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Complex Citizenship and Legitimacy in Compound Polities (MLPs and MLG): The EU as Example¹

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The traditional concepts of sovereignty, nationality, citizenship, identity and loyalty (the holy trinity of sovereignty, citizenship and national identity) are one-dimensional and monolithic. They are losing plausibility in a world where political entities increasingly overlap, horizontally and vertically, national competences are being decentralized or transferred to suprastatal entities such as the EU, and in addition we are seeing manifold shifts from traditional *government* towards *governance*. The duplication and intertwined development of multi-level polities and new forms of governance² has been stimulated by a widely shared realization of the limited effectiveness and problem-solving capacity of traditional national government and administration. Practitioners of political philosophy, legal theory and political theory and the corresponding social sciences therefore need to reflect afresh on their inherited basic principles, instead of judging the more complex socio-political reality by the yardstick of antediluvian, simple principles and normative standards, which lead them to condemn it without further ado. Political theorists need to go back to school if they are not to miss the connection with changing institutions and moral intuitions. *Sovereignty* – like its historical twin, *private property* – needs to be seen again as a package of powers and rights that can be – and are – divided, limited and delegated. *Citizenship* needs to be seen again as a differentiated, multi-layered and compound concept (cf. Appendix), and political theorists need to realize finally that individual and collective *identities* and *loyalties* (including national ones) are superimposed on one another, displace one another, and are defined and redefined depending on the context and the situation.

A brief historical review will confirm these more or less commonplace realizations. In the European Middle Ages citizenship was a multi-level concept; at the same time, however, it was not a right but a privilege of certain estates (*privilegium, immunities*). This estate system was destroyed by the absolutist ideology and practice of the modern era. People became citizens in the sense of subjects. The fact that citizenship had an inherent tendency towards equality in the relationship of subjects to one another and to their rulers was a precondition for the concept of citizenship to develop and potentially be extended to all subjects of a state. The democratic revolutions and their theorists (Rousseau, Kant) went on to proclaim these same subjects as politically active citizens with equal rights and duties conferred upon them irrespective of class, estate, education or ascriptive criteria. The principle of ‘one man one vote’, which stands for the abolition of estate privileges, characterizes the gains from immediatization; to the extent that this went hand in hand with the devaluation or loss of all other forms of multi-level citizenship, however, it was ambivalent (cf. Bader, 2007a).

¹ Based on my article ‘Komplexe Bürgerschaft’ in Zurbuchen, S. (ed.), *Bürgerschaft und Migration*. LIT, Münster, pp. 53–90.

² Terms such as ‘negotiating government’, ‘reflexive government’ and ‘neo-corporatism’ are often employed in this connection.

Present-day concepts of democratic citizenship, which express fundamental normative principles such as freedom, equality and autonomy, are still under the grip of this ambivalence. Social contract theorists from Rousseau to Habermas have regarded the *basic principle of democratic legitimacy* as meaning that those who are subjected – directly or indirectly – to rule, especially to the threat or use of force, should have a say in the rules, institutions and persons of the respective rulership (the identity principle, ‘addressees as authors’). This democratic right is as correct as it is *underdetermined*, since it leaves the following important questions unanswered:

- (1) Who should be *members* of democratic rulerships and why? It should be remembered that membership of polities and organizations is historically contingent, and non-members do not have a democratic say in this (cf. Bauböck, 1994 on states).
- (2) What are the various relevant *territorial units* of democratic political rule?
- (3) What are the various *socially* relevant private-sector socio-economic organizations and institutions?

Dominant classical and present-day liberal and republican democracy theory bridges this gap of underdetermination with monistic institutional assumptions: the relevant units are political rulerships, in particular nation states, and democratic legitimacy is sovereignty of the people. These hypotheses have always been contentious, and nowadays they prove inadequate mainly for the following reasons:

- (1) Principles and practices of nationality and citizenship inherently go hand in hand with illegitimate *exclusion* (cf. Bader, 1995, 1997 and 2005).
- (2) The focus on political rule, in particular state rule, obscures *domination or rule in private-sector* economic and social organizations and institutions.
- (3) The focus on state rule obscures non-state forms of political rule, the *multi-level structure* of political systems.
- (4) They ignore *non-political sources* of democratic legitimacy, tending to restrict democratic political legitimacy to *parliamentary legitimacy* (seeing the national legislature as the centre of democratic legitimacy).
- (5) In modern, functionally differentiated societies the *state* – entirely irrespective of controversial globalization theses – can *no longer* really be regarded as the *centre or summit of society*.³

Dominant democracy theories are based on decidedly uncritical domination or rule theories, outmoded theories of society, and inherited theories and models of political institutions. The correct democratic claim, that everyone subjected to rule should have a say, needs to be disentangled from the unitary monistic assumptions and reformulated. In my opinion we can still learn today from the rich tradition of institutional pluralism,⁴ which has contributed substantially to the design of institutionally pluralist arrangements. Institutional pluralism offers better cognitive and normative opportunities than monism for bridging the gap of underdetermination. Citizenship and democracy relate not only to the state but also to all the political and social entities at every level where rule is exercised. The developing theoretical and practical tradition of associative democracy that I’d like to advance is fully cognisant of this history (cf. Cohen/Rogers, 1992 and 1995; Hirst, 1994; Hirst/Bader, 2001 and Schmitter, 2000).⁵

³ For ‘loss or lack of governance capacities’ cf. Bader, 2001b.

⁴ Here I am thinking for example of the German historical school or the French and British institutionalists (cf. Hirst, 1989 and Bader, 2001c).

