Christian Jetzlsperger
Universität Erfurt / European University Institute, Firenze

Legitimacy through Jurisprudence?
The Impact of the European Court of Justice on the Legitimacy of the European Union

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Please mail any comments to christian.jetzlsperger@iue.it

"The judiciary [. . .] has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE *nor* WILL, *but merely judgment".*

— Alexander Hamilton, *The Federalist* no. 78

PART ONE
Legislatures, Judiciaries, and Public Opinion

Parliaments as Public Enemies?

"Congress as Public Enemy" is the title of a study, published in 1995, in which John R. Hibbing and Elizabeth Theiss-Morse analysed "public attitudes toward American political institutions" (Hibbing and Theiss-Morse 1995). In their research, the authors combined quantitative and qualitative methods in order to find out the reasons for an apparent dissatisfaction of the American people with their political system. Their results were surprising: While Congress (like indeed every Parliament) had been designed, by the Fathers of the Constitution, as the federal institution that would most closely reflect the will of the people, it was exactly the Congress which respondents to a national survey as well as participants in focus group interviews disliked most. Or, to be more precise, it was the way in which Congress operates that aroused the fury of the people.

Hibbing and Theiss-Morse discerned, in the public perception, a distinction between the institutions *per se* and their day-to-day operations. And while support for the constitutional set-up and the institutions it established remained strong, the very political process that is the inevitable consequence of this set-up turned out to be heavily disliked by "ordinary people". The public, concluded the authors, refutes professionalised government, special-interest influence, controversial debate, compromise, and the lengthiness of democratic processes. As a consequence, the work of those institutions that display these features to the greatest extent is least appreciated. Paradoxically enough, therefore, Congress was perceived as "public enemy" — "*because* it is public" (149). It is the other side of the same medal that non-majoritarian institutions, where the processes people dislike most are either not in operation or at least not visible to the general public, enjoy a high level of support. The distinction between the institution as such, as a part of the constitutional structure, on the one hand, and its actual operation on the other are less clear-cut; these institutions, or so it appears, live up better to the constitutional ideal. In the American ambience, this is especially true for the Supreme Court: Its individual members have a comparatively low profile; it operates in dignified settings; disagreements among judges usually are not openly visible.

Unfortunately, comparative research in this field is rare, if not outright non-existent. It is therefore not clear to what extent Hibbing's and Theiss-Morse's findings allow for generalisations across modern pluralist political systems. Some preliminary and rather superficial observations may nonetheless, for the time being, corroborate the impression that legislatures, despite being the branch of government designed to represent the will of the sovereign people, are in general less popular than essentially non-democratically responsible judiciaries. According to a recent *Eurobarometer* opinion poll (*Eurobarometer*

2002b: B.9f), people in most member states of the European Union seem to have more confidence in judicial institutions than in the two other branches of government (see Figure A-1 in the Annex).[1]

Our hypothesis, then, might be that a democratically elected legislature is, by means of its mere existence as part of the constitutional order, a necessary but, because of the way it operates, by no means a sufficient prerequisite to secure public support for the political system. Other ingredients have to be added to the constitutional recipe in order to stabilise the polity. One of these ingredients might be a strong, independent and effective judicial system, with a special emphasis on its publicly most visible part: the supreme or constitutional court.[2]

The Contested Polity

The problem of parliaments' precarious legitimacy would certainly be aggravated in a "polity in the making" like the European Union. In an article first published in 1991, Joseph Weiler argued that people "accept the majoritarian principle of democracy [only] within a polity to which they see themselves as belonging" (Weiler 1999: 83). Strengthening the European Parliament, from his point of view, could hardly contribute to a higher level of popular support for the European integration process. The heart of the problem was not the widely acknowledged "democracy deficit". What the European Union suffered from was a much deeper legitimacy problem. Strengthening the European Parliament in the European decision-making process, possibly accompanied by extended qualified-majority voting in the Council, might, from this perspective, do more harm than good. The results of Hibbing's and Theiss-Morse's research strengthen the case for Weiler's skepticism: If parliamentary processes, including the bargaining between different interests and the striking of compromises, enjoy little public support even in stable national contexts, it is reasonable to assume that the very same processes will hardly be able to strengthen a feeling of "belongingness" among the citizens of the European Union.

However, more than ten years after Joseph Weiler's analysis, *Eurobarometer* figures seem to indicate that European integration has regained at least part of its popularity. As Table 1 shows, positive answers prevail for all major indicators of support for the integration process. At first sight, one might even get the impression that attitudes toward the European Union are, in many aspects, more favourable than toward the nation-state. At least, as Figure A-2 (in the Annex) demonstrates, European citizens display much more trust with regard to European institutions than toward their national equivalents.

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[1] It should be observed that, in the *Eurobarometer* survey, people were asked for their trust in their country's "judicial system" as a whole, without any specific reference being made to the respective supreme or constitutional courts. Moreover, unlike in Hibbing's and Theiss-Morse's work, no distinction was made between the institutions as such and their day-to-day business.

[2] Throughout the remainder of this paper, I will subsume both constitutional and supreme courts under the heading "constitutional courts", implying all courts enjoying the competence of judicial review of legislation.

Table 1: Attitudes toward the European Union

	positive	neutral	negative
Membership "good thing"	53%	28%	11%
Benefit from EU for respective member state	51%	n.a.	26%
Regret if EU failed	34%	44%	11%
Trust in the EU	46%	n.a.	37%
Image of the EU	49%	31%	14%

Source: *Eurobarometer* 2002a.

Does this mean that the legitimacy deficit Weiler had notedhas been cured? Hardly so. The dust of the fierce Maastricht debates may have settled down. But the social legitimacy of the European Union arguably remains precarious. European integration now faces not so much open hostility, but rather indifference and disinterest. The legitimacy deficit has not disappeared; it just comes in a different guise. In 1999, only about 57% of the European electorate participated in elections for the European Parliament — a turnout lower than in previous European elections and certainly much lower than the average turnout in national general elections. Even those who did vote can hardly be said to have acted, unless in a very formal sense, in their capacity as citizens of the European Union: Electoral campaigns in all fifteen member states had been dominated by issues of national politics, rather than focusing on a genuinely European agenda. The 1999 elections were symptomatic for a lack of interest, on behalf of the European public, in European Union affairs.

The same lack of interest is reflected in the low public awareness of the work of the European Convention, composed of representatives of the European Parliament and the European Commission as well as of national parliaments and member (and applicant) state governments. The (rather restricted) academic and political public has widely acclaimed the "Convention method" as an inclusive and therefore promising approach to Treaty reform in the European Union. But while the Convention has, for the last year, broadly discussed the foundations of the European Union, advanced far-reaching proposals for its reform, decided to establish a European Constitution, and begun to discuss the first concrete stipulations of this Constitution, the public at large has hardly taken notice. According to the results of the most recent *Eurobarometer* opinion poll only 28% of the respondents had even heard of the Convention's existence (*Eurobarometer* 2002a: 10) — despite the fact that 65% declared themselves in favour of the adoption of a European Constitution (13). This discrepancy is not too difficult to explain: Media coverage is scarce, if it exists at all; and unsurprisingly so, if one considers the fact that 30% of the European citizenry are not interested in news concerning the European Union at all, while 49% pay only little attention (*Eurobarometer* 2002b: 10). And even though more people would regret than feel relieved if the European Union disappeared completely from the international stage, the most frequent attitude, as Table 1 shows, would be one of mere and simple indifference.

The Argument

Tying together the two threads of argumentation we have spun thus far, two sets of questions impose themselves:

1. What contribution can courts, and more particularly constitutional courts, make to the "production" of legitimacy for a given polity? What are the preconditions for their having an impact on the polity's legitimacy, which factors influence this effect and what are its limits? How can their "legitimatory" contribution be reconciled with democratic theory and with their own precarious position as a non-democratically responsible institution in a democratic environment? That is, what about the normative claim that "all State authority is derived from the people", as for example Article 20 of the German *Grundgesetz* stipulates?

2. Can the theoretical findings be applied to a supranational polity, and if so, to what extent? Has the European Court been able to provide legitimacy for the European Union and for the integration process? How large is its potential to do so in the future? Under what conditions could this potential be further unfolded in the current constitution-making process?

Obviously, the answers to the second set of questions will largely depend on the answers to the first. This paper, therefore, focuses to a large extent on that first set, i.e. the theoretical implications of our hypothesis with regard to the role courts can play in the legitimation of a polity. The first section aims at clarifying the catch-all term of "legitimacy" and elaborating a working definition which focuses on the empirical-analytical rather than the normative connotations of the term. I will then try to individuate dimensions of legitimacy that together make up the legitimacy of a polity. In the next step, I will discuss one possible approach that might be helpful in assessing the role of courts in the "production" of legitimacy: Jürgen Habermas' construction of legitimacy through legality within the framework of deliberative democracy. Building upon this discussion, I will endeavour to locate the contributions of courts within the framework of dimensions of legitimacy. In the light of the preceding analysis, I will finally individuate tentatively some factors that condition, influence, or limit the impact of courts on securing a polity's legitimacy.

In the concluding part of the paper, I will present some first — rather intuitive — ideas about what the results of the theoretical discussion might imply with regard to the European Union. I will try to analyse to what extent the factors which have previously been individuated are present in the European context, and arrive at a tentative conclusion about the extent to which the European Court of Justice does indeed have, and can have in the future, an influence on the legitimacy of that *sui generis* polity that is the European Union.

PART TWO
Legitimacy through Jurisprudence

The Concept of Legitimacy

> "The question of the legitimacy or rightfulness of political authority is of central concern to both normative political philosophy and explanatory political science, yet a satisfactory definition of the concept remains elusive, and the connection between the respective concerns of political philosophy and political science is obscure" (Beetham and Lord 1998: 15).

Social Legitimacy

"Legitimacy" is indeed a colourful concept. What do we mean when talking about the legitimacy of the German constitutional order, the legitimacy of Italian court decisions, or the legitimacy deficit of the European Union? The term is extraordinarily difficult to define, and it is even more difficult to measure. This is not to say that we do not know what it means. Just as many of us instantly know, when looking a piece of art, whether we like it or not, we intuitively know whether a given political system or individual political decision is, in our view, legitimate. Just as we appraise a piece of art at first sight, without asking for what exactly, which of its characteristics (colours, structures, form, etc.) makes us like it, we consider a polity legitimate or not without exactly knowing why.[3] For our purpose, however, we will have to go beyond intuitive knowledge. In this section, I will make a distinction between the connotations of "legitimacy", elaborate a working definition of the term, and individuate its dimensions.

In his famous study on *Economy and Society*,[4] Max Weber laid the foundations for social science research on legitimacy. The concept of legitimacy forms the cornerstone of his *Herrschaftssoziologie*. Departing from his definition of *Herrschaft* — the "probability that certain specific commands (or all commands) will be obeyed by a given group of persons" (Weber 1968: 212) — Weber contends that "custom, personal advantage, purely affectual or ideal motives of solidarity do not form a sufficiently reliable basis for a given domination [*Herrschaft*]. In addition there is normally a further element, the belief in *legitimacy*" (213). The "validity" (in German, *Legitimitätsgeltung*) of a given polity then depends on the extent to which such a belief in legitimacy (as opposed to mere custom, personal advantage and similar motivations) governs the "obedience" of the subordinates.

Every system of *Herrschaft* will therefore endeavour to foster its subjects' belief in its legitimacy in order to endure. How it does this, and which effects result from this endeavour, will rely to a large extent on the "claim to legitimacy typically made by each" such system (213). The famous distinction of three

[3] Philippe Schmitter refers a similar, though less benevolent comparison, citing US Supreme Court Justice Potter Stewart's remark about pornography. See Schmitter 2001: 79.

[4] In general, quotations from non-English texts are taken from an authoritative current translation; where they are taken from the original-language version, translations are my own.

"pure types" of legitimate *Herrschaft* — rational, traditional, and charismatic — builds upon that identification of claims to legitimacy and their different sources. In our context, what is more important is the relation Weber establishes between the *belief in* legitimacy, shared (to a certain extent) by the subordinates of a specific system of *Herrschaft*, the *claim to* legitimacy made by that system itself, and the *validity* of the system. To rephrase it: a political system commands validity if and to the extent that its citizens consider its interferences with their actions, their behaviour and their expectations, in short: with their daily lives, by and large justified. If we substitute "social legitimacy" for Weber's *Legitimitätsgeltung*, our working definition of social legitimacy may then be as follows:

The social legitimacy of a polity depends on the extent to which citizens accept as justified the fact that decisions which are binding upon them are taken by or in that system.[5]

The crucial element of this definition is the acceptance as justified, or otherwise said: the belief in legitimacy. Social legitimacy is nothing more than the aggregate measure of individual beliefs in legitimacy. "Put simply, legitimacy converts power into authority — *Macht* into *Herrschaft* — and, thereby, establishes simultaneously an obligation to obey and a right to rule" (Schmitter 2001: 80); it is "the recognition of the right to govern" (Coicaud 2002: 10). Societal compliance, in turn, that is (once more, in Weberian terms) the extent to which commands "will be obeyed by a given group of persons", is a function with several variables, among them habits, the menace or the actual use of force — *and* social legitimacy.

$$L = f(B_L) = \left(\sum_{i=1}^{n} B_{Li}\right) \div n$$

L: Social Legitimacy
B_L: Individual's Degree of Belief in Legitimacy

This is clearly an empirical-analytical definition of "legitimacy", marked as such by the word "social". We are not primarily concerned with how government *per se* or how a certain polity can be normatively justified. Nor are we particularly interested in whether certain legal norms have been enacted according to pre-established rules, that is, in a concept of legality. Rather, we ask whether and to what degree people do *de facto assume* that the polity that produces legally-binding norms is legitimate. We do not look at the polities we want to analyse from *outside*, applying "external" standards, but we take an *inside* perspective, asking for whether our system is "congruent with the customs, beliefs, preferences and aspirations" of its constituency (Walker 2001: 34). So we now know what we want to know. However, we have not yet gained any substantive knowledge from our definition. Indeed, it merely clarifies what we meant with our initial question — what makes polities legitimate? — and begs another, more pre-

[5] This definition of (social) legitimacy differs from Habermas' (normative) notion of legitimacy. However, in spite of terminology, it does not necessarily contradict his basic argument. For Habermas does establish a link between legitimacy (understood as normative justification) and "factual compliance". Although the former is independent of the latter, compliance is enhanced by a *belief* in legitimacy, which in turn is, according to Habermas, rooted in legitimacy-as-justification. Belief in legitimacy thus is a crucial catalyst in transforming legitimacy-as-justifiability into compliance. See Habermas 1996: 30.

cise question (cf. Luhmann 1983: 27): what makes people *believe* that the political system is legitimate? Put differently: *why* do people ascribe legitimacy to the political system? What exactly is it that makes people accept as binding decisions of their government, even if detrimental to themselves, apart from menace of force, habit, custom, etc.?

