed. What matters are institutional arrangements ensuring, on the one hand, responsive government and political accountability and preventing, on the other, the abuse of governing powers through the protection of human rights and the rule of law. At the empirical level as well, trust in the effectiveness of these vertical safeguards must play a significant role in legitimacy beliefs.

But that is not all. Voluntary compliance also has a horizontal dimension in which individual subjects will respond to perceptions of each other's non-compliance. In game-theoretic terms, this relationship can be modeled as an n-person prisoners' dilemma, in which compliance must erode in response to information about unsanctioned non-compliance (Rapoport 1970). This theoretical intuition is confirmed both by empirical research on tax evasion (Levi 1988) and on the survival or decline of cooperative institutions (Ostrom 1990) and by experimental research (Fehr/Fischbacher 2002) – all of which demonstrate that voluntary compliance with rules, whether imposed or agreed upon, does indeed erode as a consequence of perceived non-compliance. Why should I remain law-abiding if others are allowed to get away scot-free? Hence we must assume that effective legitimating beliefs will also include expectations of a basic mutuality and

fairness among citizens and of a basic reciprocity between the consumption of public goods and the obligation to contribute to their production (Rothstein 1998). It is these expectations which are vulnerable to the removal of national boundaries through negative integration (Scharpf 1999, chapter 2).

Even in the original EEC Treaty, governments had signed sweeping commitments to negative economic integration. Customs duties and quantitative restrictions to free trade and "all measures having equivalent effect" were to be prohibited; obstacles to the free movement of persons, services and capital should be abolished; undistorted competition in the internal market was to be ensured; and any discrimination on grounds of nationality was to be ruled out. In the original understanding, however, these were political commitments whose more precise meaning and reach would in due course be spelled out through further negotiations between governments and through political legislation at the European level – and whose consequences could be controlled through re-regulation at the European level.

Under the unanimity rule, however, political progress toward market integration was slow. Beginning in the early 1970s, therefore, the Court began to give direct effect to these Treaty commitments. But given the intrinsic limitations of judicial power, it could only strike down national regulations that impeded free trade and free movement; it could not itself re-regulate the underlying problems at the European level. The resulting asymmetry was only somewhat reduced when the Single European Act introduced the possibility of qualified majority voting in the Council for regulations implementing the Internal Market program. Where conflicts of interest among member states are politically salient, European regulations can still be blocked very easily, whereas judicial legislation continues to extend the reach of negative integration (Weiler 1999).

This asymmetry of negative and positive integration has effects that may undermine expectations of reciprocity at the national level. Now capital owners may evade or avoid income and inheritance taxes by moving their assets to Luxembourg; firms may relocate production to low-cost countries without reducing their access to home markets; local service providers may be replaced by competitors producing under the regulations and wages prevailing in their home country; national firms may avoid paying the "tax price" for their use of public infrastructure by creating financing subsidiaries in member states with the lowest taxes on profits; and the latest series of ECJ decisions allows companies to evade national rules of corporate governance by creating a letter-box parent company in a low-regulation member state. Many of these examples – and the list could easily be extended – can be interpreted as a consequence of neo-liberal and free-trade economic preferences in the Internal Market and Competition directories of the Commission and on the Court (Gerber 1994; Höpner/Schäfer 2007).[7]

7 On the basic affinity between multilevel governance and neo-liberal policy preferences, see Harmes (2006).

But this motive alone can no longer explain the full range of Court-imposed rules of negative integration. A dramatic recent example is provided by a decision striking down, as discrimination on account of nationality, an Austrian regulation of admissions to medical education that had required applicants from abroad to show that they could also have been admitted in their home country (C-147/03, 20 January 2005). The Austrian rule had tried to deal with the disproportionate inflow of applications from Germany, where admissions are restricted by stringent *numerus clausus* requirements – and when this was voided by the Court, the proportion of applicants from Germany rose to 60 percent in some Austrian universities. In response, Austria passed a new rule limiting admissions from abroad to 25 percent of the total – against which the Commission again initiated Treaty violation proceedings that are presently on their way to the Court.

As an exercise in legal craftsmanship, the decision seems surprisingly weak: it is based on Article 12 of the EC Treaty – which, however, does not prohibit discrimination on grounds of nationality per se, but only "within the scope of application of this Treaty." Yet nothing in the present Treaty (nor even in the draft Constitutional Treaty – Art. III – 282) empowers the Union to regulate university admissions. Instead, Articles 3 and 149, to which the Court referred, merely authorize the Community to make "a contribution to education" (Art 3, 1 EC) and to "encourage mobility of students and teachers" (Art. 149, 2 EC) – but with the explicit proviso that such actions should be limited to recommendations by the Council and to "incentive measures, excluding any harmonization of the laws and regulations of member states" (Art. 149, 2 and 4 EC). In other words: the "masters of the treaty" have ruled out EU legislation that could regulate admissions to member states' universities.

Moreover, these restrictions were explicitly introduced in the Maastricht Treaty to limit the expansion of the EU's role in education. Yet the Court merely cited its own *pre-Maastricht* precedent (193/83, 13 February 1985) that had had no textual basis in the Treaty, to assert that access to vocational education was within the scope of the Treaty. Apart from the arrogance with which political corrections of judicial legislation are ignored here, the decision appears remarkable for its completely one-sided concern with maximizing educational mobility and (in contrast to the legal situation among the American states) in ruling out any preference for residents of the country where the taxes are raised that finance higher education. This is like saying that the EU entitles you to claim access to a dues-financed club even if you (or your family) are not assuming the burdens of membership. Similarly, there is no concern for the structural problems Austrian medical education and medical practice will face if half or more of the available places go to students from abroad that are most likely to leave the country after graduation.[8]

8 Apparently, Austria has a shortage of doctors as well as a perceived general need to expand its university education in spite of tight budget constraints. Having to introduce restrictive admissions examinations, as the Court had suggested, in order to contain the flood of German applicants would thus be counterproductive.