⁵ In the broader sense also papers on ‘empowered democracy’ (Unger, 1998), ‘empowered deliberative democracy’ (Fung/Wright, 2001 and 2003) and ‘directly-deliberative polyarchy’

My aim in this essay is not to summarize the rapidly growing literatures in political philosophy or theory which proposes concepts and practices of complex citizenship from the legal, political, social and cultural point of view and discusses their effects on exclusion/inclusion, democratic legitimacy, identity, loyalty, motivation and participation.⁶ Nor is it to sum up the exponentially growing social science literature that analyses multi-level polities and/or developing new forms of governance.⁷ Instead, I'd like to look at some problems and inevitable trade-offs from a constitutional and democracy theory perspective, distinguishing analytically and empirically as clearly as possible between problems inherent in multi-level polities (MLPs) and problems arising from new forms of multi-level governance (MLG),⁸ and discussing the various ways of solving them. I take the following considerations as my guide:

(1) In themselves MLPs and MLG are neither undemocratic nor democratic, but they suffer from *inherent difficulties regarding constitutional and democratic organization, control and legitimacy*, which we must face up to without ignoring or rejecting their considerable advantages.

(2) Compared with non-pluralist systems, *MLPs* do of course have considerable *advantages* when it comes to dealing with ethnic national (linguistic, cultural) and ethnic religious *diversity*, both in federal multi-national states and, clearly, in the EU (diversity gains). The *advantages of MLG* in functionally differentiated societies lie in better information, richer know-how and broader perspectives of problem definition (cognitive and normative framing), resulting from the early, institutionalized involvement of all the relevant stakeholders in every phase of the political decision-making process. This potentially increases problem-solving capacity (leading to better, more balanced, forward-looking, context-sensitive and situation-specific decisions) and above all the likelihood of effective and efficient implementation. In a word, MLG potentially offers *gains in efficiency and effectiveness*.

(3) The *normative judgment* of political systems is a *complex* matter, and it is well-known that there are tensions between the relevant moral, prudential and realistic criteria (cf. Bader/Engelen, 2003). Liberal democratic constitutions are historical compromises. There are conflicts, theoretically and often in practice, between the *moral* principles that they embody, as regards constitutional rule of law (due process, guarantees of civil rights) and democracy (e.g. majority decisions), so a balance needs to be struck between them.⁹ *Prudential* arguments judge political systems by efficiency criteria: lower cost is always to be preferred, all other things being equal. *Realistic* principles judge political

(cf. Cohen/Sabel, 2003; Sabel, 2003 and Zeitlin, 2005).

⁶ Cf. my own essays on the concept of citizenship (Bader, 1995 and 2007a), the issue of exclusion (Bader, 1997, 2002 and 2005), the issue of transnational culture and loyalty (Bader, 1997a and 2001a), citizenship, identity and loyalty in the EU (Bader, 1999 and 2007; Bauböck, 2007) and the relationship between patriotism and cosmopolitanism (Bader, 1999 and 2005).

⁷ Cf. Benz, 2001, 2003 and 2004; Hooghe/Marks, 2006; Schmitter 2000 and 2001 and Héritier, 2002 and 2003. Normative concepts, theories and standards of good or accountable governance have not kept pace with MLPs and MLG (cf. Hoekema et al., 1998 and Zeitlin, 2005a, p. 25). This is also true of concepts, theories and standards of democracy (cf. Schmitter, 2000; Scharpf, 2002 and Benz, 1995, 1998, 2000, 2001 and 2002).

⁸ Cf. also Schmidt, 2006. Terminologically preferable to MLG I and MLG II (cf. Hooghe/Marks, 2006), as otherwise the use of the term 'governance' gets out of hand (cf. also Treib et al., 2006). Unfortunately, Seibel/Zeitlin (2003) and Zeitlin (2005a, p. 4) do not make a clear distinction between MLPs and MLG in their enumeration of various components of the 'new experimentalist governance'.

⁹ For moral pluralism cf. Bader/Saharso, 2004 and Bader, 2007b.

systems by criteria of effectiveness. Clearly, the *tension between moral and prudential criteria* lies in the fact that constitutional rule of law and democracy can be comparatively expensive (at least in the short term). The *tension between realistic and moral criteria* is also clear and undisputed: maximizing security and the ‘war on terrorism’ are difficult to reconcile with constitutional principles, and democratic decisions are by no means always effective. The various trade-offs should be openly acknowledged and articulated before seeking ways of mitigating them. We need to look for balancing rather than optimizing or maximizing strategies, as there are no optimum solutions irrespective of context or situation, merely better or worse ones (benchmarking, best practice).

(4) Both normative sources of and claims to legitimacy and the empirical legitimacy of political systems are *highly complex* matters. The *constitutional legitimacy* of institutions is a particular variant of throughput (e.g. criminal process law) and output legitimacy (legal security/guarantees), whereas *democratic legitimacy* should be understood as a particular combination of input legitimacy (complex representation, equal access and equal opportunities for all) and throughput legitimacy (quality and fairness of deliberations and negotiations). Efficiency and effectiveness are both important sources of legitimacy or forms of output legitimacy, which should by no means be underrated; they cannot however be described as democratic legitimacy (as in Scharpf, 1999), as they are yardsticks for non-democratic political systems as well, and it is by no means preordained that (a) democracy and (b) effectiveness and efficiency simply reinforce one another (either in nation states or in the EU). This shows that legitimacy has many sources, especially when it is a question of the legitimacy of economic as well as political systems (the neo-functionalist legitimation of the EU). We also need to consider the social, cultural and identity foundations of political legitimacy (cf. Bader, 1989; Wiener, 1998, 2007 and Krauss, 2006 for the EU). Sadly, this is often forgotten in the standard debate on the EU’s notorious ‘democratic deficit’.

(5) MLPs and MLG should be compared with non-pluralist political systems (e.g. Westminster democracy in Great Britain) in a fair and nuanced manner, instead of contrasting idealized models of national democracy with the ‘muddle’ of the EU.¹⁰ Fairness also demands we acknowledge that the problems of both MLPs and MLG are neither completely new nor specific to the EU polity; well-known problems of member states are merely heightened in the EU, thus increasing the urgent need to develop new institutional and practical proposals.

(6) The decisive and urgent normative problem can be summed up as follows: what proposals would contribute to making MLPs and MLG in general, and the EU in particular, both *more constitutional* and *more democratic* (more transparent, open and inclusive, easier to control, and more representative and politically legitimate), without compromising or sacrificing *effectiveness and efficiency* as a result (cf. Héritier, 2003 and 1999) and losing out on the diversity and plurality of the interests they represent (cf. Benz, 2003, p. 12) being lost?