In order to answer this question, we cannot (despite our emphasis on a social definition of legitimacy) entirely dismiss the normative point of view. It comes "back in", so to speak: normative assessments of course do play a role in determining the degree to which the citizens will consider the operation of the polity legitimate. It is not the only factor, to be sure; it is not a sufficient, but certainly a necessary condition for people's belief in legitimacy.

Dimensions of legitimacy

If we are to identify the different factors which may or may not contribute to citizens' belief in legitimacy, we will have "to cut the conceptual cake" (Walker 2001: 34) of the term, disaggregating it into *dimensions* of which this belief is composed. While we have, until now, not specified the type of society we are talking about, this step requires us to concretise our object somewhat. For, when we analyse the medieval *Sacrum Imperium Romanum*, different dimensions would certainly come to the fore than when looking at, say, the supranational polity of the European Union. Given the objectives of this paper, our focus will be post-traditional, non-metaphysically bound, pluralistic polities: that is, polities in which "comprehensive worldviews and collectively binding ethics have disintegrated" and in which "the surviving posttraditional morality of conscience no longer supplies a substitute for the natural law that was once grounded in religion or metaphysics" (Habermas 1996: 448).

In this context, what are the dimensions of social legitimacy? The attempts at individuating them are burgeoning. One of the best-known approaches is the distinction between "input" and "output" legitimacy as suggested by Fritz W. Scharpf (1999). According to Scharpf, the legitimacy of a polity depends on the interaction between "input-oriented authenticity" and "output-oriented effectiveness" or, in other words, between "government by the people" and "government for the people":

— *Input legitimacy* stresses that policies, in order to be (perceived as) legitimate, have to reflect the will of the people as a community. Input legitimacy does not stem from the mere existence of democratic institutions and processes like free elections, however. Rather, it presupposes what Weber called *Gemeinsamkeitsglauben* or "belief in commonness", founded on pre-existing features like language, culture, or ethnicity. Only then, asserts Scharpf, will minorities accept majority decisions (cf. 18; see also, albeit with different emphases, Weiler 1999: 83; Grimm 1995).

— *Output legitimacy*, on the other hand, emphasises that political decisions have to promote public welfare. "Government for the people" means that the legitimacy of a polity depends on its ability to solve problems which call for collective solutions, i.e. problems that can neither be solved by individuals, nor by market mechanisms, nor by collective actions freely coordinated by civil society. Output-oriented legitimacy is founded on a common interest, not on a common identity; it relies on (possibly very diverse) institutional mechanisms serving two purposes: they have to prevent

the abuse of power and ensure that costs and benefits are spread according to principles of distributive justice (Scharpf 1999: 20ff).[6]

Scharpf argues that, in democratic nation-states, both forms of legitimacy — input- and output-oriented — coexist to varying degrees while, for example, the European Union lacks input legitimacy. However, the distinction he proposes is not fully convincing. Scharpf enumerates four institutional mechanisms of producing output legitimacy — to which he seems to assign equal functional value: responsibility vis-à-vis voters; independent "expertocracies"; corporatist and intergovernmentalist arrangements; and pluralistic policy networks (22-28).

> "Given the instrumental character of these mechanisms, there is no reason to turn down functional alternatives [to democratic responsibility] if [it] led to undesirable results or were too ineffective because societal and institutional preconditions of democratic responsibility were not fulfilled" (23).

From a normative point of view, this is a questionable assumption. But in analytical terms as well, the argument seems to be flawed. The notion of output legitimacy unnecessarily conflates two analytically distinct objectives: first, ensuring the efficiency and effectiveness of decision-making and high quality standards of the resulting collectively binding decisions; and second, what Scharpf calls "preventing the abuse of power". Moreover, it remains unclear why democratic structures and procedures would have to be classified under "output legitimacy", and not, as common sense would suggest, as a contribution to input legitimacy. This distinction is even less convincing if one takes Scharpf's own argument serious: that the viability of democratic institutions and procedures — which are supposed to produce *output* legitimacy — is dependent on the existence of "societal and institutional preconditions", i.e. *input* legitimacy. This dependence, by the way, appears not to exist for the other three mechanisms listed.

Another approach[7] which, in my view, is more convincing has been proposed by Neil Walker (2001: 34-39), albeit in a different context. Walker distinguishes between three dimensions: performance, regime, and polity legitimacy.

— *Performance legitimacy* is concerned with the efficiency and effectiveness of the system at hand. Performance legitimacy varies with the capacity of the political system to solve problems, mostly

[6] In a sense, this classification follows Weber's distinction between *Vergemeinschaftung* and *Vergesellschaftung*.

[7] A further and again different classification is proposed by Beetham and Lord (Beetham and Lord 1998: 15; cf. also Beetham 1991). They distinguish between a political power's

- legality, i.e. its exercise according to pre-established rules;
- justifiability, i.e. that the rules are created by an authority which is socially accepted as based on a rightful source, and that they live up to accepted ends of government;
- legitimation, i.e. the express consent by those subordinate to political power.

Now, it is without doubt that the term "legitimacy" is used in all three of these aspects. However, Beetham and Lord assert that political power is legitimate whenever and to the extent that these three aspects are given; i.e. the connotations of the term — its social and philosophical usage — are taken in the sense of criteria or dimensions of legitimacy. This categorisation, in my view, unduly conflates internal and external aspects of legitimacy without explicating their relation, and without further differentiating within the two connotations. Moreover, assigning independent status to "legality" as a dimension of legitimacy is questionable. Legality can be an important aspect of normative justifiability (and probably is when it comes to modern societies and polities); and it can be an equally significant part of the explanation of legitimation (as I hope to show later in this paper). But I cannot discern wherein its status as a separate dimension of the term could lie.

within a given framework of aims and values. For example, performance legitimacy will tend to be higher in a system that ensures economic wealth, social security, and high levels of employment, than in one that faces long-standing and serious problems in solving economic crises.

— *Regime legitimacy* refers to the "overall institutional framework through which the entity in question is constituted and regulated. [It] is concerned with the deep pattern of political organisation and 'style' of political engagement within the entity in question, with the role, 'scope' and representative quality of governing institutions and their mutual relationship" (35). In a post-traditional setting, regime legitimacy will be high whenever a political system is highly inclusive, i.e. when the processes at work allow for representation of as many societal interests and concerns as possible, while guaranteeing comprehensive individual liberties.

— Finally, *polity legitimacy* is the component which is most difficult to grasp. It refers to the "feeling of belongingness" felt by the citizens with regard to the entity in question. It requires some kind of attachment to the polity as such and a degree of mutual solidarity, a "web of mutual commitments" (37) between the citizens themselves. Polity legitimacy, in the final analysis, is about the citizens' identity; it determines and claims the extent to which the polity shapes this identity. It is the aspect of legitimacy a polity enjoys *qua* existence and which is formed and maintained through a history experienced as common, by political symbols and a common cultural heritage.

The legitimacy of a polity, then, is composed of these three elements which are, to different degrees, present in any viable polity:

$$L = L_{perf} + L_{reg} + L_{pol}$$

However, it would be too easy to assume *a priori* that an increase in one legitimacy dimension could simply make up for a decrease in another dimension. For the degree of stability of these dimensions is very different: Whereas polity legitimacy, due to its nature, is extraordinarily stable, performance legitimacy is subject to rather frequent variation, with regime legitimacy taking the middle ground.

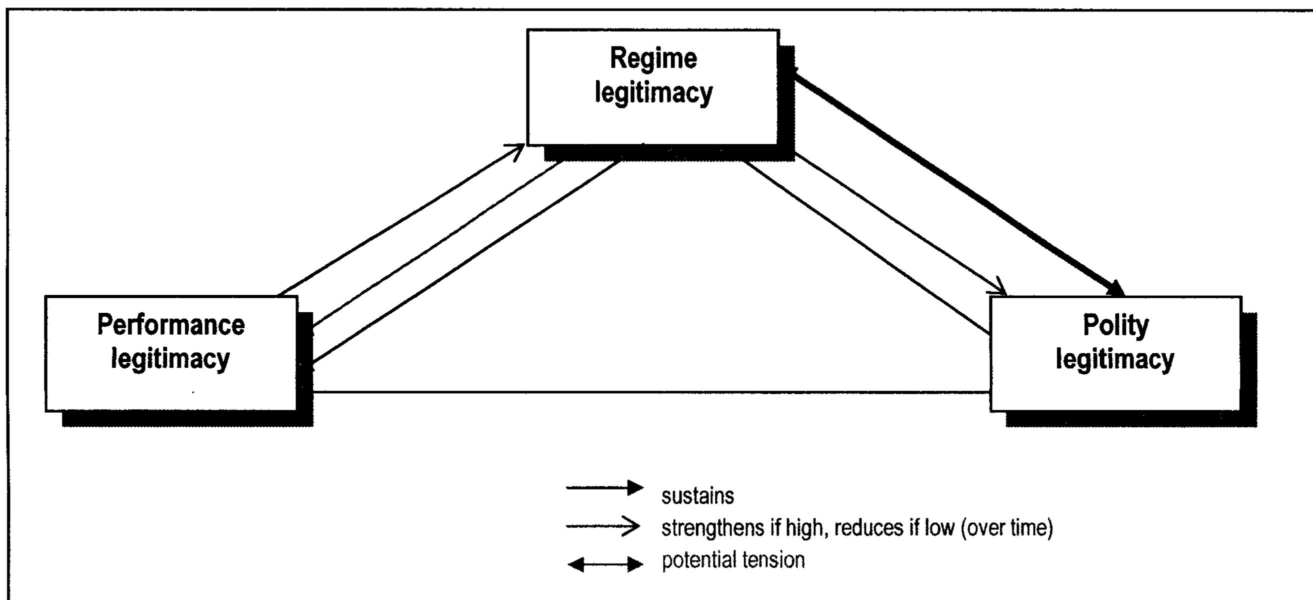

Figure 1: Dimensions of legitimacy and their relations

Moreover, the three dimensions are to a large extent interrelated and influence upon each other (see Figure 1). For example, the performance of a political system — and thus its performance legitimacy — clearly depends on how its institutional matrix is organised. Performance legitimacy may increase proportionally to regime legitimacy; but there may also be an inverse relationship: while an institutional design that favours the openness of the political process should enhance regime legitimacy, the down-side of such a design might well be an adverse effect on the system's "output", and in that way, on regime legitimacy. Polity legitimacy, on the other hand, may for some time sustain a political system which lacks performance legitimacy or even regime legitimacy, but will in the long run be harmed by an enduring lack of the latter.

Excursus: Is a European Demos *Possible?*

The most complex and at the same time crucial of these relationship is the one between regime and polity legitimacy. To what extent does regime legitimacy depend on polity legitimacy? In other words, do people really accept majority decisions only if they feel themselves as "belonging" to it? And how "thick" does this feeling of belongingness have to be? As this question is particularly intriguing when it comes to a supranational political entity, we will focus our attention on the European Union for some time in order to see more clearly the issues at stake.

In its famous and controversial 1993 decision on the Maastricht Treaty on European Union (*Maastricht-Urteil* 1993[8]), the German Constitutional Court seized the opportunity to set out its understanding of democracy, declared to be one of the inviolable and immutable principles of the German constitutional order by Article 79 (3) of the German *Grundgesetz*:

> "Democracy, if it is not to remain a merely formal principle of accountability, is dependent on the existence of certain pre-legal conditions, such as a continuous free debate between opposing social forces, interests, and ideas [...] out of which comes a public opinion which forms the beginnings of political intentions" (87).

At least for the foreseeable future, according to the Constitutional Court, these conditions are not given in the context of the European Union. Therefore, asserts the Court, significant spheres of activity have to be left to the states so that "the people of each [state] can develop and articulate itself [sic] in a process of political will-formation which it legitmates and controls, in order thus to give expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically".[9] Democracy, then, is dependent on the pre-existence of a *Staatsvolk*, a "people of the state", and serves as a means for this pre-existent people, bound together "spiritually, socially and politically", to express itself. Democracy without such a people, conceived of in the "thick" sense of the word, is impossible. Expressed in a different way: Regime legitimacy, insofar as it is attained

[8] Quotations from the judgement are taken from the translation in the *Common Market Law Reports* (1994 1 CMLR 57). For a (not always fair) critique of the Maastricht decision of the German Constitutional Court, see, among many others, Weiler 1995.

