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Summary

This report lays out a unified account of the complex and confusing relationship between legitimacy, democracy and accountability. The reasons we have to value accountability mechanisms and democratic arrangements also lend support to some modes of accountability that lack strong enforcement mechanisms or ultimate electoral accountability, and that all of these forms may further the normative legitimacy of a political order. They may help address the manifold needs of assurance among citizens regarded as ‘contingent compliers,’ - willing to do their share in just schemes, if they are assured that others act likewise. This general perspective is brought to bear on some salient features of the ‘Constitutional Treaty’ of the European Union that might have enhanced the normative legitimacy of the EU: Democratic accountability of EU bodies toward European and national parliaments, accountability for subsidiarity toward national parliaments; and accountability of national and EU bodies to international courts with regard to human rights. Such accountability mechanisms, democratic and otherwise, may assure citizens that the institutions and offices satisfy the appropriate standards of legitimacy, and that most other citizens and officials actually do their share.

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0. Introduction

The current general and academic debates about the alleged legitimacy deficit of the European Union show that the relationship between legitimacy, democracy and accountability is complex and confusing.¹ Some proposed cures for the alleged illnesses aim to enhance accountability, democratic or otherwise; others explicitly prevent electoral accountability - all for the sake of increased legitimacy of the Union. In order to understand and assess mechanisms of accountability the present explorations first lay out some one unified account of the relationship between the three notions of legitimacy, democracy and accountability. Mechanisms of accountability may contribute to assure citizens of general compliance with existing institutions and policies. Such accountability can take many forms, in what we may think of as horizontal and vertical versions. Competitive democratic elections allow citizens to hold politicians accountable ‘from below’. In the European Union this mechanism is not well developed, but two other forms of accountability proposed or developed by the Constitutional Treaty would supplement it: Subsidiarity and Human Right. The proposed mechanism to monitor and enforce the Subsidiarity Principle employs accountability of central authorities to member state parliaments. They are not hierarchically ordered above or below Union authorities, so this might best be described as a horizontal form of accountability. The human rights arrangement secures accountability of member state authorities ‘from above’, to courts. Much of this mechanism is in place regardless of the fate of the Constitutional Treaty.

These three accountability mechanisms may contribute the requisite assurance of general compliance needed for a stable and just European political order.

Section I gives an overview of some of the relevant legitimacy literature as a backdrop. Section II addresses the conception of ‘accountability’; section III sketches the normative basis of these remarks. Section IV considers the case for democratic accountability, against the arguments by Moravcsik and Majone who warn against more democratic arrangements in the EU. Section V considers reasons for enhancing accountability mechanisms for the principle of subsidiarity, and defends the suggestion of the Constitutional Treaty against the criticism that this gives too much authority to narrow minded national parliaments whose accountability incentives only pull toward the national interests. Finally, section VI defends increased accountability for human rights within the EU, as proposed in the Constitutional Treaty, even though this form of accountability to courts is not obviously democratic.

I. The Legitimacy Deficit

Reflective and well informed authors exhibit a fascinating range of views on the alleged legitimacy deficit of the European Union.² Some deny that the EU suffers from a legitimacy deficit, democratic or otherwise,³ while others grant only that there is the perception of one.⁴ Optimistic scholars warn against fixing something that ‘ain’t broke.’⁵ They might defend this view by challenging, evidence for the deficit to the effect that support for European integra-

¹ This report is part of the research funded by the NEWGOV project on New Modes of Governance, financed by the European Commission. The Edmond J. Safra Center for Ethics, and Currier House, both at Harvard University, kindly offered optimal conditions to complete these reflections. I am grateful for helpful comments from, inter alia, Arthur Benz, Christian Joerges, Carol Harlow, and Yannis Papadopoulos.

² For an overview cf Follesdal 2006;

³ Moravcsik, 2002, Majone, 1998a; but cf Follesdal and Hix, 2006.

⁴ Banchoff and Smith, 1999, 3.

⁵ Weiler, 2001.

tion has been falling since the 1990s. But such decline is not unique to the EU: politicians witness falling support in many advanced industrial democracies.⁶ Others recommend to *keep* the democratic deficit.⁷ Some see legitimizing deliberation in the relatively nontransparent ‘Comitology,’ while others worry that these complex procedures for executing secondary legislation are rather part of the problem.⁸

Even careful scholars and politicians of good faith also disagree about prescribed medications. Some favor the *status quo* and argue that those EU bodies that are non-democratically independent bolster the credibility of member states, as a ‘regulatory state,’ while others observe and welcome more arenas of normatively salient deliberation.⁹ Some want a written Constitution that simplifies the structures of decision-making and that strengthens the legal standing of the Charter on Fundamental Rights. Some urge more Member State discretion through the Open Method of Coordination, or a more powerful and efficient Commission that can secure the European interest against the conflicting national interests. Some suggest strengthening the European Parliament, while others seek a stronger role for national parliaments such as the new mechanism in the Constitutional Treaty so they can appeal to the Principle of Subsidiarity against proposed Union legislation.¹⁰

Unfortunately, many of these constructive proposals are mutually incompatible. The present reflections seek to defend several but not all of these proposals. Some enhance *democratic* accountability – that is, an arrangement of accountability of office holders to an electorate of citizens. I shall also present a defense in principle for the increased accountability of other kinds, especially accountability for subsidiarity and human rights - without thereby rejecting the multiple other forms of accountability provided already. Even though these three are incompletely developed in the document and stand in some internal tension, these institutional mechanisms create and facilitate trust and trustworthiness in institutions and in one’s fellow citizens. Two of them do so partly because they are not under direct or indirect democratic control, or so I shall suggest.

II. On Accountability

For purposes of this discussion, accountability is understood in the sense laid out by Bovens (Bovens, 2006):

A relationship qualifies as a case of accountability: when

- 1 There is a relationship between an actor and a forum
2. in which the actor is obliged
3. to explain and justify
4. his conduct,
5. the forum can pose questions
6. pass judgement
7. and the actor may face consequences (xx12)

⁶ Dalton, 1999.

⁷ Gustavsson, 1997.

⁸ Joerges, 1999, Dehousse, 1999, Wessels, 1999.

⁹ Majone, 1998b, Joerges and Neyer, 1997, ...

¹⁰ Neunreither, 1994. On the other hand, Falkner and Nentwich, 1995 warn against allowing national parliaments to control votes of ministers in Council of ministers.

[Note to editors: I would want to add to this list some standards/criteria/values by reference to which an explanation or justification is provided – where the standards may be part of the account the actor provides.]

We may follow Bovens, and others,¹¹ who hold that accountability is defined as a retrospective phenomenon. Central elements of democratic rule provide accountability in this sense: both *elections*, where representatives are replaced on the basis of ex post assessment by voters, and various *powers of legislatures*, including parliamentarianism, where parliament can force the government to resign by a vote of no confidence. These arrangements certainly affect behavior, but only because actors are aware of such future accountability. In contrast, *ex ante* mechanisms¹² where politicians promise to vote in certain ways are not examples of accountability in this sense.