1 MLPs: problems, trade-offs and modest proposals

The main problems of MLPs – heightened in the EU – are well-known from the debate on federalism: those of the clear and effective distribution of the various administrative powers or competences (1.1), those of complex, compound democratic representation, participation and legitimation (1.2), and those of transparency and accountability (1.3).

¹⁰ Cf. Moravcsik, 2005, p. 369. Cf. also the balanced critique of Føllesdal/Hix, 2005.

1.1 The distribution of competences in MLPs

The problems of the division of powers, i.e. the normatively appropriate, efficient and effective demarcation, distribution and delegation of legislative, executive and judicial competences, are heightened in MLPs because the various competences are distributed among different levels and institutions: legislative competences are assigned to municipal councils, regional parliaments, federal parliaments and the European Parliament, executive competences to the various cooperating and competing departments of the municipal, cantonal, national and European authorities, and judicial competences to the administrative and constitutional courts (and in some cases courts of audit and ombudsmen) of the regions and the federation and to the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).

The main *advantages* of MLPs are:

- (1) They enable us to translate the minimum moral rights, which on a global level are generally articulated in more neutral and universalist terms (cf. Bader, 2007, Ch. 3), into legally relevant and binding conventions (the International Pact on Civil and Political Rights, the Geneva Refugee Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc.) and to hold states accountable in a court of law (the International Criminal Court, ECJ and ECHR).
- (2) They provide much broader institutional and political scope for morally legitimate ethnic national (linguistic, cultural) and religious diversity.
- (3) Compound democratic sovereignty permits significant – albeit limited – autonomy and democratic self-determination at lower levels (in the EU, for example, at that of member states, regions and municipalities).
- (4) Autonomy at these levels makes for better information, richer know-how, thus better decisions specific to the context and the situation and more effective implementation.

The main *disadvantages* of MLPs from a constitutional and democratic point of view are as follows:

- (1) It is legally possible to specify the distribution of competences (the powers, rights and duties of the various authorities and institutions) either *ex ante* (by grand design) or *ex post* – as a result of a laborious, long-term practical learning process – as far and as clearly as possible. The trade-off between (a) *specification* and (b) *effectiveness and efficiency* should not be underestimated, however. This has been discussed in detail in organizational, administrative and legal sociology (e.g. by Luhmann): the more detailed the rules (laws, measures), the less scope there is for discretion, which is particularly necessary in non-standardized contexts and situations if quick and appropriate decisions are to be taken.
- (2) As a rule, strict hierarchical coordination (tight coupling) results in loss of information, qualification and communication, only aggravating the *problems of effectiveness*.
- (3) Neither of the strategies popular with academic lawyers (specification and hierarchy) is able to prevent the familiar social and political *struggle for power* between particular authorities, or between ministries and civil service departments, that also characterizes non-pluralist states. Experience of federal states and the EU shows that with each new level MLPs provide fresh opportunities for rivalries and competence disputes of this kind (e.g. between regional, federal and European courts).
- (4) In MLPs a larger number of levels and actors are involved in decisions, formally and *de facto*. As we know, where unanimity, a qualified majority or co-decision-making is required this can result in joint decision traps (cf. Scharpf,

1988 for Germany and the EU), and more complex power structures and blocking situations can certainly be expected. The *rigidity or slowness* of decision-making systems of this kind can be an obstacle to reforms, even when everyone involved considers them necessary (for example, health and education reform in Germany, and the decision-making procedures in the Council of Ministers in the case of EU expansion).

Advocates of MLPs need to take these problems seriously and face up to them. Limitations of space merely permit to outline the *proposed solutions* that have been developed.

Re (1): the standards implemented in EU treaties and national constitutions are phrased in relatively general terms; there is substantial scope for making them more specific at the various lower levels.¹¹ National administrations are increasingly working with open-ended goals and general administrative measures and therefore have to develop functional equivalents to compensate for losses of legal security, democratic control and accountability. The EU Commission is also cutting down on the proliferation of rules by acknowledging the principle of subsidiarity and increasingly restricting itself to framework directives and minimum standards or, since Maastricht, the *open method of coordination* where goals are formulated jointly but ways and means left open.

Re (2): the disadvantages of strict coupling and vertical coordination both within and between organizations and levels can be overcome by complementing (not replacing!) them with loose coupling (cf. Benz, 1998 and 2003 for MLPs) and horizontal coordination (cf. Harlow/Rawlings, 2006 for the European Court of Justice, the member states' constitutional courts and courts of audit and ombudsmen). This means relinquishing unfounded claims to supremacy and finding suitable degrees of specification.

Re (3): the idea, particularly prevalent among academic lawyers, that competence disputes could be overcome by intensifying strict vertical coordination is naive. Loose coupling and overlapping competences are not a bad thing in themselves; while horizontal coordination (deliberation and negotiation) with no strictly specified rules admittedly aggravates competence disputes substantially, it also brings them to light as legitimate ones. A dispute can be defused and made productive if a shared awareness of the *urgency of the problems* and their potential solutions develops among the various actors at the various levels. Two factors are instrumental here: first, the political, administrative or judicial elite in question needs to develop a cooperative attitude if it is to deal productively with the divergent interests and cognitive and normative interpretative frameworks (cf. Jörges, 1999 and Hérítier, 1999 for the EU). Second, sufficient pressure needs to be exerted through public debate, social movements and NGOs to remind the official political actors and elites that there are urgent common problems that require solutions.

Re (4): Benz (1998) has shown that not all multi-level (joint decision) systems are caught up in joint decision traps, commonly shared approaches are not the only way out, and the greater complexity of the EU in fact offers additional ways of solving problems.¹² Hérítier (1999) has demonstrated under what conditions, for what

¹¹ In this respect too the constitutional treaty was the wrong approach, as it abandoned the tried and tested path of practical experimentation in favour of a strategy of 'grand institutional design' (cf. Zeitlin, 2005a, pp. 21ff. and de Búrca, 2003). While this did not fundamentally rule out innovations, it did not cast them in a suitable constitutional form.