[9] In the original text, this passage reads: "[...] um so dem, was es — relativ homogen — geistig, sozial und politisch verbindet [...], rechtlichen Ausdruck zu geben" (BverfGE 89, 155 (186)).

through the self-government of the people, requires a very high degree of polity legitimacy, that is exactly those spiritual, social and political bonds the *Bundesverfassungsgericht* calls for.

In a similar vein, another former Judge on the German Constitutional Court, Dieter Grimm (who was not part of the Senate which decided the Maastricht case), has argued that Europe lacks the *demos* that would be the prerequisite for fully democratising the European Union (see Grimm 1995). Grimm carefully departs from the primordial view of a pre-existent, given people that the *Bundesverfassungsgericht* had employed at least in parts of its Maastricht judgement (such as the one cited above). According to Grimm, the problem lies in a lack of "mediatory structures" which would relate public opinion to parliamentary decision-making. Social cohesion, he argues, depends on such structures like mass media, parties, associations, or civic movements which are indispensable for creating social discourse. The institutions of the state alone can neither guarantee nor replace them (251). Grimm sums up:

> "The requirements for democracy are here developed not out of the people, but out of the society that wants to constitute itself as a political unit. It is true that this requires a collective identity, if it wants to settle its conflicts without violence, accept majority rule and practise solidarity. But this identity need by no means be rooted in ethnic origin, but may also have other bases. All that is necessary is for the society to have found an awareness of belonging together that can support majority decisions and solidarity efforts, and for it to have the capacity to communicate about its goals and problems discursively. What obstructs democracy is accordingly not the lack of cohesion of Union citizens as a people, but their weakly developed collective identity and low capacity for transnational discourse. This certainly means that the European democracy deficit is structurally determined. It can therefore not be removed by institutional reforms in any short term" (255).

Although Grimm builds on less primordial and more constructivist premises, the consequence remains the same: Democracy requires a *demos*; in the terms of our own analysis: regime legitimacy is by no means independent of, but instead presupposes polity legitimacy.

The notion underlying Grimm's (and many others') analysis has recently been elaborated in an article by Lars-Erik Cederman (Cederman 2001). Following the constructivist approach in the abundant literature on nations and nationalism,[10] he concedes that political identities can, to a large extent, be generated by intellectual and political activism.[11] However, once created, these political identities become deeply entrenched in the cultural environment (cf. Cederman 2001: 143) and can hardly be substituted for by alternative identities — not least because they will be upheld by much the same policies and mechanisms which created them in the first place. These "locked-in" identities, then, are the defining elements of the constituent *demos*:

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[10] On the use of constructivist approaches in European integration studies, see the programmatic article by Christiansen, Jørgensen and Wiener 1999, and the papers collected in Christiansen, Jørgensen and Wiener 2001.

[11] For abundant proof of this fact with regard to the processes of nation-building in the 19th century, see (among many others) the historical and theoretical analyses of Hobsbawm 1990; Schulze 1994; Langewiesche 2000; Thiesse 1999; Gellner 1983.

> A "demos is a group of people the vast majority of which feels sufficiently attached to each other to be willing to engage in democratic discourse and binding decision-making" (244).

Only a *demos* thus understood can, in Cederman's view, provide the legitimacy basis for majority rule and collectively binding decisions.

It has to be remarked that neither Grimm nor Cederman, not even the Judges who decided the Maastricht case in 1993, would go so far as to maintain that a European *demos* and with it, a collective identity beyond the nation-state, could not be created. However, all of them project such an identity creation in the distant future because it would require some long-term manipulation of cultural substrates which is not at all likely in present circumstances.

If all this is the case, we can stop our inquiry at this point. If indeed legitimacy is fully dependent on the existence of a strong collective identity — as the German Maastricht decision, Dieter Grimm, and Lars-Erik Cederman would all, despite important nuances, suggest —; if, that is, regime legitimacy presupposes polity legitimacy and cannot, by itself, contribute to the *creation* of polity legitimacy, the very distinction between those two dimensions of legitimacy would not make sense. Courts would not be able to make significant contributions to legitimacy, nor would any other institutions — unless, of course, on the basis of a solid collective identity. Institutions could only develop the potential already inherent in the polity-as-community, but could not add any independent contributions. I will argue, however, that polity legitimacy and collective identities are not pure givens, fixed once and forever. Instead, I will argue that both are amenable to influence from the realm of regime legitimacy: Polity legitimacy can be moulded through institutions and processes.

This is not to say that Cederman's, Grimm's, and all the others' empirical analyses are flawed. Quite to the contrary, most of their observations are obviously true. Indeed, the European Union lacks mediatory structures like mass media, truly European political parties and interest associations. It is true, there is no European political discourse; not even is there, beyond an utterly restricted élite, transnational political interest. And it would be difficult to neglect that national identities are persistent and deeply rooted in political and societal culture. A tradition of reasoning often termed "post-nationalist", however, which finds its point of reference in the writings of Jürgen Habermas and his concept of "deliberative democracy",[12] contests not so much the diagnosis presented by these authors than their conclusions. Habermas himself, in a reply to Grimm (Habermas 1995), rejects the view that democracy and, consequently, the legitimacy of a polity are entirely dependent on the existence of a given collective (read: national) identity:

> "I see the nub of republicanism in the fact that the forms and procedures of the constitutional state together with the democratic mode of legitimation simultaneously forge a new level of social integration. Democratic citizenship establishes an abstract, legally mediated solidarity among strangers. This form of social integration which first emerges with the nation-state is realised in the form of a politically socialising *communicative context*. Indeed this is dependent upon the satisfaction of certain important functional re-

[12] See below pp. 20-24.

> quirements that cannot be fulfilled by administrative means. To these belong conditions in which an ethical-political self-understanding of citizens can communicatively develop and likewise be reproduced — but in no way a collective identity that is *independent of the democratic process* and as such existing prior to that process" (305).

But is this not mere "wishful thinking", as some of Habermas' own remarks and the works of many of his followers (see for example Lacroix 2002) might suggest? This is indeed the reproach of many critics who consider identity-formation beyond the nation-state as a necessary and yet highly unlikely prerequisite for obtaining a higher level of legitimacy of the European integration process: Post-nationalists, they argue, are naïve and apolitical; their approach is highly normative, without offering positive proposals (cf. Cederman 2001: 157, 160ff). Habermas refutes objections like these: For him, collective identities are not "an historical-cultural *a priori* that makes democratic will-formation possible", but rather "the flowing contents [*Flussgröße*] of a circulatory process that is generated through the legal institutionalization of citizens' communication. This is precisely how national identities were formed in modern Europe" (Habermas 1995: 306f). In the same way, says Habermas, could European institutions and processes — he specifically mentions the context of a European Constitution — induce such a circulatory process (cf. Dellavalle 2002).

I agree with Habermas' analysis. As the historical literature on the creation of nations between the 18th and 20th centuries has perfectly made clear, collective identities can be formed — can *only* be formed — by way of such circulatory processes between cultural background and political process. In such a circulatory process, the prerequisites for communication among strangers which in the beginning may exist only in a rudimentary form, will come into being as well. This basic assumption has four important consequences which, at the same time, serve as qualifications to the contention that institutions and procedures can create identities:[13]

— First, identities certainly cannot be created *ex nihilo*. Even "solidarity among strangers" requires some basic feeling of commonness, of attachment to the polity. Yet, it need not be essentialist, based on a common *ethnie*, or even a common language.[14] Nor need it be the dominant layer of identity of any of the polity's members. Political identities can, and indeed do most of the time and in most cases, take the form of concentric circles. So in James Joyce's novel *A Portrait of the Artist as a Young Man*, the protagonist, Stephen Dedalus, can classify himself as a young man: "Stephen Dedalus, Class of Elements, Clongowes Wood College, Sallins, County Kildare, Ireland, Europe, The World, The Universe" (cf. Herz 2002: 129). What is necessary is only that people as least in part define themselves as belonging to that polity. In the case of the European Union it is quite clear that the large majority of its citizens does indeed feel "European", at least in part (cf. *Eurobarometer* 2002b: esp. 59-62). In fact, there are elements of a common historical heritage and of

[13] For the purposes of this paper, the following remarks will necessarily have to remain somewhat superficial. Nonetheless, for each of them a wealth of specialised literature could be cited in support — which I omit for the sake of brevity and readability.

[14] After all, even the national languages were (at least in part) constructions for the purpose of unifying the nation. Probably the best-known anecdote in this context is that Giuseppe Manzoni "translated" his novel *I promessi sposi* from Lombard dialect to the "high language" (itself derived from the Tuscan dialect) in order to inspire in his fellow countrymen a sense of "Italianness" (cf. Herz 2002: 130).

a common culture, and there is the experience of "growing together", obtained not last in millions of trips European citizens have undertaken to neighbouring countries.

— Second, common identities *can* be strengthened and fostered by institutions (and not only by more clear-cut "identity policies" like the construction of a common history, the creation of symbols representing the polity, or the definition of boundaries and the exclusion of the Other — all of which have been pursued for some years now in the context of the European Union[15]). Let us consider money: The importance that, to take the most outstanding example, the *Deutsche Mark*, had for German post-war identity, is beyond doubt. At present, one can only guess what impact the introduction of the Euro will have on European identity, but it can hardly be questioned that it will have some such effect. The discussion need not be restricted to such clear material symbols like currencies, however. Take the United States with its undoubtedly high degree of patriotism. To a large extent (though certainly not solely), that patriotism is "constitutional patriotism", grounded in the values and reproduced every day in the institutions embodied in the Constitution of 1787.

— Third, in a circulatory process of mutually reinforcing collective identity formation and institutional development, both aspects have to keep up with each other. That is to say that institutional designs and the extent of decision-making powers must not expect too much of the level of social integration and identity formation attained thus far. Nor should they simply be acquiescent to the *status quo*. Identity formation and institutional development have to go hand in hand.

— Fourth, and finally, "European identity can in any case mean nothing other than unity in national diversity" (Habermas 1995: 307). Identity in a post-modern era cannot take the "thick" form it had in the early 20th-century nation-state. Even today's nation-states are internally too differentiated, fragmented in too many different communities as that such "thick" identities could still form a sufficient basis for solidarity even on a nation-state level. This is even more true for a supranational entity like the European Union.

The last point brings us back to our original assertion that "solidarity among strangers" today requires integration that cannot solely be based on some kind of "identity politics". Social cohesion can and must, under the conditions of pluralistic societies, be induced by political means, that is, by processes and institutions.

What does this all mean for our inquiry? First of all, asking for the impact of courts on the legitimacy of a given polity does indeed make sense, even under conditions of precarious polity legitimacy. Polity and regime legitimacy are undoubtedly interrelated. But it is not a one-way relation. Both dimensions are mutually reinforcing. And while it is true that at least some basic level of polity legitimacy will be

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[15] The European Union has a flag which in many European countries is exposed alongside national flags. The twelve golden stars on dark blue ground not only symbolise perfection, as the European Commission's official explanation reads today (see http:// www.europa.eu.int/abc/symbols/index_de.htm, as of 6 March 2003). It was originally taken from Christian symbolism: In Saint John's *Apocalypse* (12:1), the twelve stars are an attribute of the Virgin Mary; the European flag thus refers to the supposedly "thick" common cultural background of European integration. The same is true, albeit with different points of reference, for the European anthem, Beethoven's *Ode an die Freude*, and the stylised bridges and portals figuring, as representative symbols of European architectural eras, on the Euro banknotes. Cf. Shore 2000: esp. ch. 2 and 4; Herz 2002: 131f. On the problem of inclusion and exclusion on a European level and its relevance for identity formation see e.g. Geddes 2000; Huysmans 2000; Turnbull and Sandholtz 2001.

indispensable for the system's legitimacy as a whole, regime legitimacy has to step in where polity legitimacy is low. It has to assume, so to speak, the deficiency guarantee and strengthen polity legitimacy over time — a task which cannot, by the way, be performed by the third dimension of legitimacy, performance legitimacy, due to its more unstable and volatile character.

We have now prepared the ground for an assessment of the impact courts — and more precisely, constitutional courts — can have on the legitimacy of a polity. We have clarified the term "legitimacy", defining it (in sociological rather than normative or legalistic terms) as an aggregate measure of people's *belief* in the legitimacy of the polity, i.e. the extent to which they accept as justified the fact that decisions which are binding upon them are taken by or in that polity. We have then discussed possible classifications of the *dimensions* of a polity's social legitimacy and identified it as including performance, regime, and polity components. We have furthermore discussed the relationship between regime and polity legitimacy and have asserted that regime legitimacy does have an importance in itself and does not presuppose a high degree of polity legitimacy. In the next section, we will ask for the role of courts more specifically: In which dimension (or dimensions) of legitimacy can courts make a contribution? By what mechanisms and for which reasons can they do so? In other words: Why do courts matter? And which factors determine how much they matter?

Why Courts Matter

Courts perform one of the basic functions of government. They "settle contests of interpretation over the application of valid but interpretable norms in a manner at once judicious and definitive for all sides" (Habermas 1996: 115). This task is a crucial one for any polity which claims the sovereign monopoly over the use of legitimate force.