Such accountability need not take the form of direct democratic control. Civil servants are held accountable by heads of departments, who in turn are held accountable to the Prime Minister, who in turn is held accountable by parliament – who is the only body held accountable to voters.¹³ Other bodies that facilitate democratic accountability may themselves lack democratic accountability. Cases include independent agencies that monitor or adjudicate independent of democratic representatives. Some such mechanisms make the executive or the legislature accountable to courts, e.g. in the form of judicial review with regard to human rights, and concerning the Principle of Subsidiarity. The European Court of Justice and the European Court on Human Rights secure such accountability but are themselves only held weakly accountable to democratically accountable bodies.

III. Normative bases

Among the many alleged legitimacy deficits of the EU, one is sometimes thought to be of a *normative* character: Do citizens have a moral duty – a *political obligation* - to abide by the rules and commands of a political order?

III.1 Liberal Contractualism

Liberal Contractualism holds that the inescapable use of public force must be defensible to all those required to uphold those practices.¹⁴ Appeals to ‘hypothetical consent’ from all affected parties serve to bring the vague ideals of equal dignity to bear on these questions of legitimacy and institutional design. The role of ‘consent’ is limited to the claim that institutions are legitimate only if they can be justified by arguments in the form of a social contract of some specific kind: No one with an interest in acting on non-rejectable grounds should have reason to reject these arguments or principles. In particular, standards of legitimacy may be specified, assessed and ranked by consideration of their impact on citizens’ interests, e.g. in terms of basic capabilities or ‘social primary goods.’ A particular rule or procedure – such as democratic accountability - is preferred over the alternatives if this procedure is a reliable tool for securing or promoting important interests of the individuals, without endangering the interests of others; and if other procedures are less suited for securing similarly weighty interests of affected parties.¹⁵

¹¹ Including Manin, Przeworski, and Stokes, 1999.

¹² Sometimes called (mandate) responsiveness, cf Przeworski, Stokes, and Manin, 1999.

¹³ cf Müller, Bergman, and Strom, 2003.

¹⁴ Cf Rawls, 1971, Scanlon, 1998, Barry, 1989.

¹⁵ Cf Scanlon, 1978.

Note that Liberal Contractualism makes no further fundamental appeal to consent, hypothetical or otherwise.¹⁶ While our ‘political obligation’ to obey the law of the land is justified partly by the claim that the social order *could have been* the subject of consent among all affected parties, such a hypothetical consent does not create a moral obligation or duty, in the way we generally hold that free and adequately informed consent binds those who consent. For instance, we do not have, and have never had, a real freedom with regards to the social institutions, in the sense that we can choose to reject them. One upshot is that the case for democratic, accountable rule is more complex than simply stating that universal voting is necessary for citizens to grant the requisite consent to be governed. Voting cannot be taken to express a morally binding tacit consent. To refrain from voting can not be understood as withholding one’s consent, and we demand that the voting minorities remain loyal to decisions that run counter to their vote. The role of consent in this contractualist tradition is instead an expression of one important condition for the just distribution of power in a society. The issue here is thus why and when various forms of accountability are required in a legitimate political order: what reasonable objections to the lack of accountability can be made among equals.

III.2 The need for Assurance

I venture that the different suggestions to enhance the normative legitimacy of the EU, including proposals to enhance accountability, may best be assessed and combined in light of how they can enhance the trustworthiness of institutions and authorities, that they regularly remain responsive to the best interests of citizens. More specifically, long-term general support for the EU requires that citizens can trust in the general compliance of others, both citizens and officials, based on a shared acceptance of the legality and normative legitimacy of the regime.

The need for trust and trustworthiness arises under circumstances of complex mutual dependence, where the regular co-operation of each individual depends on their conscious or habitual expectation of the regular co-operation of others.

Such mutual assurance is central for the long-term stability of any political order. It has become increasingly important among increasingly interdependent Europeans. Consider, for instance, how increased use of (Qualified) Majority Voting and the rule of mutual recognition of Member States’ regulations increase the need for trust and trustworthiness among individuals and their representatives, requiring them to adjust or sacrifice their own interests.¹⁷

Contingent compliers are prepared to comply with common, fair rules as long as they believe that others do so as well, for instance out of a sense of justice. They may be motivated by what John Rawls called a *Duty of Justice*¹⁸

that they will comply with fair practices that exist and apply to them when they believe that the relevant others likewise do their part; and to further just arrangements not yet established, at least when this can be done without too much cost to ourselves.

The EU institutions may provide important forms of *assurance* among such contingent compliers that they will all comply.

The problems of assurance among contingent compliers were addressed already by Rousseau.¹⁹ Recent work on the theory of games and research on social capital shed further light

¹⁶ Cf Hampton, 1997.

¹⁷ Nicolaidis, 2001.

¹⁸ Rawls, 1971, 336 and cf Scanlon, 1998, 339.

on how institutions can bolster expectations concerning others' actions to provide the requisite assurance.²⁰

For contingent compliers, the general answer to the question of when one has political obligations is: When the rules that apply are normatively legitimate, *and* when each has reason to believe that these rules are actually generally complied with. So for citizens generally to have a normative duty to obey political rules and authorities two sets of conditions must hold: firstly, the commands, rulers and regime must be normatively legitimate, and secondly, citizens must have reason to trust in the future compliance of other citizens and authorities with such commands and regimes.

III.3 The Contributions of Institutions

I submit that many concepts of legitimacy - normative, legal, social – and various institutional arrangements of legitimation can enhance political trust and trustworthiness in a normatively legitimate EU among people who are 'contingent compliers.'

Social institutions can promote trust and trustworthiness in various ways. They can reduce the likelihood that others default by shifts in the trusted's incentives. They can reduce the costs of failed trust, for instance by restrictions on the scope of legal political decisions by human rights that protect minorities.²¹ And institutions can socialize citizens and politicians to be contingent compliers.

A contingent complier decides to comply with rules and institutions, and otherwise cooperate with officials' decisions because she

- A) perceives the government as trustworthy in making and enforcing normatively legitimate policies; and
- B) she has confidence that other actors, both officials and citizens, will do their part.

Institutions can provide relevant assurance about these two conditions of at least seven relevant kinds. With regards to the first condition, - a perception that the government pursues normatively legitimate policies:

- 1) Institutions may allow and foster public *political deliberation* in civil society, including debates among political parties. This is important to foster the development and dissemination of a plausible public political theory that provides normative legitimacy by laying out and defending the objectives and normative standards of the political order, such as democracy, economic growth, subsidiarity, solidarity, and human rights..
- 2) Institutions must be sufficiently *simple and transparent* to allow assessment of whether they secure these goals reasonably well.
- 3) The institutions must be seen to be generally sufficiently *effective and efficient* according to the normative objectives and standards identified in public deliberation.