¹² Cf. Engelen, 2001, pp. 145-48. Joint decision traps only occur when participants are delegates who are mandated and controlled in the strict sense, when none of them can act as a hegemon and none has a *de facto* opt-out power. In the EU not all actors are delegates, the Commission can often *de facto* play the role of a hegemon, and unanimity is complemented by flexible forms of cooperation and interaction between territorial and functional bodies at various levels.

problems and using what strategies impasses can be avoided in the EU. The price, however, that has to be paid for such strategies and processes – which Hérítier characterizes as ‘policies of subterfuge or stealth’ – is disarray and lack of transparency, openness and accountability (cf. Hérítier, 1999, pp. 97f. and 1.3 below) and a democratic deficit (cf. 1.2 below).

All in all it is fair to say that while MLPs should not be equated with destructive competence disputes, rigidity and inability to reform, these dangers are not easy to avoid. Theoretical imagination and practical experiments are therefore required (cf. Sabel/Zeitlin, 2003; Zeitlin, 2005a and Tully, 2006). The problems associated with MLPs are too often ignored by advocates of differentiated or plural citizenship, or at least not tackled satisfactorily, let alone solved.

1.2 Problems of democratic representation, legitimation and participation in MLPs

It is often forgotten in the debate on the commonly cited democratic deficit in the EU that the problems this refers to also occur in very similar form in member states with multi-level systems. Here I shall briefly outline the relevant types of democratic representation (1.2.1), the complex structure of legitimacy (1.2.2), and the problems of democratic participation in MLPs (1.2.3).

1.2.1 Three types of democratic representation in MLPs

Democratic representation is a complex affair in all states, but especially in multi-level systems. I distinguish between (a) direct and indirect forms of representation and (b) social or functional representation.

First, we need to consider that other modern democracies too – and not only Switzerland – do not rely solely on forms of indirect or representative democracy but have forms of direct democracy, e.g. people’s parliaments or various kinds of referendum at municipal, regional/provincial or federal level.

Second, modern democracies are necessarily indirect or representative, and moreover more or less *compound*.¹³ *Political electoral* representation (cf. Bartolini, e.g. 1999, p. 35) or *republican* representation (cf. Hérítier, 2003, p. 815) is based on the principle of ‘one (wo)man one vote’, which is organized in the form of elections of representatives to parliaments (which in turn elect the government) or the direct election of presidents or prime ministers, which may be organized in a trapped way themselves (e.g. in the US). Indirect representation is also characteristic of judges of constitutional courts, whose democratic legitimacy rests on complex nomination and selection procedures.¹⁴

In MLPs the individual territorial representation of the voters is complemented by the parallel representation of the governments of the various territorial subdivisions on councils, e.g. of the regions, cantons, provinces or states in the Bundesrat or Senate, or of EU member states in the Council of Ministers¹⁵ and in the Committee of the Regions: hence this is said to involve ‘dual representation’ or ‘dual legitimacy’. Thus the basic principle of ‘one (wo)man one vote’ is replaced by the

¹³ For the territorial ‘chain of representation’ cf. Benz, 2003, p. 10.

¹⁴ Half of the judges of the German Federal Constitutional Court are elected by the Bundestag (Lower House), the other by the Bundesrat (Upper House), in both cases by a two-thirds majority, for a term of twelve years. Re-election is not allowed. In the USA, on the other hand, the judges of the Supreme Court are appointed for life by Congress on the nomination of the President. The judges of the European Court of Justice are appointed by mutual agreement of the governments of the member states for a renewable term of six years. Neither the courts nor the judges, then, are totally lacking in democratic legitimacy (cf. 1.2.2).

¹⁵ Bartolini (1999, p. 35) refers in this connection to ‘territorial representation’, Hérítier (2003) to ‘executive representation’. Cf. Schmitter’s proposals for ‘proportionate proportionality’ (2000, pp. 82ff.).

principle that each subdivision must have an equal or proportionate number of votes. This departure from the individualist principle is based on the implicit or explicit recognition of internal ethnic national or religious diversity (group rights or group representation).

The *social* or *functional* representation of the relevant stakeholders (organizations, leaders) on *economic or social councils or commissions* is also a departure from the principle of individual representation, being based on the principle of an equal or proportionate number of votes. Various types of such ‘corporate representation’ (Bartolini, 1999, p. 35) are institutionalized in most member states and the EU itself (cf. 2 below).

To sum up, then, we can identify *three basic types of representation*: individual territorial representation of the electorate, group territorial representation, and social or functional group representation.

1.2.2 Complex democratic legitimacy

As this outline of institutionalized forms of democratic representation shows, the factors that legitimize modern democracies are composite and complex. As they are based on indirect as well as direct representation, forms of direct democracy are not per se more legitimate. Moreover, we know from the comparative political science of institutions that modern democracies display a vast multiplicity of institutional forms, and none of the national models is better than the others in every respect and every context. It would be wrong, therefore, to measure new MLPs such as the EU by the yardstick of national models and judge them from the point of view of the traditional political theory which remain rooted in these national contexts. MLPs are not more undemocratic or less legitimate simply because they operate on more levels and display indirect representation. The EU merely adds a new level to the two or three-tier national systems, thus increasing the complexity of representation and of democratic legitimacy.

It should also be emphasized that not only the EU but also many member states recognize both forms of group representation as legitimate, and even died-in-the-wool individualists among liberal or republican theorists regard the group representation of territorial subdivisions as legitimate – however much they may fulminate against social or corporate representation and especially minority representation. The stubborn prejudice that classic republican and liberal political theorists harbour against intermediate authorities is long obsolete, at least as regards political parties. It is now realized that in complex modern democracies the individual voice is often only noise: this is already true of forms of territorial representation, and *a fortiori* of functional representation, of course.

Democratic input legitimacy in the EU is based on the same logic as complex democratic representation. Whether it is necessary and prudent to strengthen the legitimacy of the institutional system or EU decisions *by direct democratic means*, in the form of referendums, is evidently a highly contentious issue, theoretically as well as practically.¹⁶ Compared with three-tier systems such as those of Germany or Switzerland, the developing institutions of the EU are clearly manifesting some major bottlenecks in terms of democratic representation, but these need to be overcome through democratic experiments rather than the kind of strategy of grand design that is implicitly or explicitly rooted in national models. Space does not permit discussion of these here.