The internal differentiation of the judiciary varies from polity to polity (cf. Guarnieri and Pederzoli 2001). Today, however, most liberal democracies know the institution of constitutional courts, be they specialised tribunals concerned with matters of constitutional adjudication only, or supreme courts which exert the prerogative of judicial review of legislative and administrative acts alongside with "ordinary" jurisprudence.[16] These courts bear an especially high responsibility: Like other courts, they are designed to "settle contests of interpretation over the application of valid but interpretable norms", but the norms they interpret are the constitution, and thus the supreme law of the land.[17] It seems safe to hypothesise that constitutional courts will therefore be particularly significant in judicial legitimacy production. In the following analysis, we will pay attention not only to the judiciary in general, but will place a special focus on the role of constitutional courts.

In order to assess the impact of the judiciary on the production of social legitimacy, it is helpful to recall the different values that correspond to the three legitimacy dimensions we have distinguished above:

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[16] Alec Stone Sweet labels these different institutional designs the "European" and the "American" model, respectively. Cf. Stone Sweet 2000: 32ff; see also Guarnieri and Pederzoli 2001: 134-147.

[17] On the (normative) legitimacy of constitutional adjudication *per se*, see below pp. 26-28.

- *Performance legitimacy* is related to the values of efficiency, effectiveness, and quality of decisions. The higher the efficiency and effectiveness of a polity's decision-making, the higher its performance legitimacy.
- *Regime legitimacy* (in a pluralistic polity) essentially emerges from the realisation of two distinct values: the idea of self-government by the people, on one hand, and the safeguarding of individual freedom and human rights, on the other.
- *Polity legitimacy*, finally, is about the realisation of collective identities, "the politicocultural self-understanding of a historical community" (Habermas 1996: 160).

Different types of institutions reflect different values and thus produce legitimacy along different dimensions. Mechanisms of representation and checks and balances, for example, embody the principle of self-government and so are primarily meant to contribute to the regime component of social legitimacy. Often, the same institutional mechanism may have contradictory effects: while enhancing the polity's legitimacy on one dimension, it may well endanger it on another. So, "expertocratic" regimes — like telecommunications control agencies, or, more prominently, central banks — are designed to enhance the quality of decisions in their area of concern and, in so doing, produce performance legitimacy; however, there is an inherent tension with the principle of self-government and thus regime legitimacy.

Now, how about the judiciary? As Figure 2 illustrates, the role of courts is no less complex. The connection to the values of efficiency and effectiveness, to begin with, is at least ambiguous. Court proceedings often protract the decision-making process (one just has to think of matters like road con-

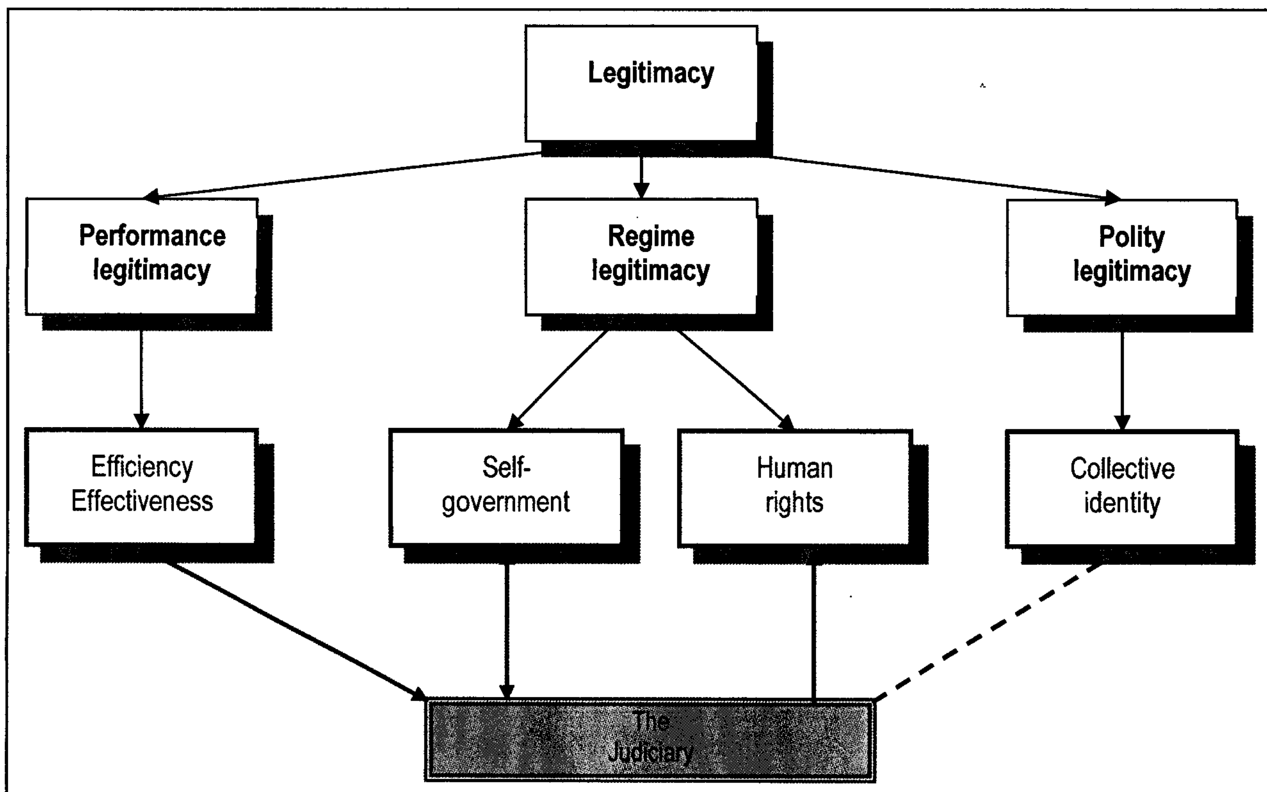

Figure 2: Dimensions of legitimacy, corresponding values, and the role of the judiciary

struction), thus undermining its efficiency. On the other hand, the involvement of courts ensures legal security in that it produces binding decisions *and*, at the same time, ensures that all interests concerned are indeed heard and taken into account; in that way, it may well increase the effectiveness of public policy.

It is at least as unclear to what extent courts can contribute to the creation of feelings of "belongingness", of a community's ideals, in sum: of a shared identity. Certainly, courts (and above all, constitutional courts) can have a part in clarifying the "value basis" of the polity by, most importantly, further developing, interpreting, and adapting a human rights code as part of the polity's common heritage. However, there are clear limits to the role courts can play in this respect, not last because they lack the symbolic and cultural tools usually employed for constructing or maintaining a "we-feeling". "Imagined communities" (Benedict Anderson) cannot be formed by *fiat*; they are being born over long periods and need to be sustained by societal input. Ultimately, polity legitimacy is the dimension of social legitimacy that is least amenable to institutional influence, including influence from the judiciary.

The clearest relationship is probably the one to the value of human-rights and individual-liberty protection. This relation is a rather unambiguously positive one: Safeguarding individuals' rights (be it against other individuals or corporate agents or against the state) is the task classically entrusted to the judicial branch of government; it is here that courts have their most direct contribution to make to the legitimacy of the polity: through the protection and promotion of human rights, of civil liberties, and of the privacy of the citizens, even against the will of majorities.

It is the other side of the coin that, when looking at courts' relation to the value of self-government, we are confronted with a different picture, above all when focusing on constitutional courts. According to the rationale behind their very existence, constitutional courts have the effect of restricting, rather than enhancing, the principle of self-government. Wherever courts with the prerogative of constitutional review of legislation exist, they are meant to defend the constitutional principle that the legislator (and with the legislator, the sovereign people) is not free to act as it wills. On the other hand, constitutional safeguards against a "tyranny of the majority" may be regarded as means to uphold the principle of self-government against the danger that it be unconsciously undermined; the most prominent of these safeguards being constitutional jurisprudence. In a sense, the "dilemma" of constitutional courts merely reflects the paradox of constitutionalism itself: The constitution "both constitutes and seeks to constrain the power of the State" (Walker 2003 forthcoming: ms. 4). While the constitution emanates from the sovereignty of the people, it at the same time limits that very sovereignty. A polity with a Constitution is by definition a limited polity: The people are not free to set up any rules they want; the sovereign is not free to act as it wills. The Constitution restricts or at least moderates the very democratic system it constitutes, and in essence this restriction or moderation resides in the fact that certain rules — institutional and procedural regulations as well as fundamental rights — are removed from the disposition of the legislator.

To sum up, while it is evident that the legitimatory effect of jurisprudence is for the most part concentrated in the realm of regime legitimacy, its extent is difficult to assess. Not only, as we have seen, are

the different dimensions of legitimacy interrelated and interdependent to a certain degree. Moreover, we are faced with the fact that even within the regime dimension, there is an inherent tension between the two values associated to it: the protection of individual rights and liberties on one hand to some extent conflicts with the principle of popular self-government on the other. Moreover, we have to consider the fact that courts, let alone constitutional courts, do not exist in an institutional vacuum. Quite to the contrary, they are part of the larger constitutional structure and in multiple ways interrelated with other branches of government. The exact shape of that constitutional structure differs from polity to polity. And even more than that, courts are embedded in a cultural context which deeply influences their mode of action, their reasoning, and thus their impact — the collective identity issue again lures behind the corner. It seems all but impossible to account for the impact of a single element within this highly complex construct.

Deliberative Democracy as a Framework of Analysis

So how can we make sense of all this? What I suggest here is that the concept of deliberative democracy and legitimacy through legality, as developed by Jürgen Habermas (Habermas 1996; see also Habermas 1987, 1998, and 2001) and others, offers a fruitful framework for our analysis. This may appear a daring endeavour. At first glance, it might seem inappropriate to make use of a clearly normatively grounded theory for explicitly empirical-analytical purposes. However, Habermas understands his thoughts about *Facts and Norms* exactly as an attempt at overcoming at least in part the divide between empirical analysis and normative theory. I shall therefore shortly sketch the essential traits of Habermas' theory,[18] and then discuss its applicability and its explanatory force with regard to "real-world" phenomena, such as social legitimacy.

At the centre of Habermas' thinking about political entities and their legitimacy stands the law. The reason for this centrality of the law is well captured in an episode in Umberto Eco's recent novel *Baudolino*. Eco tells the story of Baudolino, a son of North Italian peasants, who becomes one of the ministerials of Emperor Frederick Barbarossa. In his young years, Baudolino's education is entrusted to the bishop Otto of Freising who, shortly before his death, advises Baudolino to go to Paris in order to pursue university studies there. Otto, who has discovered Baudolino's talent of "creative lying", suggests that he read poetry, study the principles of rhetoric and even a little bit of theology. However, says Otto, he should not poke his nose into the law: "because with the law, it is impossible to lie" (Eco 2000: 60).

It is this belief in the sincerity of the law which accounts for its importance as a legitimating force. In Habermas' words, inherent to the law is a tension between *Faktizität und Geltung*, between facticity and validity: law demands *de facto* recognition and claims to *deserve* that recognition at the same time (cf. Habermas 2001: 113). The law leaves the decision on which grounds to observe it to its addressees: They may choose to do so because they consider it as a *de facto* limitation of their own freedom to act and because they calculate the risks of non-compliance; or because they consider these norms legiti-

[18] Certainly, this summary can by no means do justice to the richness of Habermas' perspectives. I hope it nonetheless captures the essential traits of his idea of deliberative democracy.

mate and valid. In order to be able to offer this freedom of choice, the law requires political power: "the state ensures average compliance, compelled by sanctions if necessary; on the other hand, it guarantees the institutional preconditions for the legitimate genesis of the norm itself, so that it is always at least possible to comply out of respect for the law" (Habermas 1996: 448).

Originally, law had been based on sacral grounds. These sacred norms, derived from religious worldviews shared by the society as a whole, had justified the exercise of social power which in turn had guaranteed its *de facto* implementation. Legitimate power and valid and effective laws had thus combined to political rule, organised in the form of the state. "Not only does law now legitimate political power, power can make use of law as a means of organizing political rule" (142). However, with the secularisation of the society and the accompanying profanisation of law, the latter lost its legitimating force because it lost its inherent legitimacy itself: Law was positivised and thus at the disposition of whoever governed. How could such positive law command similar authority? Essentially, two answers were given:

— Natural law concepts tried to bridge the gap: "After the canopy of sacred law had collapsed, leaving behind as ruins the two pillars of politically enacted law and instrumentally employed power, reason alone was supposed to provide a substitute for sacred, self-authorizing law, a substitute that could give back true authority to a political legislator who was pictured as a power holder" (146). Natural law should serve as a functional equivalent to the sacred law which had lost its spell and restore a moment of indisposability of the law (cf. Habermas 1987: 5f).

— Legal positivism, on the other hand, defined law simply as the "order of the sovereign" and thus deprived it of its normative character. The indisposability of the law, if at all, was vested in the form rather than in the contents or the foundations of the law. Metasocial guarantees of the law's validity, therefore, were unavailable (cf. 3).

Yet according to Habermas, both these attempts essentially failed because they posit an antagonism between political power and law. Natural law concepts claim that there is a law prior and superior in relation to political power; the exercise of political power is thus bound to the respect of the principles enshrined in natural law. This position binds the sovereign: Legislation (or at least constitution-making) in that view amounts to discovering and positivising the "law as it is". On the other hand, legal positivism unleashes the political legislator. Law is being dissolved in politics. Yet the insights of political philosophy from Locke to Kant suggest that some fundamental principles — which we can identify with a kind of "standard set" of human rights — should not be at the disposition of the legislator.