This is a remarkable position which, as I said, is not logically connected to the free-market fundamentalism that may explain liberalization decisions in other areas. Instead, it must be seen as the expression of a more general pro-integration bias that treats any progress in mobility, non-discrimination and the removal of national obstacles to integration as an unmitigated good and an end in itself. In this regard, the case is by no means unique. As Dorte Sindbjerg Martinsen has shown in a fascinating series of papers, the same pro-integration bias has also been driving the case law that is progressively removing the boundaries shielding national welfare systems.[9] Its intensity is revealed by the variety of Treaty bases which the Court invoked to move forward in the same direction from one case to the next – relying sometimes on the protection of migrant workers, sometimes on the freedom of service provision, sometimes on non-discrimination, and sometimes on the new chapter on "citizenship of the Union." Moreover, when governments managed, by unanimous decision in the Council, to force the Court to retreat on one front, the ground was recovered a few years later by decisions relying on another Treaty base (Martinsen 2003, 2005a, 2005b, 2005c, 2007).

This quasi-unconditional preference for more integration through the removal of national boundaries has consistently characterized the policies proposed by the Commission and enacted by the Court. Their preference is widely shared by academic specialists in European law, who not only admire, and contribute to, the evolution of a largely autonomous legal system (Craig/Búrca 1999), but also praise the functional effectiveness of "integration through law" under conditions where political integration has been weak (Weiler 1982; Cappelletti et al. 1985). Nearly the same admiration is evident in political science studies of the judicial edifice (Alter 2001; Stone Sweet 2004) and, more generally, in the way Europeanists in the social sciences view the "constitutionalization" of the European polity – whether achieved through "stealth" and "subterfuge" or through explicit political action (Héritier 1999; Rittberger/Schimmelfennig 2006).

This pro-integration bias, I hasten to add, is most plausible and respectable, considering the horrors of our nationalistic pasts and the manifold benefits that we derive from the progress toward an "ever closer Union." But as long as the asymmetry between political immobilism and judicial activism persists, progress is mainly achieved by non-political action, which – since the judicial power to destroy far exceeds its capacity to create – is bound to favor negative integration. The mere removal of national boundaries, however, is likely to deepen the divide between the mobile and the immobile classes in our societies, and between the beneficiaries of integration and those who have to pay its costs in terms of unemployment, lower wages and higher taxes on the immobile segments of the tax base. If left unchecked, the split is dangerous for member states if it undermines the sense of mutuality and reciprocity at the empirical base of national legitimacy. And it is dangerous for the Union if it weakens the willingness or the ability of member states to maintain the voluntary compliance on which the viability of European integration continues to depend.

9 See also the magisterial study by Maurizio Ferrera (2005), which, however, is surprisingly optimistic about the possibility of a recreation of boundaries at the European level.

6 So what could be done?

To summarize: a multilevel perspective on legitimacy in the European polity suggests a change of emphasis in current normative and empirical discussions. As long as the EU is able to rely on the voluntary compliance of its member states, the alleged European democratic deficit loses much of its salience. Instead, the structural asymmetry between the immobilism of political modes of EU policy-making and the activism of non-political modes of EU policy-making appears more worrying. Moreover, there is a danger that the unrestrained pursuit of economic and legal integration may weaken the political legitimacy of member states and endanger the voluntary compliance of governments with EU rules that violate salient national interests.

But it is difficult to see how this danger might be avoided. There is apparently no way of persuading the Commission and the Court to use their non-controllable power in a more balanced way that would give more weight to the national problems that are created by the inexorable progress of negative integration. So, if judicial self-restraint cannot be counted upon, one should seek ways to increase the European capacity for political action. Given the high consensus requirements and the heterogeneity of national interests in EU 27, however, this seems a remote possibility. I am also deeply skeptical of proposals to invigorate the political modes of EU policy-making through political mobilization and the politicization of EU policy choices (Follesdal/Hix 2006; Zürn 2006). I agree with Stefano Bartolini (2005) that the most likely outcome, under present institutional rules, would be increased conflict and even less capacity for political action – as well as frustration and increased alienation among disappointed citizens. And, for reasons explained elsewhere (Scharpf 1999), I would be even more skeptical of institutional reforms that would reduce the veto power of the Council in favor of majority rule in the European Parliament.

Instead, one might think of creating a defense for politically salient national concerns that avoids the disruptive consequences of open non-compliance and that does not depend on the good will of the Commission and the Court. A while ago I suggested that this could be achieved through a form of politically controlled opt-outs (Scharpf 2006). Member states could then ask the Council to be exempted, in a specific case, from a particular EU rule which in their view would violate highly salient national interests. I still think this would be a good idea: the Council could be counted upon to prevent opt-outs at the expense of other member states, but in the absence of significant externalities it would also have more sympathy with the plight of a fellow government than could be expected from the Commission or the Court. At the same time, the prospect that one could later apply for an opt-out might facilitate agreement in the Council on new EU legislation and thus strengthen the political modes of EU policy-making. As far as I know, however, this idea has not found any takers.

So I must leave it at that. I certainly cannot say that I have a solution. Yet I am persuaded that there is indeed an important problem – on which, as we used to say, much research remains to be done.

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