Nuanced *democratic throughput legitimacy*, as already stated, depends on the fairness and quality of *deliberation and negotiation* in all the institutions and between all the tiers. If the EU’s institutions are to be judged or compared with those of the member states, this should be done fairly, rather than parroting ingrained prejudices

¹⁶ If this were to be done, it should entail legitimizing certain political decisions by Europe-wide referendums, which would have to be held simultaneously in all the member states.

and expressing selective indignation at the ‘horse-trading’ in the Council of Ministers, the Commission or the Committees. Studies on this subject point out the relatively high quality of deliberation and negotiation in the European Committees (cf. Jörges, 1999; Neyer, 2004 and Héritier, 2002).¹⁷

The *political legitimacy* of the EU depends not only on input but also on *output legitimacy*, in two respects. As regards guaranteeing constitutional procedures and fundamental rights, the European Court of Justice and the European Court of Human Rights are at least on a par with, if not superior to, the courts of the member states. This gives the EU *liberal constitutional legitimacy*, as is indeed more or less undisputed (cf. Weiler, 1999). The fact that the courts derive their legitimacy primarily from their constitutional role as ‘guardians of the constitution’, however, does not mean *eo ipso* – as is often assumed – that they therefore forfeit any democratic legitimacy (cf. 1.2.1.), even if their decisions could necessarily go against democratic majorities. A fair comparison between the efficiency, effectiveness and problem-solving capacity of the EU Commission and national executives would not necessarily be to the detriment of the EU if the implementation of the Commission’s decisions were not delayed, impeded or even blocked by member states, as is so often the case (cf. Héritier, 1999 and Knill/Lenschow, 2000).

Lastly, a more comprehensive analysis of the EU’s political legitimacy would also require a discussion of the *non-political sources of its political legitimacy*, e.g. the effectiveness and fairness of the economic and socio-political system it promotes or of its cultural resources, which cannot be included in the analysis here either.¹⁸

Against the background of such complex legitimacy-claims, the many questionnaires and results of Eurobarometer and other quantitative social science research on de facto legitimacy-beliefs appear rather paltry, merely reproducing the sociological artefacts of simplistic questions.

1.2.3 Problems of participation in MLPs

Political participation in the EU is also more complex than in the member states, as the EU adds a further tier as well as new political arenas and actors. Citizens of the various member states, EU citizens and immigrants from outside the EU (TCNs) have different participation rights, for instance. Participation is in itself selective: politically active citizens need to know at which levels the decisions in question are taken and by which bodies, and they have to decide whether and at what stage in the political cycle (definition of issues and problems, examination of alternatives, decision-making, implementation or auditing) it is worth their time and trouble to participate. Should I and can I participate effectively as a citizen of a district, town, region, country or the EU? This selectivity is heightened in MLPs, where the traditional limitations on participation (lack of time, expertise and information) that disadvantage the poorer and less educated sections of the population are even more keenly felt. Political participation in MLPs is more difficult for three reasons in particular.

¹⁷ The radical utopian yardstick of consensus would then have to be replaced with down-to-earth criteria of fair deliberation and negotiation (‘moderately agonistic democracy’: cf. Bader, 2007, Ch. 5; Wiener 2007, Tully @@@ and Zeitlin 2005a, pp. 4 and 10).

¹⁸ Similar arguments can be found in Lord and Magnette, 2004. For the vexatious debate on the lack of European identity and loyalty and the lack of a European nation cf. my critique and proposals in Bader, 2007. Also taken out of the equation is the debate on the legitimacy of the various forms of capitalism and of the various welfare institutions in the EU: both these problems had far more influence on the ‘No’ vote in the French and Dutch referendums than the substance of the constitutional treaty or the EU’s democratic deficit as such. Cf. also Fossum/Trenz, 2006.

First, politics in MLPs is often *not transparent* (many levels, many actors, co-decision and joint decision-making). The stakeholders either drown in a flood of unfiltered information or lack critical pieces of information.

Second, not only the problems that need to be solved but also the political process and decisions are increasingly ‘glocal’. Effective participation requires multi-level participation.

Third, participation at the higher levels is often crucial if changes are to be brought about at lower levels (EU directives and recommendations on immigrants from outside the EU, minimum standards for incorporation, dual citizenship, the ban on discrimination, gender mainstreaming, etc.). For minorities, however, effective participation at higher levels is even more difficult than at lower ones, as both power and mobilization resources and opportunities to organize and act are unequally distributed, particularly in the EU. Whether they are able to offset disadvantages of this kind temporarily with stronger motivation, greater input of time and energy and better mobilization is theoretically an open question, but initial studies suggest that this is unlikely.¹⁹ The introduction of *Euro vouchers* could at least lessen this dramatic inequality of resources (cf. Schmitter, 2000, pp. 25ff.).²⁰

1.3 Problems of transparency, openness and accountability in MLPs²¹

As we know, the problem of shaping all the phases of the political process transparently, openly and accountably is not easy to solve, also in states that do *not* officially subscribe to principles of institutional pluralism. The work of deliberation and negotiation, for instance, takes place not in parliaments but in committees and informal – but often institutionalized – contacts between the parliamentary party (*Fraktionen*) and national party leadership and representatives of government and the civil service. Often the only result of attempts (e.g. by means of legislation on public disclosure of administrative acts) to make administration more transparent is that no important things are written ‘on paper’, or of attempts to make the final stage of the legislative process public, is that the political negotiators in question retreat behind closed doors again (cf. Lord, 1998 and H eritier, 2003, p. 825).

Problems of transparency, openness and accountability are heightened in MLPs such as the EU by the fact that, even *on paper*, a large number of actors are involved (the problem of many hands) on multiple overlapping levels and various forums (the problem of many eyes), which makes it difficult to ascertain who decides, when, and about what.²² On top of this, there is a substantial increase in the scope for, and experience of, *informal practices* (cf. Farrell/H eritier, 2003).