¹⁹ Rousseau, 1978, 2.4.5, Madison, 1787.

²⁰ Sen, 1967, Taylor, 1987, Elster, 1989, 187; Ostrom, 1991, Scharpf, 1997, Rothstein, 1998; Levi, 1998a. Recent normative contributions addressing the standards of normative legitimacy on the explicit assumption of such contingent compliance include Rawls, 1971, Goodin, 1992, Thompson and Gutmann, 1996, 72-73; Miller, 2000. For Social Capital, cf Loury, 1977; Coleman, 1990 ch 8; Putnam, 1993; Putnam, 1995; Levi, 1998b; Newton, 1999.

²¹ I here modify Margaret Levi's model of contingent consent (Levi, 1998a, ch. 2; Braithwaite and Levi, 1998; Levi, 1998a.). See also Goodin, 1992.

Institutions may also address the second condition, insofar as they help provide public assurance of general compliance.

- 4) Institutions can be seen to *socialize* individuals to be conditional compliers, for instance in the educational system, or in political parties that promote somewhat consistent and responsive policy platforms.
- 5) Institutions can include mechanisms that can be trusted to *monitor* whether the particular policies and authorities actually *solve the problems* aimed for, as effectively as the government claims.
- 6) Institutions can include mechanisms that can be trusted to *monitor the compliance* of citizens and authorities with the legal rules.
- 7) Institutions can provide *sanctions* that modify or reinforce citizens' and authorities' incentives, to increase the likelihood that others will also comply.

These dimensions of assurance are not necessary conditions, but arrangements that contribute to secure these forms of assurance help stabilize compliance. Also note that any one of them is by itself insufficient to secure assurance. Thus arenas for public deliberation do not suffice: there must be 'post-deliberative' institutional arrangements as well, to provide assurance that the institutions and authorities in place do in fact reliably protect and promote citizens' central interests. In the following, we consider in particular how various mechanisms for accountability contribute to build trust and trustworthiness along these seven dimensions.

IV. A Case for Democratic Accountability

So popular is the notion of democratic accountability that many regard it as necessary for legitimation and legitimacy across Europe — and, some hold, globally.²²

To illustrate why accountability is important on the Liberal Contractualist perspective, consider democratic rule.

IV.1 Democracy Defined

For our purposes the following sketch of democratic institutions may suffice²³: they are

- 1) Institutionally established procedures that regulate
- 2) competition for control over political authority,
- 3) on the basis of deliberation,
- 4) where nearly all adult citizens are permitted to participate in
- 5) an electoral mechanism where their expressed preferences over alternative candidates determine the outcome,
- 6) in such ways that the government is responsive to the majority, or to as many as possible.

Some normative theories might be favorably inclined to democratic accountability because voting appears to grant consent to be governed. Liberal Contractualism, on the other hand, is not committed to hold that these features should be incorporated in every institution. Still, there are good reasons to support democratic arrangements where rulers are held accountable to the ruled, in particular that rulers must offer an account, and face consequences of being removed from office.

²² Lenaerts and Desomer, 2002.

²³ Cf Follesdal and Hix, 2006.

What reasons are there to value such democratic arrangements? I submit that one interest of citizens is to control the institutions that shape our lives, through the use of political power. Another is to enjoy a fair share of those benefits that are the products of cooperation, including political rights. These rights are a complex bundle of legal claim rights that exist only when citizens generally abide by the rules that specify the procedures and consequences of voting. Other urgent best interests are non-domination and basic needs. Voting thus has both intrinsic and instrumental value, insofar as voting ensures responsiveness to citizens' best interests of these kinds. Compared to the alternatives, these arrangements are more reliably responsive to the best interests of the members of the political order.²⁴

The backward looking nature of accountability notwithstanding, democratic arrangements also promote the (*ex ante*) responsiveness of the agent to the best interest of the citizenry.²⁵ They are flawed, to be sure, but are arguably better than alternative arrangements.²⁶ Preemptive responsiveness by legislatures to citizens' future express preferences is one important feature that makes democratically accountable legislatures valuable. Competitive elections are crucial to make elected officials - and their competitors - responsive to the preferences of citizens.²⁷ The risk of being turned out of office prompts governments to give accounts of what they have done, and what they should have done – be it what they promised, or what turned out to be best given how the world turned out, or best given what citizens have come to see are the best objectives. Crucially, democratic arrangements provide public assurance that authorities reliably govern fairly and effectively, and public knowledge of this helps make politicians responsive to citizens, not only on single occasions but over time.

IV.2 Conditions for Democratic Accountability for Assurance

Under certain conditions, democratic accountability may contribute to several of the seven forms of assurance needed among contingent compliers.

Party contestation is important for opinion formation and informed policy choice. Such contestation is important for credible Monitoring, and to ascertain whether the chosen policies are reasonably effective and efficient in problem solving (no. 5 above), in light of alternatives and externalities. Consider each in turn.

One important aspect of competitive politics is the existence of *opposition parties*. A critical opposition and media scrutiny are crucial to citizens' judgment of the authorities' agenda and performance. As the EU is currently designed there is little room for a rival set of leadership candidates and a rival policy agenda, though the recent rejection by the European Parliament of the proposed slate of Commissioners illustrate that there is some room for contestation. Such scrutiny of government against plausible alternatives are central to the seven contributions of institutions mentioned above.

To provide such assurance, the decision structures must be sufficiently *transparent* (2 above) and it must be possible to place responsibility for policy decisions with sufficient clarity.²⁸ Within the European Union, the plethora of multi-level modes of governance and multiple modes of decision making makes for opacity.

²⁴ Cf Shapiro, 1996, Levi, 1998a.

²⁵ Cf Pitkin, 1967, Shapiro, 2001.

²⁶ Cf Przeworski, Stokes, and Manin, 1999, Shapiro, 2001.

²⁷ Powell, 2000, Shapiro, 2001.

²⁸ Manin, Przeworski, and Stokes, 1999.

Party contestation is also crucial for Socialization (4) and preference formation. Many scholars point to the importance of federation-wide parties that compete at several levels of the multi-level political order.²⁹ Such competition fosters political debate and formation of public opinion about the best means and objectives of policies that heed and accommodate the interests of both the sub-unit population and that of other Union citizens. These debates allow voters to form their preferences on complex policy issues on the bases of alternatives that all claim to be committed to the interests of others in the union in 'overarching loyalty.'³⁰ Another benefit of opposition parties is that they seem crucial to mobilize voters, because only when there are alternatives can people discern the impact of their votes. We saw this when the European Parliament rejected Commission President Barroso's first slate of commissioners. The grounds for this rejection is surly contestable, but the main point here is simply that party political contestation is important to promote electoral participation.