There seems to be an indissoluble contradiction. Either the legislator is bound by pre-existing norms and thus politics loses its function, or politics trumps over the law and law loses its legitimising force. Yet "the idea of human rights, which is expressed in the right to equal individual liberties, must neither be merely imposed on the sovereign legislator as an external barrier, nor be instrumentalized as a functional requisite for legislative goals" (Habermas 1998: 259). How can we reconcile these seemingly irreconcilable desiderata? Habermas argues that positive law cannot draw its legitimacy from its form or even its content, but can only be justified with reference to the democratic process of its creation.

"If legitimacy through legality is to be possible in our type of society, the belief in legitimacy, which has been deprived of the collective certainties of religion and metaphysics, must in some way be based on the 'rationality' of the law" (Habermas 1987: 11). As neither the contents nor the form of the law, as has been shown, can provide such a basis of rationality, its legitimising force must and can only be procedural. Habermas builds on his earlier work on discourse theory when he defines his "principle of democracy" (being a specification of the more general discourse principle): *Just those legal norms are legitimate to which all possibly affected persons could agree in (themselves legally instituted) rational discourses, calling on pragmatic, ethical-political, and moral reasons.* These discourses, in order to be rational, must not exclude anybody, be open to issues of every kind, and not be constrained by external pressures or dominated by participants who command social power (cf. Habermas 1996: 107-110).

Now, how does this principle of democracy dissolve the dichotomy between positivity on one hand, and the requirement of indisposability on the other? Put differently: How does it reconcile popular sovereignty and the rule of law? The legitimacy of law resides in everybody's equal chance to participate in its formation. There are, however, prerequisites to the exertion of this right to participate or public autonomy. Public autonomy is exercised through the medium, the "language" of law which, in turn, requires legal *subjects* who have decided to associate themselves with each other. Such an association, however, cannot be conceived of without presupposing that the citizens have agreed to guarantee to each other a sphere of personal freedom — and that is, private autonomy:

> "However well-grounded human rights are, they may not be paternalistically foisted, as it were, on a sovereign. [...] At the same time, one must also not forget that when citizens occupy the role of co-legislators they are no longer free to choose the medium in which alone they can realize their autonomy. They participate in legislation only as legal subjects; it is no longer in their power to decide which language they will make use of. [... T]the legal code as such must be available. But in order to establish this legal code it is necessary to create the status of legal persons who as bearers of individual rights belong to a voluntary association of citizens and when necessary effectively claim their rights. There is no law without the private autonomy of legal persons in general"(Habermas 1998: 260f.)

In this way, private and public autonomy presuppose each other. This means, at the same time, that popular sovereignty (the principle embodying public autonomy) and fundamental rights (those rights which are constitutive of private autonomy) do not contradict each other. Fundamental rights are "necessary enabling conditions; as such, they cannot *restrict* the legislator's sovereignty, even though they are not at her disposition. Enabling conditions do not impose any limitations on what they constitute" (Habermas 1996: 162).

According to Habermas, several categories of individual rights which define the status of legal subjects can be identified *in abstracto* (cf. 155-165). These abstract principles serve as a point of reference on which the people, when framing their constitution, orient themselves. They accord to each others equal individual rights and thus constitute the legal code. Yet these individual rights protecting everyone's private autonomy have to be complemented by basic political rights to participate in legislation.

"For *as* legal subjects, they [the citizens] achieve autonomy only by both understanding themselves as, and acting as, authors of the rights they submit to as addressees" (126).

In order that the citizens can understand themselves as the authors of the law even beyond the "metaphorical event" of a "reciprocal conferral of rights" (132), administrative (or executive) power has to be coupled back to the "communicative power" which generates law. This feedback requirement implies a highly demanding concept of democracy. At its centre is "a normative concept of the public sphere" (183). It is in this public sphere that a presumably reasonable collective will is being formed because, if at all, the demanding requirements for successful discourses are most likely to be fulfilled here: The public sphere excludes nobody, is open to issues of every kind, and is not constrained by temporal pressures (cf. Blätte 2001). The process of will-formation must not be limited to parliament, therefore. "Rather, the communication circulating in the various arenas of the political public sphere, of political parties and organizations, and of parliamentary bodies and Government leaders are intermeshed with, and reciprocally influence, one another" (Habermas 1996: 185). In order to be able to draw upon legitimacy through legality, the political system therefore has to provide "sluices" through which the communication flows within the public sphere can pass into the decision-making centres, so as to prevent administrative or social power from becoming independent and uncontrolled (356).

> "If the communicatively fluid sovereignty of citizens instantiates itself in the power of public discourses that spring from autonomous public spheres but take shape in the decisions of *democratic, politically accountable* legislative bodies, then the pluralism of beliefs and interests is not suppressed but unleashed and recognized in revisable majority decisions as well as compromises. The unity of a completely proceduralized reason then retreats into the discursive structure of public communication. The reason refuses to concede that a consensus is free of coercion, and hence has legitimating force, unless the consensus has come about under the fallibilist proviso and on the basis of an anarchic, unfettered communicative freedom. In the vertigo of this freedom, there is no longer any fixed point [*im Taumel dieser Freiheit gibt es keine Fixpunkte mehr*] outside that of democratic procedure itself, a procedure whose meaning is already implicit in the system of rights" (185f).

All political power is thus derived from the communicative power of the citizens. Yet it is obvious that political decisions cannot be reached in the public sphere itself, not last because it is impossible that all citizens come together to deliberate and decide freely "face to face". For this reason, laws have to be enacted by representative bodies which as truly as possible reflect the plurality of opinions present in the public at large. However, their very institutionalisation subjects parliamentary procedures to certain temporal, social, and substantive constraints. In order to deal with these constraints, decision rules (a majority rule, for example) have to be developed that supply "a procedural rationality that compensates for the weaknesses [...] inherent in the process of argumentation" (179). The justification of norms is always a fallible and provisional one because argumentation has, under certain decision rules, been interrupted but can in principle be resumed at any time.

As we have seen, according to the principle of democracy, only those legal norms are valid (legitimate) to which all possibly affected persons could agree in rational discourses, calling on pragmatic, ethical-

political, and moral reasons.[19] Now Habermas is realistic enough to concede that even under ideal conditions there will be cases in which "it turns out that all the proposed regulations touch on the diverse interests in respectively different ways without any generalizable interest or clear priority of some one value being able to vindicate itself". That is to say, there will be cases in which it will be impossible to reach a reasonable consensus in the discourse. "In these cases, there remains the alternative of bargaining" in negotiations (165). These negotiations, if instituted in a way that ensures fair consideration of all interests involved, does not "destroy" the discourse principle, but presupposes it: The rules for accordingly fair negotiations, set out primarily in the constitution, must have been agreed upon in rational discourses in the first place. In any case, the results of negotiations — in the same way as those of pragmatic or ethical-political discourses — must be in accordance with moral principles, i.e. must be justifiable in moral discourses.

The Ideal of Deliberative Democracy and the Reality of Legitimate Policy-Making

The question we are now confronted with is this: Can we indeed make use of Habermas' elaboration of deliberative democracy in non-normative, analytical terms (as many others have in fact done[20])? The study of John Hibbing and Elizabeth Theiss-Morse which I referred to in the introduction (Hibbing and Theiss-Morse 1995) may serve as a point of departure. I would argue that in at least three facets, their empirical-analytical findings about mass opinion with regard to the political system strikingly coincide with Habermas' normative concept:

— Hibbing and Theiss-Morse convincingly show that "ordinary" Americans deeply distrust the way in which their political system operates from day to day. They would like to see less conflict, less interest-group lobbying and bargaining, less tradeoff and compromise. Instead, they would prefer dignified political style, convincing arguments, and agreements representing something more than the lowest common denominator. They would, to summarise the argument, prefer a more discursive style of policy-making; they do not want power-based compromises, but rationally motivated and justified policies. The privileged position Habermasian-style deliberative democracy accords to rational discourse mirrors this empirical finding: Decisions, in order to be fully legitimate, have to originate in discourses, i.e. in non-coercive, power-free and argument-based speech situations.

— Despite popular criticism of day-to-day politics, Americans do nonetheless appreciate their political system *per se*. Hibbing and Theiss-Morse demonstrate that people distinguish well between the ideals set forth in the constitution and embodied in its institutional design, on one side, and its concrete *modus operandi* on the other. Again, an adapted deliberative-democracy approach is capable of explaining this difference: In this view, the constitution enshrines the principle of popular sovereignty and realises the "system of rights" which establishes the legal code. The realisation of

[19] On the different characteristics of pragmatic, ethical-political, and moral discourses (which I cannot expand on here) see Habermas 1996: 197-201.

[20] Giving a comprehensive overview is virtually impossible. In the area of European Union studies, the idea of applying the concept of deliberative democracy stands at the heart of the project "Citizenship and Democratic Legitimacy in Europe" (CIDEL), co-ordinated by Erik O. Eriksen and John Erik Fossum, to name but one of the most outstanding research projects in this field. See (among others) Eriksen and Fossum 2003; Neyer 2003; Joerges 2003. Previous studies within the same research agenda have been collected in Eriksen and Fossum 2000. See also Schmalz-Bruns 1999; Joerges 2001.

these universal principles is the result of a discursive consensus of all citizens. While in this view, non-discursive, power-based negotiations play an important role in the polity's everyday operation, the constitution *per se* cannot be the result of negotiations (for which the constitution itself creates the conditions), but has to come out of a combination of non-coercive pragmatic, ethical-political, and moral discourses.

— Finally, Hibbing and Theiss-Morse (like many others) have pointed out that the American people view the "Washington system" as being distant and unresponsive to the people's "real" needs. The capital and its political class appear like a spaceship, way above the heads of those whom they are meant to represent — a fact that heavily constrains the legitimacy of national decision-making. Our deliberative-democracy approach in this regard stresses the importance of administrative power being bound back to communicative power and, in turn, the latter's dependence on informal public spheres. For political decisions to enjoy legitimacy, it is necessary for the political system to provide "sluices" through which popular opinion (as formed in public spheres) can enter into the political system and influence on its agendas.

At this point, a *caveat* is in order. I do not propound that any "real-world" political system is living up to the ideal of deliberative democracy as developed chiefly by Habermas. Nor do I say that full-fledged fulfilment of its (indeed demanding) preconditions and requirements are possible. However, I neither contend the opposite. I would argue that the debate about whether deliberative democracy can be realised or not is of little relevance for our purpose. It may well be that deliberative democracy is an unachievable ideal. What I suggest, however, is to use the concept of deliberative democracy as a yardstick for assessing a polity's social legitimacy because it seems to reflect people's thoughts about political systems and their operation in many respects. In a sense, this means that we can compare and "measure" existing polities against a Weberian-style "ideal type" of deliberative democracy. In our case, it allows us to theoretically deduct criteria for assessing the degree to which courts can contribute to the production of legitimacy; criteria which it should then be possible to verify in empirical research. Developing these criteria is the purpose of the final section of Part Two. Before that, however, we will have to discuss more generally the channels through which courts and the political system as a whole are connected.

A Model of Legitimacy through Jurisprudence

It is obvious that courts have a primary role to play within a framework that assigns central importance to the law — after all, it is the courts who have to implement it (on the following see Habermas 1996: 193-237)? The judge has to guarantee legal certainty and thus take decisions consistent with the existing legal order, and he has to guarantee the "rightness" of his decisions by rationally grounding them so that all participants can accept them as rational decisions.

> "The rationality problem [...] consists in this: how can the application of a contingently emergent law be carried out with both internal consistency and external justification, so as to guarantee simultaneously the *certainty of the law* and its *rightness*?" (199)

With reference to Ronald Dworkin (1977; see also Dworkin 1986), Habermas sees the task of the legal discourse as consisting "in *discovering* valid principles and policies in the light of which a given, *concrete* legal order can be justified in its essential elements such that the individual decisions fit into it as parts of a coherent whole" (Habermas 1996: 212). Of course, this would require a "Judge Hercules" who, in the real world, does not exist. The task is somewhat facilitated through "legal paradigms" which bring the norms that are considered valid at some given point of time, into a transitive order. However, these paradigms have a tendency to develop into fixed ideologies and often concur with conflicting other paradigms. "The paradigmatic preunderstanding of law in general can limit the indeterminacy of theoretically informed decision making and guarantee a sufficient measure of legal certainty only if it is intersubjectively shared by *all* citizens and expresses a self-understanding of the legal community as a whole" (223). Instead of the herculic judge who overcomes the dilemma between certainty and rightness of the law, Habermas suggests a "discourse theory of law, which ties the rational acceptability of judicial decisions not only to the quality of arguments but also to the structure of the argumentative process" (226). It is judicial procedure that ensures that outcomes are "reasonable". Again, there are practical restraints which limit the ability to come to judgements which live up to the ideal of justifiability in a discourse. In addition to temporal constraints, there is the fact that in court procedures it is only the judge and the parties who are involved. However, the judge represents the perspectives of the uninvolved members of the legal community. And like "democratic procedures in the area of legislation, rules of court procedure in the area of legal application are meant to compensate for the fallibility and decisional uncertainty resulting from the fact that the demanding communicative presuppositions of rational discourses can only be approximately fulfilled" (234).