To start with, the widespread preconception among democracy theorists, that openness needs to be optimized or maximized at all costs, should be countered with

¹⁹ For the labour movement and trade unions cf. Schmitter, 2000; for immigrant minorities cf. Koopmans et al., 2005; for global Internet regulations cf. Bernstorff, 2003. On top of this, potential new participants are not familiar with the agenda or the decision-making process, nor do they have established networks or access to the relevant institutions.

²⁰ See also Schmitter/Trechsel 2007. See Greenwood 2007 for subsidies and other opportunities provided by the Commission to partly rectify these inequalities. The theory of associative democracy is of course not able to solve this problem either (cf. Bader, 2001).

²¹ Often there is simply no distinction made between such concepts and criteria as ‘transparency’, ‘publicity’, ‘equity’, ‘democracy’, ‘efficiency’, ‘responsiveness’, ‘responsibility’, ‘integrity’, ‘accountability’ and ‘good governance’, which are used interchangeably (cf. Bovens, 2006, pp. 8f.). I confine myself here to (a) transparency and openness and (b) accountability in the narrow sense. Following Bovens I define the latter as ‘a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences’ (ibid., p. 9).

²² Bovens (2006, pp. 18f.) thus distinguishes between corporate, hierarchical, collective and individual accountability.

the argument that not only successful negotiations but also *productive deliberations* need to be protected from the public gaze, at least partially and for a time.²³ In other words, a larger or smaller trade-off needs to be accepted between (a) transparency and openness and (b) successful negotiation and deliberation. Constitutionality and democracy need to be offset against efficiency, effectiveness and problem-solving capacity. In essence the above argument by Lord applies ‘also to negotiations in groups and committees that advise the EU Commission. This, however, aggravates the problem of democratic legitimacy, as the representatives of these bodies are delegated by member states or represent associations that do not have a democratic mandate.’ (Héritier 2003, p. 825)

Comparisons between the EU and member states should of course be fair and nuanced, also as regards democratic control and accountability.²⁴ On this point I follow the approach of Bovens (2006, p. 20) and Harlow/Rawlings (2006), who apply a clear definition of accountability, pointing out moreover that democratic control and accountability can be organized both vertically (as is predominant in the traditional understanding) and horizontally or diagonally. When considering to whom bodies are accountable, we should distinguish between political, legal, administrative, professional and social accountability.

Political control and accountability in vertical or hierarchical terms²⁵ is a mirror image of the chain of representation (cf. Bovens, 2006, p. 16). In the EU the Commission is accountable to the Parliament and (through the latter) the European electorate; the Council of Ministers to the governments of the member states and (through them) the national parliaments and voters; the Committees to the Commission. In addition, all the bodies are policed, albeit indirectly and horizontally, by the political parties, the media and the general public.

Legal control and accountability, which are also vertical, are exercised by courts rather than parliaments, both in the member states and in the EU itself.²⁶ The European courts – the Court of First Instance and the Court of Justice – increasingly networked horizontally (cf. Harlow/Rawlings, 2006, pp. 8-19). As a result of the large increase in audits, *administrative* control by quasi-legal institutions has also increased in the EU (cf. Harlow, 2002, pp. 108ff.): the European Court of Audit (ECA) is not only complemented by the Office of the European Ombudsman but also by independent watchdogs, supervisors, anti-fraud agencies and auditors (cf. Bovens, 2006, p. 17), as well as legal protection for whistle-blowers. The work of these European institutions is increasingly effective; furthermore they are horizontally networked with national and local courts of audit and ombudsmen (cf. Harlow/Rawlings, 2006, pp. 19-27). Horizontal accountability, however, should complement vertical accountability, not replace it (cf. *ibid.*, pp. 30f.).

Professional accountability to peers and disciplinary courts and *social accountability* to interest groups, NGOs, specialist media and so on are particularly

²³ Public negotiations (on collective employment agreements, coalition agreements, EU treaties etc.) conducted by representatives of conflicting interests with strict mandates are unproductive because they do not leave any room for the necessary compromises. Productive deliberations that result in promising solutions, based on a redefinition of the cognitive or normative frames, the situation and the problem or the interests at stake, require continuity, trust and ring-fenced areas for experimentation. Zeitlin’s criticism – that deliberations in the Employment Committee, the Social Protection Committee and the Economic Policy Committee took place behind closed doors, hence their internal debates escaped public scrutiny (cf. Zeitlin, 2005a, pp. 12 and 23) – only shows that, unlike Føllesdal/Hix (2005, pp. 20f.) and Curtin (2003, pp. 57, 62, 64 and 67) he does not take this trade-off seriously.

²⁴ As far as I know there are no comparative empirical studies available.

²⁵ In this context Benz (2003, p. 10) refers to a ‘chain of control’.

²⁶ Even taking the work of parliamentary fact-finding committees into account this is still true. The Conference of European Affairs Committees (COSAC), on the other hand, networks the European Parliament with the national parliaments (cf. Harlow/Rawlings, 2006, pp. 29f.).

suited to improving the transparency and accountability of MLG. Here too the Commission has put forward and implemented many proposals in recent years,²⁷ although these have often blurred the distinction between *ex post* accountability and greater openness in the sense of broader representation of interests in the political process (cf. Bovens, 2006, p. 13) or *representative deliberation* (cf. Harlow 2002, p. 185).²⁸ While early information and broad political participation can obviate the disadvantages of *ex post* accountability (which is always ‘too late’), it makes those involved co-responsible, so they are no longer able to act as independent auditors.²⁹ It is important, therefore, to make a clear distinction between *participation* and *accountability*. This is another trade-off – one that has hitherto scarcely been acknowledged or even examined –, which is very important to the analysis of MLG.

2 MLG – problems, trade-offs and modest proposals

Even in national forms of MLG, functional or social democracy, representation, participation and citizenship present their own problems, of course, which will be briefly mentioned here.