Some also argue that a necessary condition for allegiance to the political system is that there be real competition with a plausible chance for losers to one day win (7).³¹

Responsiveness to the real interests of citizens by means of democratic accountability also requires that the information flow should not be controlled by the present government. To reduce the opportunities for deception about underperformance, opposition parties, critical media and independent research may alleviate the information asymmetry between the government and voters. Electoral contests foster rival policy ideas and candidates for political office. These help voters realize which choices may be made, and give them some alternatives (5, 6).³² In comparison, without electoral competition at the European level there are few incentives for the Commission or the governments to change these policies in response to changes in citizens' preferences.

Finally, opposition parties and free media can provide important monitoring functions to add credibility to governments' claims to be responsive to citizens (5, 6).

In contrast to many domestic democracies, there are few if any vehicles for encouraging a European-wide debate about the public political theory of the EU. The relative dearth of public arenas for political discussion makes it difficult to mobilize political opposition. But their absence may be temporary, since the requisite public debates and forums are likely to develop as political contestation among parties increases. Thus pessimism about European level democracy should not be overstated: there are signs of more party organization and competition in European Parliament, and more policy contestation within the Council of Ministers. There are therefore openings for contestation about the EU's policy agenda, and critical scrutiny of performance.

IV.3 Some Objections Considered

Some have voiced thoughtful criticism against democratizing the EU. In particular, Giandomenico Majone and Andrew Moravcsik have objected to such moves. I believe the preceding discussion of legitimacy, accountability and assurance helps identify the strengths and some weaknesses of their views.

²⁹ Cf Linz, 1999.

³⁰ Linz, 1999.

³¹ Shapiro, 1996, Shapiro, 2001.

³² Manin, 1987: 338-68.

Majone is in favor of certain modes of accountability and trustbuilding measures in the form of more transparent decision-making, *ex post* accountability by courts and ombudsmen, rules that protect the rights of minority interests, and better scrutiny of decisions by private actors, the media, and parliamentarians at EU and national levels. But he worries that if EU policies are made by ‘majoritarian,’ democratically accountable institutions such as the European Parliament or a directly elected Commission, the majority will select EU policies according to their short term preferences rather than in pursuit of long term Pareto improvements. Long term credibility would suffer, and we would be left with politicized regulatory policy-making aimed at redistribution rather than Pareto improvements.³³

Moravcsik agrees with Majone in favoring the EU’s insulation from democratic contestation. He also argues that there are already extensive accountability measures in place in the EU, albeit not always directly under electoral control: the decision processes are less opaque than many national procedures; national parliaments and media scrutinize the nationally accountable ministers in Brussels; the directly elected European parliament has gained power, including parliamentarism in the form of veto-power over the selection of the Commission. And, he holds, EU policies track the preferences of the median voter owing to the various checks and balances of the system.³⁴

Essentially, their point seems to be that accountability and responsiveness to an electorate with irrationally short-term preferences will prevent unpopular but wise choices for the common good.

Several responses are warranted.³⁵ Firstly, we may question whether Majone is correct that EU decisions largely concern topics where there are Pareto optimal outcomes. Arguably, the decisions tend to lie on a continuum between policies that are predominantly efficient and policies that are predominantly redistributive. Many of them impose costs on some parties, and even more distribute the gains in ways that could be done otherwise. Where there are short- and long-term losers, there seems to be a strong case to ensure that the decisions are made in a fair and justifiable way. The issue is then not only the choice of the clearly most effective policies, but how to specify objectives that are contested, and how to make choices that will affect the short term and perhaps even long term distribution of benefits. Democratic accountability is arguably one of quite few arrangements that can be trusted to both determine what is at stake, and secure responsiveness reasonably well over time – at least, as Churchill noted, compared to most other decision procedures that have been tried from time to time. In particular, many may doubt that independent regulators will reliably use their discretion responsive to the best interests of citizens, rather than for less legitimate objectives – unless they too are indirectly held accountable to the electorate within a system with multiple competing parties.³⁶

With regard to Moravcsik, he may well be correct that EU policy outcomes are close to some abstract European-wide ‘median voter.’ However, this should not only occur as a matter of fact, but mechanisms should be in place that can be trusted to ensure this – providing assurance of type 2 and 3 above. Again, democratic accountability is one mechanism that serves to

³³ Majone, 1998b, Majone, 1998a, Majone, 2001; cf Follesdal and Hix, 2006 for details.

³⁴ Moravcsik, 2002, Moravcsik and Sangiovanni, ; cf Follesdal and Hix, 2006 for details.

³⁵ Cf Follesdal and Hix, 2006 for in-depth arguments.

³⁶ For parallel criticisms against John Rawls’ defense of ‘hierarchical,’ nondemocratic states (Rawls, 1999, cf Follesdal, 2006)

kick rascals out and thereby serves to deter and limit domination and disempowerment.³⁷ Furthermore, voters' preferences are not purely exogenously determined. Citizens form views about policy options through processes of deliberation that typically occur as a result of party contestation. Some assurance of this type 1 above seems requisite if contingent compliers are to comply.

These criticisms of Majone and Moravcsik should not be taken to imply that non-democratic forms of accountability are irrelevant or even normatively illegitimate. To the contrary, I shall go on to agree with them, and defend their view, that there are some good reasons to have some non-democratic modes of accountability.

V. Accountability toward National Parliaments: the Subsidiarity Mechanism

The Constitutional Treaty includes a new procedure for applying a particular version of the Principle of Subsidiarity.

V.1 The Principle of Subsidiarity

A principle of subsidiarity regulates the allocation or the use of authority within a political order where there is no unitary sovereign. Such a principle is particularly important to address the disagreements about the purposes of subunits and central authorities typical of (quasi)federal arrangements. The distribution of authority between sub units and central authorities, and redistribution of such competences, are likely to remain a contested issue where normative arguments are commonplace. A principle of subsidiarity provides some guidance in such conflicts and increases predictability. It holds that powers or tasks are to rest with the subunits of that order unless a central unit is more effective in achieving certain specified goals. Such a principle may seem to reflect similar normative ideals to those of democratic rule in general: policies must be controlled by those affected, to ensure that institutions and laws reflect the interests of the individuals under conditions where all count as equals. Only when these considerations counsel joint action is central authority warranted.

Such appeals to subsidiarity take on particular salience in periods of institutional transformation, often as part of the bargain among sovereign communities who agree to a common authority in 'coming together' federal arrangements. By limiting the common agenda to Pareto improvements, a principle of subsidiarity might reduce the risks for members of being overruled in common decisions..

The particular conception of subsidiarity laid out in the Constitutional Treaty holds that

in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.³⁸

Such a principle of subsidiarity was first included in the 1992 Maastricht Treaty on European Union, and further elaborated in a Protocol of the Amsterdam draft Treaty of 1997, to quell fears of centralization beyond the areas where the national governments thought it necessary

³⁷ Shapiro, 1996.