Constitutional courts play a special role. They are a necessary element in a system based on deliberative democracy, taking into account the fallibility of parliamentary decision-making and the necessity for every norm to be justifiable in moral discourses. In a system of judicial review, "the new programs [laws] are examined for their fit with the existing legal system. The political legislature may use its law-making powers only to justify legal programs that — insofar as they do not immediately interpret and elaborate the system of rights — are compatible with this system and can link up with the corpus of established laws" (167f). For the constitution which does exactly that, namely to interpret and elaborate the system of rights, contains nothing but the principles and conditions of the legislative process.

The obvious problem with judicial review is its compatibility with the principle of the separation of powers.[21] Habermas recognises the necessity for separating branches of government:

> "Laws can regulate the transformation of communicative into administrative power inasmuch as they come about according to a democratic procedure, ground a comprehensive legal protection guaranteed by impartial courts, and *shield* from the implementing administration the sorts of reasons that support legislative and judicial decision-making" (192).

[21] For the vivid normative-philosophical debate on the question, see *partes pro toto* Holmes 1988; Dworkin 1990; Ulrich R. Haltern 1998; Ulrich Haltern 2001; Tushnet 1999; Shapiro 2002; Sadurski 2002.

Whereas the administration may have no recourse to normative reasons, but works according to criteria of effectiveness and efficiency *on the basis* of the norms established by the legislature and the judiciary, the latter two share in the task of normative decision-making. However, while it is for the legislature alone to justify and consequently enact norms in discourses of justification, the judiciary engages in discourses of application. This distinction sets clear limits to the extent of "judicial policy-making" (cf. for example Shapiro and Stone Sweet 2002): judges may not go so far as to substitute themselves for the political legislator. As judges — and be they constitutional judges — are limited to discourses of application, the problem is particularly vexing in cases of abstract norm control: According to Habermas, this task generally has to be performed from a legislator's perspective. He concedes, however, that it may be admissible for constitutional courts to *overturn* norms, as long as judges do not usurp the competence of giving positive mandates to the legislator. In any case, abstract norm control has to be understood as a "delegated power" given to it by parliament: for the court may actually only "reopen the package of reasons that legitimated legislative decisions so that it might mobilize them for a coherent ruling on the individual case in agreement with existing principles of law; it may not, however, use these reasons in an implicitly legislative manner that directly elaborates and develops the system of rights" (Habermas 1996: 262). The reason for this is that constitutional adjudication cannot be based on substantive values as this would contradict the very principles of deliberative democracy and because this opens the door for functionalist considerations to trump over normative arguments. "*In the final instance*, only rights can be trump in the argumentation game" (259). Under this proviso, a substantial scope for constitutional adjudication nevertheless remains:

> "Only the *procedural conditions for the democratic genesis of legal statutes* secure the legitimacy of enacted law. If one starts with this democratic background understanding, one can also make sense of the powers of the constitutional court in a way that accords with the purpose of the separation of powers: the constitutional court should keep watch over just that system of rights that makes citizens' private and public autonomy equally possible. [...] Hence, the constitutional court must examine the contents of disputed norms primarily in connection with the communicative presuppositions and procedural conditions of the legislative process" (264).

Habermas' discussion of the role of courts and particularly of constitutional courts demonstrates the tension between the principle of democracy and extended decision-making powers entrusted to non-elected judges. Habermas himself remains rather skeptical with regard to the scope of tasks constitutional courts can legitimately perform. However, if legitimacy, in a deliberative democracy approach, rests on two pillars — popular sovereignty and individual rights — which are equally constitutive of the principle of democracy, there is some logic in maintaining that the tension between parliaments and courts is nothing more but a reflection of this two-pillar structure. In this view, courts guaranteeing an efficient protection of individual rights would be equally important as parliaments embodying popular sovereignty.

Moreover, as Alec Stone Sweet has shown, constitutional discourse as practised by constitutional courts tends to "spill over" into the parliamentary sphere (Stone Sweet 2000: 194-204). On the one hand, there certainly is the danger of constitutional adjudication being instrumentalised for political

purposes in order to "prolong" the decision-making process for a further and ultimate stage. The question of judicial activism and judicial restraint, of judicial interference with the competencies of the legislator *cannot* easily be dismissed. But on the other hand, as legislators act under the shadow of constitutional court judgements, they are forced to engage in constitutional discourse themselves: they have to justify their decisions on constitutional grounds or at least demonstrate that the legislative proposal at hand does not violate constitutional law as it stands. The existence of the constitutional court thus propels politicians to engage not only in power-based negotiations, but also and ultimately in moral discourses; it forces them to act in accordance with the universalistic principles of justice.

Another crucial point is that constitutional courts function as "sluices" through which societal communication feeds back into the political system. The very existence of a constitutional court not only enables people to seek effective remedy against alleged or real violations of their rights; it not only has the effect of a "rationalisation" of the political process itself; but it also serves as a catalyst for popular concerns which are, through the court, fed into the political system. The importance of this sluice depends on which alternatives the system provides: To the extent that other opportunities to feed back are lacking or deficient, the significance of the court sluice increases, even though it cannot fully substitute other links between the political system and the "life world" (*Lebenswelt*).

However, this is not a one-way relation. Courts, and again particularly constitutional courts, in turn exert influence upon the opinion-forming processes in the life world itself; they constitute what Erik O. Eriksen and John E. Fossum have called "strong publics" (Eriksen and Fossum 2002; see also Eriksen and Fossum 2001).[22] While acknowledging the centrality of the public sphere for modern democracy because it forces decision-makers "to enter the public arena in order to justify their decisions and to gain support" (Eriksen and Fossum 2002: 403), they argue that "the" public sphere actually consists of several distinct public spheres. Among these, they distinguish between "strong" publics — spheres of institutionalised deliberation and formal decision-making — and "weak" or "general" publics, i.e. spheres of opinion-formation without decision-making powers (Eriksen and Fossum 2002: 402). Both forms of public spheres are dependent on and influence each other; hence strong publics perform an important function in that they are essential links in the communication between the political system and the life world.

Eriksen and Fossum argue that courts cannot be considered strong publics in the full sense of the term as they lack one important characteristic, namely accountability. Yet it is certainly the case that they represent fora for the discussion of common concern and joint decision-making, that decision-making is preceded by a process of deliberation, and that decisions have to be motivated and justified through reason-giving (cf. Eriksen and Fossum 2002: 406). Courts are deliberative bodies *par excellence*. The facts which have been found during proceedings before the court are being normatively assessed in the judges' legal discourse which is shielded from external influences. However, the court is required to publicly set forth the reasons for its judgements. In this way, courts do constitute spheres of

[22] In their article in the *Journal of Common Market Studies*, Eriksen and Fossum (2002) elaborate the concept of "strong" as opposed to "general" publics and apply it to the European Parliament, the Charter Convention, and the system of "comitology". A consideration of the European Court of Justice which was included in an earlier draft of the article (Eriksen and Fossum 2001) was omitted in the final version of the paper.

institutionalised deliberation and formal decision-making and can be classified as "strong publics". There even is an aspect of control, if not outright accountability: The judgements of a court "can be submitted to review through channels of appeal", thus taking the fallibility of judicial decision-making into due account (Habermas 1996: 236). Whereas this element of a possible review of judgements evidently does not hold for constitutional courts, different mechanisms can perform the same function in this case: for instance, providing extensive reasoning for and, by way of dissenting opinions, also against the judgements delivered.

Hence there are two major reasons why courts — and with a special salience, constitutional courts — can, under certain conditions, serve as important producers, rather than consumers, of legitimacy: First, they constitute fora of "strong publics" and serve as communication links between *Lebenswelt* and political system. As such, they even tend to induce an aspect of discursive rationality in other decision-making bodies. Second, they serve to defend individual rights and freedom, one of two load-bearing pillars upon which the legitimacy of a polity is founded.

Conditions, Factors, Limits

To be sure, the production of legitimacy by courts is subject to a number of conditions and restraints and dependent on several intervening variables. In the light of the foregoing, we can now try to identify and describe these conditions, factors, and limits.

Let us begin with those variables that directly delimit the extent to which courts can influence the legitimacy of the polity in the ambience of which they act. What factors determine the effectiveness of the two channels we have identified above?

1. *Courts as "strong publics"*: As we have seen, courts constitute strong publics: They are institutionalised decision-making bodies characterised by processes of deliberation. As such, they are an important part of the society-wide process of opinion- and will-formation. However, the degree to which they can indeed perform this function depends on a variety of factors:
    a) First and foremost, there needs to be a connection between the court (as strong public) and the general public. The court must be able to exert influence on the public debate; it therefore needs to be *publicly visible*. This depends in part on the extent to which the court's reasoning and that of the parties are being disclosed and understandable to the public; in part, on the material extent of its jurisdiction. By the same token, the openness of access to the court largely determines the extent to which the court can function as a "sluice" for the general public into the political system.
    b) The second factor is the *discursive quality* of the court's decision-making. A "strong public" is not only determined by the inclusiveness of its discursive processes, but also by the quality of the arguments put forward in these processes. In this context, two elements can be individuated: First, the court's judgements have to be justified in accordance both with the existing law, and in the light of the principles underlying the constitutional and legal order as a whole. Second, taking into account the fallibility of judicial decisons, its judgements and its rules of procedure must be characterised by interpretive openness: They must furnish arguments backing

the court's decision, but also those that might in the future serve as a basis for overturning the judgement in the light of an advancement or new development of "communicative reason", for example in the form of new consensuses in societal ethical and moral standards. In this way, the principle of disclosure of judicial reasoning in as broad terms as possible comes into play again.

c) The third factor is the *export of discursive rationality* into other decision-making bodies, in particular parliament. A court's impact on legitimacy increases with the extent to which it succeeds in transforming the mode of argumentation in these decision-making bodies. Again, this depends on the reach of its jurisdiction, in other words the salience of issues it deals with, and the quality of the justification it gives for its decisions. Naturally, it will primarily be supreme and constitutional courts which will be able to influence parliamentary reasoning.

2. *Courts as defensores libertatis*: Courts are deliberately counter-majoritarian institutions. That means that it is of utmost importance that a court is indeed recognised as a counterweight against the polity's majoritarian political institutions. In turn, this requires that access to the court be as open as possible; that it is capable of dealing with the alleged violation of rights that is brought before it; and that its rulings be justified as "deduced from the law". We have found the very same factors already in the context of courts as strong public spheres. However, we now have to add a further ingredient: the independence of the court and of the judicial system as a whole from political interference by other institutions or social pressures. Only under that condition will the court — or indeed, the polity's judicial system as a whole — be acknowledged as an effective means to defend the individual's inalienable rights. Moreover, the legal system must offer effective remedies against decisions by courts themselves: procedural rules must provide for judicial review by higher courts, while the principle of legal certainty calls for a hierarchy of courts, with a supreme court on top ensuring uniformity of jurisdiction.

We can re-summarise these findings under five headings: five factors which, in a deliberative-democracy framework of analysis, should allow us to measure (even though in non-quantifiable terms) the degree to which courts can produce legitimacy for the political system as a whole: (1) the degree of disclosure of judicial reasoning; (2) the material reach of jurisdiction; (3) the quality of justification in terms of coherence and accordance with general principles of the constitutional and legal system; (4) the openness of access to court; and (5) the independence of the judicial system.

We also have to take into account that courts, as we have amply seen, do not act in an institutional, social, and cultural void. We have to consider, in other words, the preconditions that have to be fulfilled if our model is to be applied, and the limitations courts encounter in producing legitimacy. We have already dealt with the preconditions when we discussed whether polity legitimacy was a prerequisite for regime legitimacy:[23] Polity legitimacy, we found, can be fostered by an increase in regime legitimacy (to which courts can contribute); however, a certain (if basic) level of polity legitimacy will be necessary to allow such a reinforcing process to operate. The primary precondition to which legitimacy production by courts is subject, therefore, is the existence of some minimum level of polity legitimacy: people have to accept that the polity can legitimately claim to produce collectively binding decisions.

[23] See pp. 12-17.

Of course, this is a question of degree rather than a simple yes-or-no question. That is, the decision-making powers vested in the polity, and hence the competencies of that polity's judicial system, have to be in step with the degree of polity legitimacy. An expansion of powers for both the polity as a whole and its judiciary must not happen too fast for polity legitimacy to "catch up"; otherwise, this would mean asking too much of the institutional production of regime legitimacy.

In this sense, polity legitimacy is not only a prerequisite. Even if a basic level of it exists, it still represents a constraint on legitimacy production by courts as it limits their visibility: If competencies must not to be too much out of step with the level of polity legitimacy attained, this means that the salience of issues dealt with by these courts will clearly be limited.