First, MLG institutions should *not replace* the institutions of *territorial political democracy* but complement them (cf. Bader, 2001, pp. 35-38). At the same time, they should be autonomous in the sense that their proposals and decisions are not regularly overridden by parliament, the government or the civil service. In other words, MLG aggravates the problems of demarcation and competence disputes mentioned above.

Second, the following difficult questions need to be answered. What *areas of policy* (e.g. employment, research, social, health and environmental policy) and topics are *relevant* here? What interests are relevant here and who are the stakeholders? What *organizations and interest groups* are relevant here? What spokesmen effectively represent them? These questions cannot be decided independently of the political process and placed in a quasi-‘natural’ or ‘logical’ system. What is important politically is what is revealed by as many as possible of those concerned raising their voices as effectively as possible and asserting themselves publicly. What applies to territorial political representation also applies to social representation: *de facto* individual voice = noise. The individual participation of political citizens needs to be complemented and strengthened by political movements and parties, and that of economic and social citizens by *social movements and organizations*. This is the price we have to pay for a democracy that avoids paternalism (cf. Bader, 2003, pp. 146f.). As already mentioned, political representation is always *selective*, and social representation is of necessity even more selective, as the committees and councils that represent the various interests are not only talking machines but also working bodies that play an important role in the implementation of decisions (cf. Bader, 2007, Ch. 11 and Benz, 2004, pp. 883ff. for various parliamentary traditions in the EU). The important question – a politically controversial one – is therefore who decides and should decide on the minimum thresholds for representation and the democratic mandates of organizations.

Third, the problems of *transparency, openness and accountability* outlined above are aggravated by the transition from traditional government to new forms of governance in MLG, as the number and diversity of actors, arenas and issues, and above all of coordination, regulation and governance mechanisms, is growing substantially (cf. Treib et al., 2006): MLG in the EU is more complex than traditional

²⁷ Cf. Commission of the European Communities, 2001 and 2003, pp. 35-38.

²⁸ This is also true of Zeitlin (2005a, pp. 11f.) and Benz (2004, pp. 896f.).

²⁹ As Bovens (2006, p. 13) notes, ‘They provide proactive inputs into the policy process and should be classified and studied separately for what they are: forms of consultation and participation. They lack the element of justification, judgment and consequences.’ Cf. also Harlow/Rawlings, 2006.

government in the already highly complex multi-level systems of the EU. This heightens the trade-off – already discussed above in general terms with Héritier – between (a) transparency and openness and (b) efficient and effective problem-solving capacity. Input and output legitimacy do not simply reinforce each other, they are also not simply incompatible.³⁰ More to the point is how a large trade-off can be transformed into a large number of smaller trade-offs by means of intelligent institutional reforms.

I see this as the common core of the current most interesting EU research programmes into MLG based on a normative approach.³¹ Let me explain this, taking as an example the problems of transparency, openness and accountability (2.1) and those of participation (2.2). In recent years the EU Commission has put forward important proposals and initiated practical experiments (the EU as a laboratory), the aim of which was to strengthen its democratic legitimacy indirectly. I shall confine myself here to summarizing Schmitter's (2001) proposals on how to make European governance arrangements (EGAs) more democratic and easier to police.

2.1 Proposals to improve transparency, openness and accountability in the MLG of the EU

To start with, the *democratic legitimacy* of the new forms of governance, which are rapidly getting out of hand, could be increased by introducing new principles and procedures for organizing them. Schmitter (2001) proposes the following six general principles for the establishment of European governance arrangements. (i) Their authority or decision-making powers should be given a democratic mandate by the Commission or the Parliament. (ii) They should cease to exist on a predetermined date if their mandate is not renewed (the sunset principle). (iii) They should be separated as clearly as possible from one another functionally (functional separability). (iv) They should not duplicate the competences of existing EU institutions, replace them or present a danger to their work (supplementarity). (v) They should be free to decide on their own internal rules and procedures (requisite variety). (vi) Lastly, spillover effects should be avoided as far as possible.

Alongside the six establishment principles, Schmitter put forward five general principles for the institutionalization and modus operandi of European governance arrangements.³² In our context it is particularly important whether their *transparency* can be increased without reducing their effectiveness, and if so how. To start with, this can (and must) be done by properly announcing publicly in what areas of policy governance arrangements are to be established and what topics are on the agenda. Then relevant interim proposals can and should be published, along with the accompanying considerations, arguments and compromises, instead of waiting until final decision documents have been published or decisions made. Furthermore, it is perfectly possible to begin public hearings at this stage, so as to expand the

³⁰ Socio-technical system theories (of labour and organization), theories of relatively highly coordinated capitalist market economies and theories of deliberative democracy are over-optimistic in this respect. Neo-liberal and neo-functionalist theories, on the other hand, support the incompatibility thesis. On this point I disagree with Zeitlin's thesis that both legitimacy and effectiveness depend on the 'participation of the *widest* possible range of stakeholders' (Zeitlin, 2005a, p. 11; my emphasis).

³¹ For MLPs in the EU cf. e.g. Benz, 2003, p. 13. For MLG cf. Héritier's *New Modes of Governance Project – Integrated Project funded by the 6th Framework Programme of the European Union*, <http://www.eu-newgov.org/public/Research.asp>. Cf. also Zeitlin, 2005a, p. 11. As Bernstorff (2003, p. 524) rightly points out, 'European governance arrangements' differ from 'global governance networks' e.g. in that they are enshrined in a legal system that is able, at least potentially, to guarantee a minimum degree of balanced participation.

³² They are: 'precautionary', 'forward regarding', 'subsidiarity', 'proportional externalities' and '(partial) transparency' (cf. Schmitter, 2001).

necessarily selective group of organizations involved and experts consulted (cf. Curtin 2003, p. 69).