³⁸ Art I-11.

to enhance and complement domestic sovereignty with common action. In the European setting, state governments' fears of excessive centralisation are particularly understandable, since safeguards against centralisation found in many federations were absent: There was no doctrine of enumerated powers, and the European Court of Justice granted Community institutions whatever competencies they needed for the specified ends of the EU. Member states enjoy little exclusive legislative authority due to doctrines of 'Direct Effect,' 'Supremacy' and 'Absorption of Community Law,' and owing to the increased scope for qualified majority voting.

Subsidiarity provides some safeguards against centralisation by laying down certain requirements for central action, and by increasing transparency about these arguments. *Comparative effectiveness* of Community action must be determined, by showing that the objectives of the proposed action cannot be sufficiently achieved by member states, and can be better achieved by the Community. Community action is required if

- a) the issue under consideration has transnational aspects beyond control by Member States;
- b) actions by Member States alone or lack of Community action would violate the Treaty;
- c) action by the Community produces benefits of scale or effects, as compared with action at the level of the Member States.

The Community is also required to legislate in the weakest form necessary, leaving discretion to member states.

V.2 The Accountability Mechanism for Subsidiarity of the Constitutional Treaty

The Constitutional Treaty contains a new mechanism to enforce this Principle of Subsidiarity. It grants national parliaments access to legislative proposals, and give the parliaments the power to appeal legislative proposals and suggested Treaty reforms. National parliaments shall monitor the application of subsidiarity and may give 'yellow cards' for suspected violations.³⁹ We must note, however, that the proposed mechanism has two important limitations. It only concerns shared competences, not the exclusive competences of the Union.⁴⁰ And the national parliaments can only appeal to the legislative institutions and ask that they reconsider. They cannot even appeal to the European Court of Justice – and even that court's willingness to prevent centralization has been doubted.⁴¹

How are we to assess this version of subsidiarity and the accountability mechanism it lays out?

An institutionalized Subsidiarity mechanism may promote assurance of several valuable kinds. Firstly, it facilitates public discussion and deliberation about the ends and alternative effective means of the European Union, thus providing assurance of type 1, 2 and 3. It does so in at least three ways. It firstly requires openness and arguments among member states and the Union institutions about comparative effectiveness. Secondly, these discussions prompt public reflection within the member states themselves about the ends and means of common action. Thirdly, the common directives identify certain outcomes that must be reached through

³⁹ Art III-259. Cf Cooper, 2006 for detailed discussions.

⁴⁰ Article I-11(3).

⁴¹ Weiler, 1999, 318.

domestic legislation, but leave the states free in their choice of how to secure these outcomes – yet require that an account be given.

Such discussions may be crucial to citizens' long-term support for any political order, and for authorities' ability to govern.

The subsidiarity mechanism also provides assurance with regard to socialization. The challenges in this regard are especially great in (quasi) federal arrangements in 'plural societies,' such as the European Union, characterized by population groups 'sharply divided along religious, ideological, linguistic, cultural, ethnic, or racial lines into virtually separate subsocieties.'⁴² Comparative federalism suggests that one institutional mechanism for such preference formation toward an 'overarching loyalty' is interlocking federal arrangements, where subunit governments and parliaments partake in central decision-making, and a federation-wide party system.⁴³ Discussions within political parties at executive and legislative arenas at the national and European level about the common objectives of the Union and requisite measures to obtain them may foster precisely the requisite 'overarching loyalty' among all Europeans, to both accommodate concerns for citizens of one's own member state, and concerns for other Union citizens. These debates are aided by the increased transparency of the legislative process laid out by the Constitutional Treaty.

The Constitutional Treaty also serves to reduce the opacity that may surround claims of subsidiarity. A subsidiarity principle can prevent the public from placing responsibility for actions on particular officials, who may appeal to vague and complex notions of comparative effectiveness and limited room for independent action. Such responses hinder accountable government – be it accountable to citizens, political bodies or the courts. This opacity might be expected when competencies are shared between subunits and central units, as in the European Union, or when the principle of subsidiarity guides discretion without requiring that the deliberations be made public. The information required to make and assess such claims for centralisation is exceedingly complex, and relies in part on counterfactual hypotheses: A comparison of the likely effects of decentralised action with the effects of central action, assessed by some standard of efficiency. Information overload is a real threat.⁴⁴ On the other hand, withholding information also violates precepts of democratic deliberation.

A major challenge for institutional design is thus to enhance the public's ability to hold officials accountable.

The Constitutional Treaty partly alleviates these fears by requiring public, substantiated arguments for comparative effectiveness of central action, where opposition parties may be expected to scrutinize the claims of comparative efficiency.⁴⁵

Still, there are some reasons to believe that subsidiarity is unlikely to alleviate worries by member states that they lose powers. The version of subsidiarity in Constitutional Treaty can be interpreted in several different ways: It can protect against intervention -- or to the contrary, grant central authorities the power to intervene. One reason is that this conception of subsidiarity, coupled with majority rule, does not prohibit centralization against the will of subunits, but only places the burden of proof on integrationists. Thus it can be disadvanta-

⁴² Lijphart, 1999, 32, 195.

⁴³ Linz, 1999, Simeon and Conway, 2001#35280.

⁴⁴ Dahl, 1997.

⁴⁵ Protocol on Subsidiarity and Proportionality Par 5.

geous to those skeptical to integration, by providing warrant for new forms of centralization to promote EU objectives they disagree with.

Another unintended effect is that sub-state regions may invoke subsidiarity against their own state, and drain national state powers from within. Regions may argue that some principle of subsidiarity must apply ‘all the way down’ to ensure that decisions are taken as closely as possible to the citizen.

Some of these aspects have been addressed in the Treaty formulations of subsidiarity. From the Maastricht Treaty onward the principle is explicitly linked to the objectives of the EU. A central problem remains, namely that these objectives and their relative rank are contested. Member states presently disagree about which common ends are to be pursued by the EU, about the shared standards, and about the likely results of separate and common action. The Constitutional Treaty does not detail the objectives of this political project to the requisite degree. Consider that Article I-3 provides a list of laudable objectives: peace, the well-being of its peoples, freedom, security, a single market, sustainable development, and a social market economy. This economy should be aimed at full employment, combat social exclusion, promote solidarity, respect cultural diversity, and contribute to international free and fair trade...and so on.⁴⁶ The all-important details, weights, and limits remain obscure, and are contested among parties and ideologies within member states, in the Council of Ministers and in the European Parliament. Moreover, the appropriate weighing is likely to differ among member states, as well as between these subunits and the Commission institutions.