The same factor is affected by yet another limitation, as is the criterion of the independence of the judiciary. In order to be legitimate and contribute to the production of legitimacy, courts have to operate in a separation-of-powers system. That is, courts as counter-majoritarian institutions would be of little use if there were no majoritarian institutions in the first place. It would mean to drive the criteria of issue salience and judicial independence too far if this resulted in a predominance of judicial policy-making and thus in the judiciary substituting itself for the legislature.[24] Not only prime ministers and

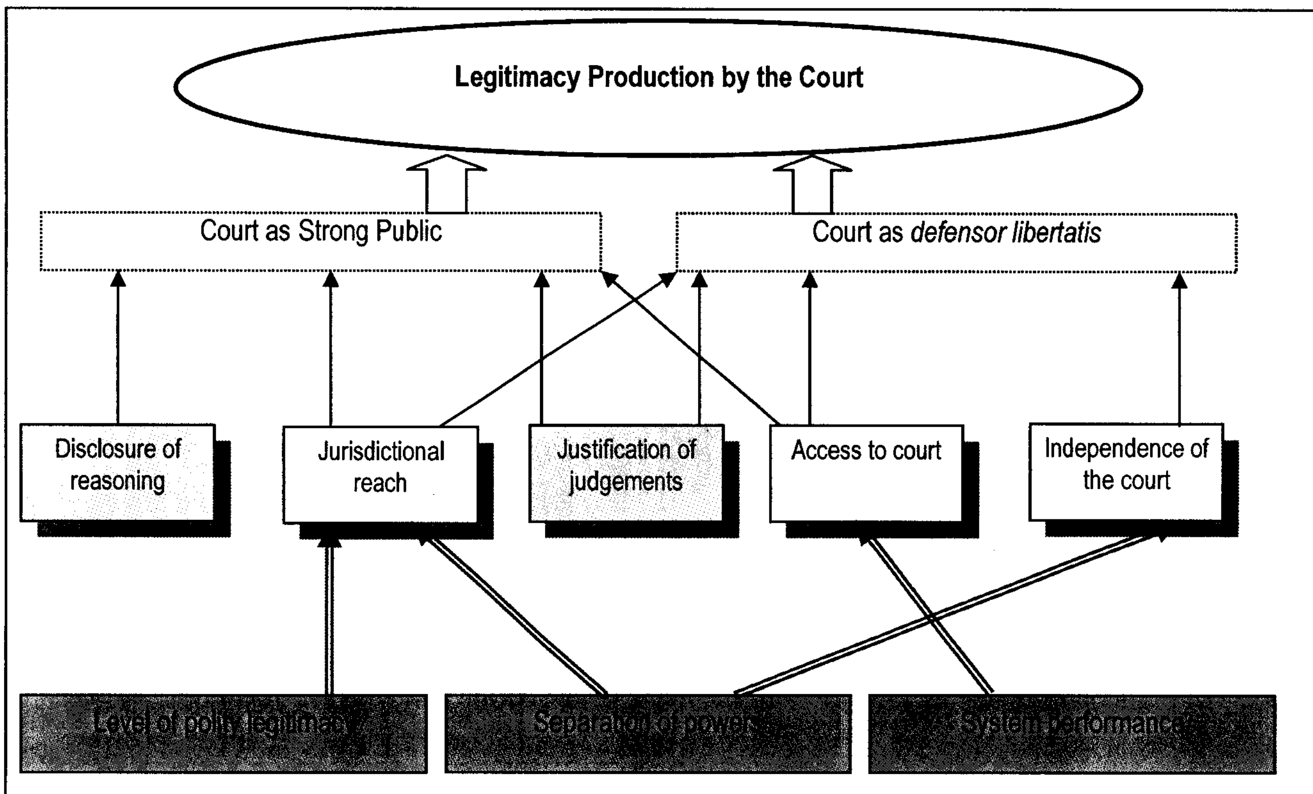

Figure 3: Channels, factors, and limits of legitimacy production by courts

[24] This is a concern expressed often and loudly by the current Italian government (and the political forces supporting it) with regard to the Italian judicial system. Their hypothesis is that a politicised and largely leftist judiciary is trying to overturn decisions legitimately taken by the other branches of government, and, in the final analysis, to revise the electoral decisions by forcing penal proceedings against leading government figures such as the Prime Minister, Silvio Berlusconi. Whether this claim is founded or not (I would tend to maintain that it is not), is of little concern here. In any case, it shows the precariousness of the judiciary's position within the system of government. Cf. e.g. Guarnieri and Pederzoli 2001, Pizzorno 1998. See also "Tipping the Scales: Italy, Its Prime Minister and the Law", in *The Economist*, 1 February 2003: 32.

parliamentarians have to be checked; the same is true for judges. There need to be mechanisms of control and appropriate appointment and, where necessary, impeachment procedures. And there need to be mechanisms (for example, provisions for constitutional amendment) by which democratically legitimised decision-making bodies like parliaments — "quintessential strong publics" (Eriksen and Fossum 2002: 411) — can overturn a constitutional court judgement which has been found inadequate in a reasoned discourse.

Finally, there is a third limit which affects predominantly the criterion of open access. Whereas judicial guarantees for individual freedoms and rights are, as we have seen, an important component of regime legitimacy, these guarantees often conflict with the interest in efficient and effective decision-making. High levels of judicial protection may endanger performance legitimacy. A balance has to be struck, therefore, between the individual's right to challenge administrative and legislative acts by which she is affected before the courts, and the society's interest. Of course, "only rights can be trumps". But there have to be provisions and mechanisms which ensure that access to court and judicial remedies are not abused, and that judgements can be rendered timely. Moreover, the legal system has to be sufficiently uniform to ensure that it produces legal certainty, and that individual judgements cannot, by contrast, undermine the coherence of the legal system.

To sum up (cf. Figure 3), every dimension of legitimacy imposes constraints on the ability of a court to produce legitimacy. Concerns for polity legitimacy delimit the extent of its decision-making powers and, in this way, its visibility; regime legitimacy requires it to be embedded in a constitutional system favouring democratic will-formation, and thus restrict its independence and, again, decision-making powers; considerations of performance legitimacy, finally, call for restrictions on access to the court. Within these limits, and premised on the condition that a sufficient minimum level of polity legitimacy exists, a number of factors determines the extent to which courts can produce legitimacy. Let us resume: these are (1) the degree of disclosure of judicial reasoning; (2) the material reach of jurisdiction; (3) the quality of justification in terms of coherence and accordance with general principles of the constitutional and legal system; (4) the openness of access to court; and (5) the independence of the courts. Of these five factors, two are not subject to any of the above-mentioned major constraints: disclosure of reasoning and justification — the quintessentially "deliberative" factors.
These factors, preconditions, and constraints determine the legitimatory impact of the judicial system as a whole as well as that of single courts within a system. Among these, supreme and constitutional courts are of particular interest as they are both the most visible courts and the ones most directly and ultimately acting as *defensores libertatis*. They therefore bear a special burden for the legitimation of the polity.

PART THREE: The European Court of Justice: Preliminary Reflections

> "Tucked away in the fairyland of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe" (Stein 1981: 1).

Equipped with the instruments we have elaborated thus far, we can now dare to address the second set of questions we have asked ourselves in the introduction: Can the theoretical findings be applied to a supranational polity, and if so, to what extent? Has the European Court of Justice been able to provide legitimacy for the European Union and for the integration process? How large is its potential to do so in the future? Under what conditions could this potential be further unfolded in the current constitution-making process? This paper can only provide some tentative conclusions derived from our preceding discussion. Whether these derivative conclusions will be validated or falsified, will remain a question for further, empirical research.

Can the Theoretical Findings Be Applied to the EU?

The answer to the question of whether our model of legitimation through jurisprudence can be applied to the European Union depends on whether we consider the European Union a "polity" or not. It has been generally held for many years now that indeed the EU is a polity, even if *sui generis*. Lawyers have described in detail the "constitutionalisation" of the European order (see e.g. Stein 1981; Weiler 1999). Although the outcome of this process of constitutionalisation can in many ways be regarded as a "Europe of bits and pieces" (Curtin 1993: 17), and although it certainly falls short of being a state, it undoubtedly constitutes a federally-structured political entity, "a new type of sovereign authoritative rule [*hoheitliche Herrschaft*] with comprehensive regulatory powers over a wide range of issues of high life-world significance; powers which have been developed, moreover, in a traditionally federalist, and not functional, direction" (Bogdandy 1999: 37). It is a "supranational federation" (ibid., cf. Weiler 2001).

Hence it is beyond reasonable doubt that the European Union is a polity. It is even a particularly interesting and challenging case precisely because it lacks the high degree of polity legitimacy common to nation-states. Moreover, its (for a long time, its only) court, the European Court of Justice, has played a major role in the very creation of the polity; the process of (legal) integration and constitutionalisation of what originated from international treaties.[25] It has therefore had an impact on the polity itself

[25] The literature on the ECJ's crucial role in the legal integration of the European Communities and, later, the European Union is too abundant as that it could possibly be summarised adequately here. For one recent analysis which to some extent modifies the dominant view referred here, see Conant 2002. For a general presentation of the ECJ, its competencies, jurisprudence, and influence, see Dehousse 1998; while the articles assembled in Craig and de Búrca 1999 offer a comprehensive and detailed discussion of the "evolution of EU law".

that hardly any other court could claim for itself. Hence it should be safe to conclude that our model can — and indeed, should — be applied to the European Union and its Court of Justice.

Has the European Court of Justice Produced Legitimacy for the EU?

At this stage, we can tentatively try to answer the question of whether the European Court of Justice has been able to produce legitimacy for the integration process and the political system of the European Union. Obviously, it is not possible to argue that because the EU enjoys low levels of overall legitimacy only, the Court has not been successful in providing support for the legitimation process. We rather have to ask the counterfactual question of whether the mere existence of the Court has made any difference, that is, if the EU's overall legitimacy would be lower if the ECJ did not exist.

In a series of articles, James Gibson and Gregory Caldeira have argued "that although most EU citizens are reasonably satisfied with the performance of the Court, diffuse support for the institution is not widespread" (Gibson and Caldeira 1998: 90; see also Gibson and Caldeira 1993). How should a Court that enjoys little legitimacy in itself be able to strengthen that of the polity it is part of? As Anke Großkopf (Großkopf 2000: 157-159) has convincingly shown, Gibson's and Caldeira's studies suffer from considerable flaws. Above all, their distinction between what they term "specific" and "diffuse" support is not always clear and consistent. Großkopf argues that the ECJ *does* enjoy a considerable level of legitimacy and that it profits from a "legitimacy transfer" from other, long-established high or constitutional courts which are, in general, better known and serve as a model which people project also upon the European Court of Justice (159-162). Irrespective of whether the ECJ's legitimacy is high in absolute terms or in comparison with comparable national courts, it is beyond doubt that the Luxembourg Court does enjoy considerable legitimacy in comparison with other EU institutions: Whereas, according to the most recent *Eurobarometer* survey (*Eurobarometer* 2002b: 47-50, B.32), the level of "net trust" (i.e. the difference between who responded favourably and those who gave a negative answer to the question for the respondent's trust in EU institutions) for the constitutional Convention is only +3 and that of the Council of Ministers is +15, the Court's rating is +28. The only institution enjoying an even higher level of support is the European Parliament with +30. In five member states (Denmark, Germany, Luxembourg, Austria, and Sweden), the ECJ even is the best-rated of all institutions.

These numbers suggest that the influence the European Court of Justice has had on the legitimacy of the European order has been significant. Let us briefly consider our five criteria in order to assess this first impression (without prejudice to future empirical findings which will be crucial to validate the model which has been developed in this paper):

- *Disclosure of judicial reasoning*. The style of judicial discourse applied by the European Court of Justice is a rather open one (cf. Lasser 2003 forthcoming). When giving a judgement, not only the legal considerations of the Court, but also the different views expressed during the proceedings and the factual background are published. Moreover, the opinion of the Advocate-General who is in charge of the case is made public as well so that societal discourse, where appropriate, can draw on

a wealth of arguments. The preliminary reference procedure adds even more to this openness as it has established a transnational, multi-level judicial dialogue (cf. Stone Sweet and Caporaso 1998). On the other hand, there are no dissenting opinions, nor is it known how many of the Judges actually supported the final judgement and how many dissented. The Court's judgements thus appear as if they had been taken by some uniform "black-box" body; future discourse cannot rely on judges' dissenting opinions, with their more authoritative character than other participants' reasoning, for the purpose of justification. Nor can the Court itself when reconsidering an issue previously decided.

— *Justification of judgement*: The lack of dissenting opinions, on the other hand, favours the impression which shall inform public opinion that the Court deduces its judgements from "the law", that what the Court's reasoning is about is indeed an application discourse. That the Court, particularly in its early years, has often rendered teleological judgements is not in contradiction to this finding — after all, the *telos* was to construct a durable and reliable European legal order. *Prima facie* at least, the ECJ seems to have been successful in establishing itself as the guardian of legal reason in the European Union.

— *Material reach of jurisdiction*: Given that it acts in a limited polity, the ECJ's competencies are limited as well (which is, as we have seen, in part a necessary consequence of the contested polity legitimacy of the EU). It means, however, that issues of a particularly high salience will only rarely appear before the European Court of Justice because of a missing legal basis to do so. In terms of substance, many of the cases with a high relevance for the construction of the European legal order had a stunningly low profile; recent high-profile cases like the ones dealing with the access of women to the military and with compulsory military service in Germany are only an exception to this general rule. Hence, it is difficult for the ECJ to build up public awareness of its existence and its work; low issue salience leads to low public visibility.

— *Access to Court*: The access to the European Court of Justice for individuals is comparatively restricted. While everyone can address a constitutional complaint to the German *Bundesverfassungsgericht*, for example, the criteria set out in Article 230 §4 TEC are highly restrictive:

> "Any natural or legal person may [...] institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

The jurisdictional practice of the ECJ has set forth demanding tests for assessing whether a "direct and individual concern" does exist. In the majority of cases, the direct way to the European Court of Justice is not available under these circumstances. Citizens have to rely on the preliminary reference procedure and thus on individual national judges as it is these who alone can institute it. Hence, although the European legal system does, all in all, provide effective remedies against alleged injustices incurred upon individuals, there are gaps in the system of

— *Independence*: The European Court of Justice enjoys a level of independence that is comparable to that of national judicial institutions. Its judges are appointed by common accord of member state governments for a term of six years. Although the possibility of reappointment might endanger the independence of individual judges, the history of the Court until now has not shown evidence for such a peril. On the other hand, the ECJ certainly is an outstanding example for judicial policy-

making, having created an outright constitutional order that probably had been beyond the intentions of the European founding fathers (cf. Burley and Mattli 1993; Stone Sweet and Caporaso 1998). The low level of democratic control — a common feature of extended policy-making by *any* court — is even exacerbated by the appointment procedure which happens behind closed doors in the Council of Ministers and in which democratically elected bodies are not involved.