Proposals of this kind increase the likelihood of substantially more significant *vertical control* and accountability to the Commission and Parliament, in that they reduce the information and knowledge deficits and reveal the preconditions, risks and consequences involved in various options before a decision is made on them. They also increase the likelihood of *horizontal control and accountability*, in that they substantially expand the *professional* and *social* control that governance arrangements are subject to by virtue of the way they are constituted. Early disclosure and information, however, also increases the potential co-responsibility of other actors (such as the Commission and Parliament), as they will have either protested or presented alternatives or failed to avail themselves of the opportunity. This heightens the trade-off between participation and accountability: the more stakeholders and experts are involved in the new governance arrangements, or are brought into consultations at an early stage, the smaller the likelihood of independent auditing after the event. Thus MLG increases the opportunities for functional representation and participation by a large number of stakeholders and experts. Contrary to the Commission's rhetoric, which has been adopted by many social scientists and political theorists, it should however be emphasized that this possibility of *ex ante* and *in actu* control is not the same as accountability in the sense of *ex post* control.

2.2 Selectivity of participation in MLG

On the one hand the social representation of stakeholders in governance arrangements enhances the EU's democratic legitimacy, on the other – as pointed out above – it necessarily remains more selective than political representation in the European Parliament. Of the vast number of potential stakeholders and the multiplicity of existing organizations and interest groups raising their voices more or less effectively, relatively few can be represented on the appropriate working bodies (councils or commissions) (cf. Greenwood 2007). We should openly face up to the resulting trade-off between inclusion and the ever controversial 'functionally required effectiveness' (Bader, 2001, p. 39): the larger the number and variety of interests and points of view represented, the higher the input and throughput legitimacy, but this goes at the expense of the quality of consultation and negotiation and the effectiveness and efficiency of proposals and decisions. Exclusion is necessary, therefore, hence there is a lot more pressure to legitimize the various exclusions and inclusions democratically. Who should decide what potential stakeholders, organizations and interest groups are to be represented in European governance arrangements?

On top of this, as already mentioned, there is the problem that the representation and participation of interests and points of view at European level increases economic, social or cultural discrimination, for two reasons. First, the social dialogue at EU level is relatively weak compared with that at member-state level (the European Economic and Social Committee has made no serious or effective contributions since its foundation; cf. Greenwood 2007 also for the CoR). Second, the interests and points of view of corporations and established interest groups are more efficiently represented at EU level than at member-state level. Large, diffuse groups such as wage earners, the unemployed, women, consumers, pensioners, young people and immigrants – also religious minorities, members of sub-national political systems and transnational or international coalitions – are systematically underrepresented (cf. Schmitter, 2000, p. 54), even if the Commission is aware of the problem and tries to find some remedies.

Schmitter has attempted to translate these considerations into four principles for the constitution of European governance arrangements. (i) Democratically accountable bodies should decide on the minimum thresholds for representation (the minimum threshold principle). (ii) They should also decide what interests, points of

view and organizations are to be represented (the democratic mandate and stakeholding principle). In this they should be guided by the consideration that not only interests (stakeholders) – in this case underrepresented interests in particular – but also experts (knowledge-holders) need to be represented. (iii) Those involved should represent Europe-wide interests and points of view (European privilege). (iv) Bodies conferring democratic mandates should be guided by the adversarial principle (cf. Schmitter, 2001), which states that groups known for differing and especially opposed interests should be represented in European governance arrangements.³³

Proposals of this kind prove that it is possible to strengthen the democratic legitimacy of the EU in spite of the inevitable exclusions that social representation entails. They also show, however, that participation by political, social and minority citizens at the various levels of MLPs and MLG can only be a highly complex and an inevitably selective affair.

3 Closing remarks

However much traditional political theorists in the liberal or republican tradition may advocate it, there is no going back to non-pluralist forms of national government and national citizenship (cf. also Zeitlin, 2005a, p. 24). The crucial question today, then, is whether we are able to reformulate our traditional principles and standards of constitutionality and democracy in such a way that they do not *a priori* ignore, misconstrue or condemn the changed socio-political reality of MLPs and MLG. On the other hand, defenders of institutionally pluralist regimes should not settle for the extolling yet again of diversity, differentiated citizenship and overlapping, intertwined competences, rights and obligations, loyalties and identities, on the assumption that constitutionality, democracy and efficiency and effectiveness simply reinforce one another in pluralist systems. Instead, we should take the trade-offs seriously and address the relevant problems, guided not only by theory but also by practical experience and democratic experiments. An institutional turn in political theory is long overdue.

³³ Cf. the Commission's criteria for decisions on what NGOs should be included in the *Consultation, the European Commission and Civil Society* database (cf. Curtin 2003, pp. 59ff.). Cf. also Schmitter's (2001) eight general principles for the internal decision rules of European governance arrangements.

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Table 1: Arenas and Levels of Representation: Differentiated Citizenship

Levels Arenas	Local	Regional: provinces, <i>states</i>	'Nation' states	Supranational and global, e.g. EU
Political/ territorial pluralism	neighbourhood, city councils	regional parliaments, administrations and jurisdictions	federal parliaments, administrations, jurisdictions	EUP, Council, Commission, ECJ, ECHR, Committee of the Regions; CoE; OSCE
political citizenship	<i>City-zenship</i>	<i>Citizen of a Province, State</i>	<i>State-Citizenship</i>	<i>European Citizenship</i>
Functional or sectoral pluralism	firm, hospital, school, university; democratic corporate governance	regional chambers of industry, sectoral (neo-) corporatist councils; councils of consumers or clients, FOCJs	federal neo- corporatist councils	Economic and Social Council; EU Committees; EGAs, UNESCO, ILO; Multinational Corporations
social citizenship	<i>Economic Citizenship; civis academicus</i>			
Minority pluralism	Local ethnic/religious communities, councils	Regional minority institutions, councils, etc.	federal institutions of ethnic/religious or national minorities	EU ethnic/ religious institutions; OSCE declarations, etc.
multi- cultural or minority- citizenship	Representation of territorially dispersed ascriptive minorities (e.g. immigrants, women, homosexuals, the elderly) in different societal fields and at different levels			

Legend:

EGAs:	European Governance Arrangements
EGJ:	European Court of Justice
ECHR	European Court of Human Rights
EP:	European Parliament
FOCJs:	Functionally Overlapping Competing Jurisdictions
ILO:	International Labour Organization
INGOs:	International Non-Governmental Organizations
UNESCO:	United Nations Educational, Scientific and Cultural Organization)