The upshot is that the principle of subsidiarity in the Constitutional Treaty does not resolve such disagreements, and hence does not lead to the clear allocation of authority between EU bodies and the member states. This opacity tends to hinder the application of the principle itself. However, the new subsidiarity mechanism may also foster public, common deliberation and agreement over time, since it requires reason giving about contested Union decisions, with reference to such topics as the aims of the union, the feasible strategies, and their expected effects. This is because subsidiarity requires that certain arguments must be made when joint action is contemplated. Agreement about objectives may in turn lead to further integration - contrary to the constraining role that some member states envisioned.

V.3 Objection: National Interests and Politicking preclude the European Interest

One standard contested issue concerning subsidiarity is who should have the authority to apply it. Different traditions of subsidiarity either grant subunits the final say about whether common action is called for, possibly by unanimity; or give central authorities the power to overturn any veto, for instance to prevent collective action problems in the pursuit of common goals.⁴⁷ The Constitutional Treaty shifts this balance in favor of national parliaments against EU bodies, since national parliaments can urge a reconsideration of proposed legislation by means of the ‘yellow card’ procedure. Even though their power to inflict consequences is severely limited, critics may worry that this mechanism puts the European interest at risk, for two reasons.

Firstly, Majone’s worries would apply, that Union policies run the risk of becoming subject to political constestation and bickering, rendering decisions less authoritative. Secondly, there is a risk that national legislators are likely to promote national interests instead of ‘The Euro-

⁴⁶ The White Paper on Governance (European Commission, 2001) contains a similar list, p 28, and suffers from the same lack of precision – cf Follesdal, 2003.

⁴⁷ Follesdal, 1998.

pean Interest.’ The procedure would for instance challenge the Commission’s role, to ‘promote the general European interest and take appropriate initiatives to that end.’⁴⁸ The ‘White Paper on Governance’ gives an indication that this might be the Commission’s worry, since disagreements and deadlocks within the EU decision making bodies are said to be mainly due to the sectoral interests inappropriately pursued by the Council of Ministers.⁴⁹ It is thus right and fitting that the Commission’s initiatives in furtherance of the ‘European interest’ enjoy legal supremacy, and override member state legislation in furtherance of the ‘national interest.’

Against this view, we may note that national vetos or appeals to national interest, be it in legally binding national referendums, or in the ‘Yellow Card’ procedure, may sometimes be normatively legitimate. It may thus be appropriate that some subsidiarity procedures should allow challenges to the Union’s own conception of the ‘European interest.’ Consider the variety of reasons for common action. Some Union policies may be required to avoid cooperation traps, such as prisoners’ dilemmas, in situations where much is at stake. These *collective action preferences* should trump the ‘egoistic’ member state preferences – at least when urgent issues must be resolved. But at other times, EU regulations concern the need for *concerted action*, for reasons of scale, such as the need to have a unified voice as a world actor in global regime building. Some of these gains may clearly be less important for citizens than the gains wrought by national policies, in which case the Union should respect national preferences. It is not obvious that the Union institutions are best situated to discern when they should override national decisions for the sake of the ‘European interest.’ When EU member states refuse to pool sovereignty, or when they vote against Commission proposals, critics cannot plausibly use this as the sole basis to accuse them of ‘egoism’ in pursuit of their ‘national interests.’ The question is rather whether common or member state action best secures and promotes the important interests of individual Europeans.

Arenas and institutions must facilitate accountable deliberations and negotiations on how member states and Union institutions should act, separately and jointly, to best pursue and protect these interests. Indeed, contestation about the ends and means of joint action often plays a crucial role to render authorities trustworthy. Within democratic states, the internal deliberations and policy platforms of political parties are central in citizens’ preference formation, to promote other-regarding perspective and consistency, and to develop the requisite concern for citizens across subunits. Moreover, the political parties are important watchdogs over government policies. In the absence of such contestation at the EU level there is little reason to believe that the Commission can credibly remain committed to the pursuit of the European interest. Optimists may even hope that this Subsidiarity mechanism would make it more likely that parties will contribute to shaping Europeans’ political preferences toward the requisite overarching loyalty over time.

The ‘yellow card’ mechanism may thus serve important functions even though – or rather, precisely because – it challenges established opinions about the ‘European interest.’ Even without the power to remove policy makers from office, such a mechanism may contribute to assurance and trust-building of several important kinds. These gains seem worth the alleged loss of effective and efficient problem solving wrought by increased transparency, interlocking arrangements and political parties – especially since it is difficult to remain assured that Union bodies are in fact effective and efficient in the absence of such scrutiny.

⁴⁸ Constitutional Treaty I-26 (1).

⁴⁹ White Paper on Governance p. 31.

VI. Accountability toward Courts: Human Rights in the EU

The third set of accountability mechanisms we consider concerns human rights. The Constitutional Treaty seeks to bolster human rights constraints on EU policies. Article I-9 on Fundamental rights states that

1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Part II of the Constitutional Treaty consists of the EU's Charter on Fundamental Rights in full. Hitherto not legally binding, the Charter provided a much-needed clarification of the legal human rights obligations of member states.⁵⁰

VI.1 Four forms of accountability for human rights

The inclusion of human rights in the Constitutional Treaty bolsters several forms of accountability that in turn secure important forms of assurance – even though several of the forms of accountability are not under democratic control.

Firstly, the strengthening of human rights seems to have occurred as an instance of accountability toward the German Constitutional Court, and the Danish Supreme Court. The German Constitutional Court found earlier treaties compatible with the constitution, but insisted on its own right to protect fundamental rights, and its right to review whether European institutions acted within their limits. Similarly, the Danish Supreme Court also insisted that Danish courts retain the authority to determine the constitutionality and hence applicability in Denmark of EC laws, regardless of the findings by the European Court of Justice. The EU is thus the actor, and the Constitutional and Supreme Courts form forums of accountability.

Secondly, the human rights provisions make union authorities accountable to the Court of Human Rights that will monitor and ensure that the Union authorities respect individuals' rights. Human rights constraints duly enforced provide assurance that majorities in the Union bodies will not ignore the fundamental interests of minorities; and that union administration will respect all citizens' rights. These arrangements bolster assurance in several ways. Human rights protections firstly reduce the likelihood of failed trust, by giving the trusted Union bodies disincentives to violate the human rights of the trusting citizen expects. Secondly, the arrangement reduces the costs of failed trust in Union decisions, by restricting the scope of valid (qualified) majority rule. The simplification and visibility of human rights bolsters assurance regarding condition 2 (institutional simplicity and transparency), and the courts provide assurance with regard to conditions 3 (institutional effectiveness and efficiency), 5 (Problem solving monitoring), 6 (Compliance monitoring), and 7 (Sanctions) – primarily since breaches of

⁵⁰ The Charter and hence this part of the Constitutional Treaty draws from the various 'constitutional traditions' and international obligations, the Treaty on European Union, Community treaties, the European Convention on Human Rights, the Social Charters of the Community and the Council of Europe, and case-law of the European Court of Justice and of the Court of Human Rights.

human rights obligations may fuel support for the opposition in the next election. The inclusion of human rights may also serve a socializing effect, as some have claimed with regard to the political elites of new member states.⁵¹ Note that this mode of accountability toward the Court of Human Rights is not democratic in any obvious way. Indeed, I submit that this increases the trustworthiness the Court provides, especially with regard to condition 3, 5 and 6. The Court's finding that a government is in compliance with human rights is more credible insofar as the Court is independent of any government, and hence cannot so easily be suspected of taking instructions from politicians. Majone has argued convincingly that one reason to favour such independence is that delegation of accountability to an independent forum can secure credible policy commitments (Majone 1998, 18, 25-27). Independence removes doubts that sound long term policies will be carried out even when a short-sighted electorate wishes otherwise. I suggest that this form of reasoning may support the role of non-accountable courts, since their judgments may be more trustworthy than the judgments of actors who are themselves accountable to the governments under scrutiny.