In the light of these first intuitions, we may conclude that the European Court of Justice has indeed had an impact upon the legitimation of the European Union. Its existence *per se* is without doubt an important factor for the regime legitimacy of the Union as it provides an important counterweight to the far-reaching powers of EU institutions and constitutes an important — if not the single most important — "sluice" for interaction between the citizens and the system. However, this effect has been mitigated by the Court's low public visibility and the restricted access to it. Due to these constraints, the Court cannot, as it were, to the full extent perform its primary functions as a strong public and as a defender of individual liberties.

The European Court of Justice and the European Constitution in the Making

In view of these results, it seems clear what would have to be done in order to further develop the legitimatory potential of the European Court of Justice: Access to the Court would have to be broadened, and its visibility increased. The current debate on the future of the European Union and the elaboration of a supranational Constitution might become the framework for both these improvements.

Since 28 February 2002, the European Convention has been dealing with how to strengthen the legitimacy of the European Union. In ten working groups, its members have discussed possible reforms to the substantive policies of the Union. With the exception of some critical provisions, a wide-ranging consensus seems to be emerging not only on the fact that the European Union shall have a Constitution, but also on a number of its substantive provisions and on the general thrust of the division of competencies between the Union and its member states.

However, the most difficult part of the debate is yet to come: Institutional provisions have not yet been tackled in detail. As of now, only a general debate on institutional matters has been held within the Convention, and unlike in other matters, no detailed proposals for the articles of the Constitution have until now been made in this area. Tackling the institutional design means tackling the decisive questions of power. A Franco-German proposal envisaging the creation of two presidencies of the Union — a permanent President of the Council, elected by member-state representatives — in addition to the President of the Commission who is to be elected by the European Parliament with a qualified majority, has already aroused heated debate and provoked negative reactions on behalf of many other member states.

In this context, the future of judicial protection in the European Union — in other words: the future of the European Court of Justice and of the Court of First Instance — appears to be less controver-

sial. While the institutional design as a whole has not been entrusted to any specific working group or discussion circle, presumably because its high (perceived) importance requires treatment by the plenary as a whole, a discussion circle has been set up to deal with the issue of reforms in the system of judicial protection.[26] Among other (more formal) issues, it will have to address the question of whether to extend the possibilities for "normal citizens" to get access to the ECJ under what is now Article 230 § 4 of the EC Treaty.

Until now, no decisions in that regard have been taken. Should the threshold for direct actions against EU legislation before the ECJ and the Court of First Instance indeed be lowered, however, this would entail a considerable improvement. Another one would be an extension of their jurisdictional competencies. Although many uncertainties remain, such a development is more than likely. It would be entailed, on one hand, by the abolition of the EU's three-pillar structure which has, until now, virtually excluded the European Courts' jurisdiction in matters of the second and third pillars. On the other hand, a widening of the Union's tasks as a whole seems to be the probable outcome in many issue areas such as in the field of immigration and asylum policies which, in turn, would encompass an extension of the ECJ's powers. Especially in areas like justice and interior policy, this would certainly increase also its public visibility and people's interest in the Court's decisions.

Hence, in the medium and long run, the European Courts might more and more develop into an equivalent to national constitutional courts enjoying (like the German *Bundesverfassungsgericht*) considerable attention and being held in (nearly) universally high esteem. Together with what has been developed until now — a high level of protection of individual rights, the broad disclosure of the Court's judicial reasoning and of the parties' arguments, a vivid academic interest in the ECJ — these changes would certainly strengthen the legitimatory capacities of the judicial branch of the European Union.
But what about the limits to legitimacy production by courts we have identified above? Would these measures not endanger performance legitimacy (because of broadened access to court) and neglect a too low level of polity legitimacy (by extending the reach of jurisdiction)? Of course, delicate balances have to be found. But the careful extension of the Courts' powers that has been envisaged can hardly be overly ambitious, and performance concerns will primarily have to be countered by increasing the Courts' own efficiency; first steps in this direction were taken with the Treaty of Nice, making possible the creation of judicial chambers in order to reduce the workload of the European Court of Justice and the Court of First Instance. In order not to demand too much of the legitimatory capacities of the Court, however, the reforms which are being discussed in the Convention will have to be counterbalanced: by the publication also of Judges' dissenting opinions, for example; by the strengthening of checks and balances against the Court's (already now) extensive powers; by increased democratic involvement in nomination procedures of Judges and Advocates General. After all, it is within a democratic context only that courts, as we have seen, can contribute to the production of legitimacy. The European Convention, if it is to succeed, will have to establish such a democratic context, and some of its propositions so far do indeed point in this direction: the clear distinction between legislative and

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[26] See the documents on the webpage of the European Convention under http://european-convention.eu.int/doc_register.asp?lang=EN&Content=CERCLEI.

non-legislative acts, for example, and the adoption of legislative acts (laws and framework laws) through a "legislative procedure", involving the Council and the European Parliament on an equal footing.

However, beyond all institutional measures, as sensible and important as they may be, the most important challenge for the European Convention is a different one. The adoption of a European Constitution could represent an excellent opportunity to further a European feeling of belongingness, the lack of which is criticised precisely by some of the most fervent opponents of a European Constitution. It should be the occasion for Europeans in all the Union's member states to discuss what they have in common, and what they want to have in common. It should be the occasion to discuss which powers they want to pool, and what competencies shall be exercised by their Union. This, however, requires increased public awareness of the work of the Convention, and it requires timely public information and discussion of the provisions of the draft Constitution. Until now, the signs are not too encouraging. Few people know about the Convention, and it is only in academic circles that its proposals are indeed being discussed. There is still time to change this. At the latest, public debate will have to commence after the Intergovernmental Conference which, in the end, will have to adopt the final texts. Before ratification of the new Constitutional Treaty of the European Union — maybe with the help of referenda — the national publics will have to address the crucial question: What kind of Europe do we want? If such debates take place simultaneously in all of the by then 25 member states, the 25 national publics might, at least for the time of the constitutional discussion, merge and constitute, in some respect, a European public sphere. In that sense, the adoption of the European Constitution could indeed amount to the foundational moment of a United Europe. If on the other hand, the European Convention and national policy-makers do not succeed in instigating such a debate, the legitimacy deficit will continue to weigh on the Union. It would be as if European leaders were thinking like Leo, the protagonist in Pier Vittorio Tondelli's novel *Camere separate*:

> "Leo non aveva mai creduto al valore dell'accettazione. Non gli importava, teoricamente, essere accettato né legittimitato da nessuno. Era in se stesso che traeva valore e legge. Non dall'esterno. A nessuno avrebbe mai e poi mai concesso questo diritto. Lui esisteva. E questo era tutto. È da folli chiedere all'essere le ragioni per cui è" (Tondelli 2001: 66).

Yet what may be true for an individual certainly will not hold for a political entity — even less so if it is a supranational one.

ANNEX 1:
Figures

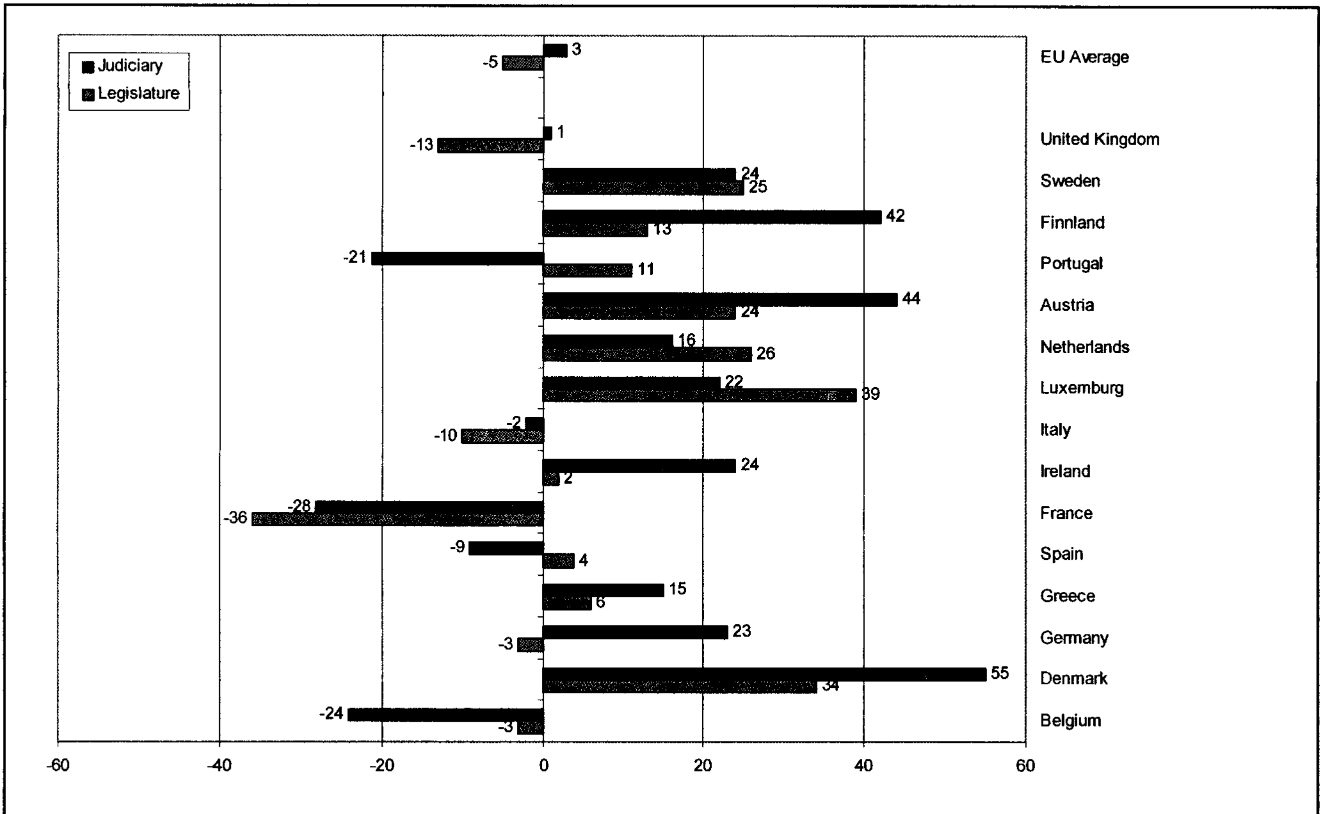

Figure A-1: "Net Trust" in national legislatures and judiciaries (Net Trust = Trust – No Trust)
Source: *Eurobarometer* 2002b.

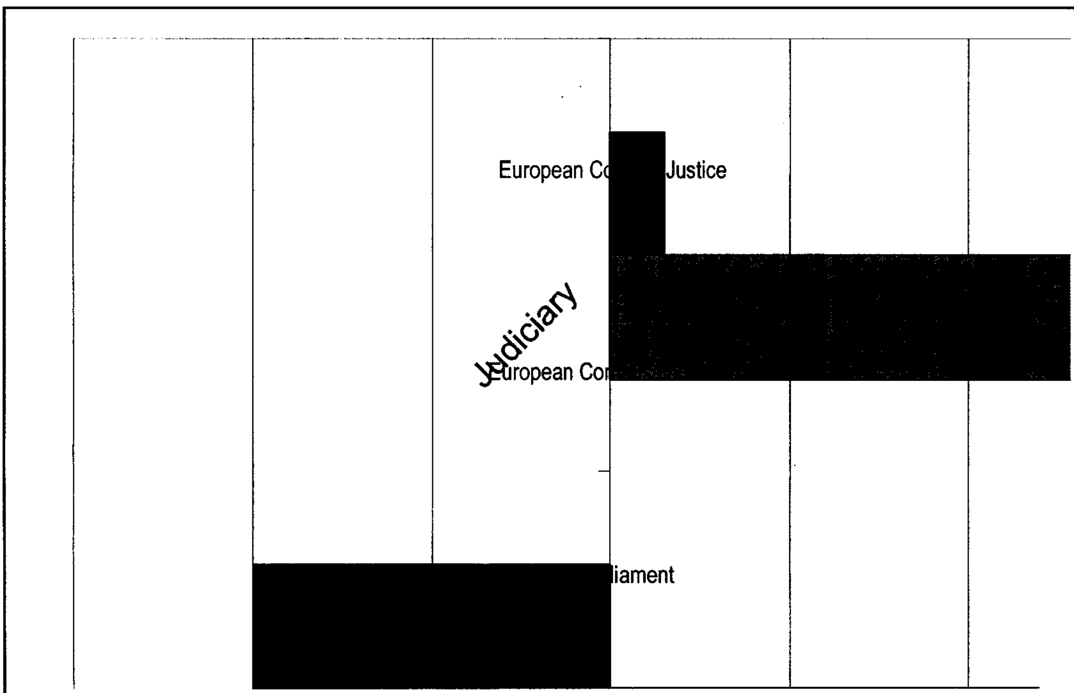

Figure A-2: "Net Trust" in European and national institutions (Net Trust = Trust – No Trust)
Source: *Eurobarometer* 2002a.

ANNEX 2:
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