Thirdly, human rights are to be secured by the European Court of Justice. How well human rights will be secured by this court remains an open question, for this court must weigh the various objectives of the EU against each other. This may be normatively problematic from a point of view that grants human rights priority over legislation and public policies. Consider that, while human rights are included among the Union's values in Art I-2, Article I-3 states the various Union's objectives:

1. The Union's aim is to promote peace, its values and the well[-]being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.
3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

....

It remains to be seen how the European Court of justice will weigh human rights against these other important objectives.

The Constitutional Treaty also revises a fourth form of accountability intended to foster human rights compliance within member states, this one without an obvious reference to courts.⁵² The procedure addresses suspicions that a member state engages in systematic violations of the Union's values. It includes fact-finding, and now includes dialogue – an arrangement that allows the target government to give an account of its policies to the EU. The element of required dialogue was notoriously absent in the 'Reactions against Austria.' Two weaknesses of the assurance provided by the new human rights mechanism merit mention.

⁵¹ Risse, Ropp, and Sikkink, 1999, Steen, 2006.

⁵² Art I-59.

VI.2 Will sovereign states agree to sufficient self binding and centralisation?

Firstly, this procedure for suspected human rights violations is consistent with a certain conception of subsidiarity, and in some ways an expression of democratic ideals, but it also highlights the weaknesses of the subsidiarity principle and tensions that arise.

It would seem that any European Union reactions should firstly seek to enhance domestic mechanisms so as to alleviate the current problems and in order to prevent similar violations in the future. Such supportive measures by outsiders may include fact-finding, and reports of facts and legal norms to domestic audiences who may have few other reliable sources. In the – democratic - member states of the EU, with freedom of the press and electoral accountability, such reports serve to enhance domestic democratic accountability mechanisms, and this may be sufficient to protect and promote human rights. Further EU or international pressure should be considered only when these boosts to domestic democratic action are exhausted or clearly futile.

Yet the mechanism points to an ambivalence regarding subsidiarity: Precisely which objectives must be promoted by common action: is it the interests of individuals, or those of the signatories - governments? Human rights in general serve to constrain legislatures, and thus human rights are sometimes challenged as ‘counter-democratic’ and hence illegitimate arrangements. *International* human rights treaties further challenge the legitimacy of constraints on legislatures – especially when they permit interference in the domestic affairs of signatory states, in possible violation of the spirit of subsidiarity. So we can assume that a domestic government will disagree in any particular case about the specific contents of these legal standards, or their relative weight, and deny that they are violated. The accused government will surely maintain that they conform with the appropriate standards, while some of their citizens, as well as other member states and the EU will disagree, either about the content or whether a violation has occurred. So who is to decide whether Union action is required? Since the alleged violator government will surely hold that no outside intervention is needed, on one conception of subsidiarity, central action is illegitimate. If the ultimate focus of concern is on citizens, however, it seems clear that intervention may be required. Yet, if it is for Union authorities to decide to override one member state, this interpretation of subsidiarity will not prevent centralization – at least not with regard to human rights protection.

The proposed procedure alleviates some of these tensions, in favor of the interests of individuals and of the competences of international judiciaries. Human rights are formulated, adjudicated and enforced with the aim to constrain local autonomy - yet they are consistent with an ideal of subsidiarity, insofar as the procedure enhances domestic mechanisms that will alleviate the current problems and avoid them in the future. Such supportive measures by outsiders may include fact-finding, and reporting of facts and legal norms to domestic audiences who may have few other reliable sources. Examples include the valuable contributions by the Helsinki Federation for Human Rights and the report on Austria in the wake of the protests against that member state.

In the democratic member states of the EU with freedom of the press and electoral accountability, such reports may be sufficient to protect and promote human rights. Further EU or international pressure should be considered only when these boosts to domestic democratic action are exhausted or clearly futile.

Still, it is remarkable that the Constitutional Treaty will not allow humanitarian intervention into any member state on human rights grounds. Instead, the ultimate sanction against a member state is exclusion from the EU. Some critics would say that this shows an insufficient commitment to human rights, and an undue respect for member state sovereignty and subsidi-

arity – at least if the touchstone is that of which institutional arrangements of the EU and member states best promote individuals’ interests and basic needs.

VI.3 The multiple roles of human rights in quasi federations

Secondly, the list of human rights in the Constitutional Treaty fails to acknowledge that human rights may serve as triggers for a wide range of actions by many different actors, in various forms of accountability relations ranging from compliance with law by individuals to humanitarian armed intervention. Historically, human rights have served as 1) moral constraints on governors, or 2) as stated conditions for political obligation, or 3) expressed conditions for regicide. Human rights have also served as 4) conditions for international immunity from military intervention, or as triggers for various non-military foreign policies of a political unit, such as 5) rights-based international assistance policies, or 6) human rights conditionalities on loans. Human rights may also be 7) part of filters on government investments, not only to promote development but to avoid complicity in human rights atrocities. This is not an exhaustive list of functions.⁵³ In particular, in such quasi-federal political orders as the EU, human rights serve at least three additional functions. 8) Human rights may specify the scope of immunity and discretion for sub-units and their citizens, to protect them from central authorities. For instance, citizens may be granted some scope of cultural and institutional variation to allow for expressions of national identity and sub-unit preferences. Violations may merit reactions by sub-units against central authorities, or even secession.

9) Human rights may protect minorities living within a sub-unit from abuse by local government. Violations may warrant rescue by other subunits against the local tyrant, as Montesquieu hoped.⁵⁴ This seems to be the role of the regulation in the Constitutional Treaty for human rights based intervention into a Member State.

10) A further task may be to promote trustworthiness among sub-units cooperating within common schemes, who share decision making power. Europeans of different Member States agree to be jointly governed by bodies consisting of representatives of all sub-units who sometimes decide by majority rule. These representatives must be trusted to not only serve their own electorate, but also be guided by common European values and an ‘overarching loyalty’ to Union citizens. If one government in the EU violates human rights, this may serve as a trigger for other governments and union citizens that it can no longer be trusted to exercise Union political authority responsibly on their behalf. Public officials of a subunit that violates even its own citizens’ human rights can hardly command such trust.

The substantive human rights requirements should be quite different for each of these functions. This is because the human rights triggers must reflect the objectives, as well as the risks and benefits of alternate allocations of authority in each of the functions. These risks, of miscalculation and abuse, must not be underestimated.

The specification of human rights triggers for each of these ten functions requires that we not only consider the likelihood of success of an individual case of intervention. We must instead apply an institutional perspective that looks at the general tendency of such cases, and the long run benefits and losses of such a publicly known practice. The question is not only the likelihood of success of an individual case of intervention, but whether such public intervention practice fosters compliance with legitimate institutions in the long run, given its incentive effects.

⁵³ Cf Follesdal, 2006.

⁵⁴ Montesquieu, 2002, book 9.

I submit that the list of human rights in the Constitutional Treaty must be detailed further with an eye to which rights violations may merit various such reactions.

VI.4 Objection: Judicial Review of Human Rights is Undemocratic

One of the central tensions between human rights and democracy is not peculiar to the EU, yet merits mention. International judicial review of human rights hardly seem democratic,⁵⁵ and some deny that such procedures are legitimate.⁵⁶ With what right may international, nonaccountable human rights courts overrule the democratically elected European Parliament and representatives of national governments?⁵⁷ At least two crucial questions with regard to this form of accountability to courts require attention: with what right an international court should restrict the agenda and options of democratically elected legislatures? Such constitutional constraints might be thought to violate a claim to ‘unconstrained political debate,’ which should allow discussion of ‘the authority of prior norms or requirements.’⁵⁸ And with what right should democratically accountable politicians be challenged or overruled on issues of human rights?

From the point of view of liberal political theory, the removal of some issues from day-to-day political debate is not necessarily to be regretted. To the contrary: Trust and allegiance to the political system may be threatened if everything can be put on politicians’ agenda. If the elected representatives are able to redefine the basic rights of all, or revoke minority protections, trust may not be forthcoming. More importantly, constitutional protections and competence allocations by such means as subsidiarity or human rights review do not remove issues from public debate, even though the issues are taken off the day-to-day political agenda. Thus some objections to constitutional constraints should be reconsidered. This criticism seems misguided. Adjudication by a constitutional or international court does remove issues from ordinary legislative debate, but do not remove issues from political debate *tout court*.

In particular, consider the case of the Court of Human Rights which performs a ‘weak’ review, as compared to the ‘strong’ review employed by the US Supreme Court, which may establish other legislation or policy. The judges, elected by the Parliamentary Assembly of the Council of Europe, may find domestic parliamentary legislative decisions, court rulings and/or government policies in conflict with the Convention, and transmits this judgment to the Committee of Ministers. The violating state is invited to inform the Committee of the steps taken by the state to compensate victims, and of any further measures required to comply with the judgment and prevent new violations. So the Court brings the violation to the attention of the parliament, courts etc, but the judgments do not take direct effect in the domestic legal system. And the domestic elected and accountable representatives must still decide what to do. The Committee of Ministers of the Council of Europe supervises whether signatory states implement the judgments at the national level.

In effect, such court judgments serve to give notice to the public that the political process now yields extraordinary effects; or that the unintended systemic effects of political decisions now cross certain limits defined as trigger issues by a constitution. So such warnings do not stifle political debate. To the contrary, they may indicate that further public deliberation is in order, in order to revise the legislation or the constitution. These procedures typically involve further

⁵⁵ Though some argue precisely that – cf Freeman, 1990.

⁵⁶ Waldron, 2000.

⁵⁷ E.g. Waldron, 2000, 8 and elsewhere; Ferejohn, 2002.

⁵⁸ Dryzek, 1990, 170.

political debate and deliberation, and further opportunities for reconsideration, over and above the deliberations required for ordinary legislation.⁵⁹

But even weak review challenges the supremacy of democratically accountable legislators – specifically, a challenge to the legislature’s unrestricted domain of decision making. Jeremy Waldron and others might object to this because decisions by elected representatives are the institutional expressions of self-government of the people.⁶⁰

In response, Liberal Contractualism is concerned to assess the set of institutions as a whole, with regard to how they jointly protect and further the best interests of the public, each person as equal. Responsiveness by accountable legislature to express preferences is one important component, but not the only one, and should not obviously decide unconstrained. Other urgent best interests of individuals are non-domination and basic needs – and control over the institutions that shape our lives. It is a very open question whether more, and less constrained, deliberation and scope of decision for accountable legislatures always makes for more legitimate decisions – or better democracy. There may be good reason to welcome human rights constraints on parliaments to protect minorities and member states, rather than to expose them to avoidable risks of unfortunate deliberations and resultant policy mistakes. Thus it may be legitimate – if not ‘democratic’ in the institutional sense – to have international bodies that monitor and adjudicate the human rights performance of national governments and administration. In short, the best reasons to value democracy – as protecting and promoting individuals’ interests fairly, and to bolster several of the 7 forms of assurance necessary among contingent compliers – may also provide us with good reasons for elected representatives, or their courts, to have the authority to review proposed institutional changes, legislation and policies.⁶¹ Thus constraints on parliament are not fundamentally problematic – to the contrary, they are to be assessed as part of democratic rule. Accountability of national legislatures and governments toward international courts may in principle be justifiable and part of a legitimate multi-level political order. Among the important remaining concerns, is whether international human rights courts will be trustworthy, ie whether there mechanisms of accountability that ensure that they in turn will reliably be sufficiently responsive to the best interests of the citizens.

VII. Conclusion

This paper has sought to lay out and defend some important accountability mechanisms of the Constitutional Treaty: Democratic accountability of EU bodies toward European and national parliaments, as well as accountability of parliaments and governments to international courts with regard to human rights. I have sought to argue that such forms of accountability may help address the manifold needs of assurance faced by citizens who are regarded as ‘contingent compliers,’ - willing to do their share in just schemes, if they are assured that others act likewise. I argue that the reasons we have to value accountability mechanisms and democratic arrangements also lend support to some modes of accountability that lack strong enforcement mechanisms or ultimate electoral accountability, and that all the forms of accountability discussed may further the normative legitimacy of the European Union political order. The increased role in the European Union of accountability mechanisms, democratic and otherwise, may provide much needed assurance for citizens, that the institutions and offices satisfy the

⁵⁹ Cf Ackerman, 1988, 192; Sunstein, 1994, 13-14.

⁶⁰ Waldron, 2000, 261.

⁶¹ cf De Marneffe, 2004, 255, Beatty, 1994, 350.

appropriate standards of legitimacy, and that most other citizens and officials actually do their share.

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