Reflections on EU Legitimacy and Governing

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ABSTRACT: Carol Harlow provides us with a nuanced and sophisticated assessment of the development of the EU's formal lawmaking processes and their legitimacy implications. She places particular emphasis on the important notion of executive legislation. That naturally puts the focus on delegation and principal/agent theory, which is discussed in relation to the EU in general. With regard to legitimacy, Harlow discusses both the input and output dimensions. The article brings in some of the crises-driven changes or mutations that the EU is presently experiencing. In this contribution I focus on some of the core notions in the analytical framework that Harlow constructs, with particular emphasis on legitimacy, representation and democracy.

KEYWORDS: legitimacy – polity – throughput – representation – democracy – shape-shifting.

I. Introduction

With regard to legitimacy Harlow notes that "the EU in general, and more specifically its lawmaking process, faces something of a legitimacy crisis".[1] She then proceeds to underline that it is difficult to pin down legitimacy and that "[a]t the end of the day [...] legitimacy lies in the eye of the beholder [...]. It is hard to define legitimacy, to distinguish its ingredients or decide where it is located".[2] I agree that it is difficult to pin down legitimacy especially in the EU context, but the importance of doing so clearly warrants the effort.

My point of departure is that political legitimacy refers on the one hand to popular approval and on the other to how authority and approval can be justified, i.e. that normative principles can be brought to bear on it.[3] This two-fold notion of legitimacy as

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[1] C. HARLOW, *The Limping Legitimacy of EU Lawmaking: A Barrier to Integration*, in *European Papers*, 2016, www.europeanpapers.eu, p. 29 *et seq.*, in particular see p. 54.
[2] Ivi, p. 54.
[3] D. HELD, *Models of Democracy*, London: Polity Press, 1987; J. HABERMAS, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge: The MIT Press, 1996.

steeped in principles and in acceptance is context-dependent. It recognizes that legitimacy lies in the eye of the beholder, but it adds the important proviso that the beholder's eye is far from unbiased. It will naturally be drawn to that which the beholder is conditioned to associate with legitimacy. In today's Europe the EU is a creature made up of member states, whose lawmaking arrangements are steeped in the formal *Rechtsstaat* ideal.[4] Those principles naturally figure in any account of legitimacy.

If we take this notion of legitimacy as steeped in principles and acceptance as our point of departure, the question naturally arises as to whether the two core notions of legitimacy that Harlow discusses are adequate. Both dimensions will engender normative expectations – pertaining to the nature and quality of input, and to the nature and quality of output. Where precisely to pitch the level of what qualifies as adequate input from a legitimacy perspective? Where precisely to pitch the level of what qualifies as legitimate output? How to think about the tradeoffs between input and output legitimacy?

The core problem in confining the assessment of EU legitimacy to the terms of input and output legitimacy pertains to the fact that the EU has always been marked by a "deliberative deficit about the ends of the polity".[5] There is neither agreement on what the EU *is*, nor on what it *should be*. That complicates the issue of determining where to pitch our expectations pertaining to inputs and outputs.

Those that insist that the EU is a system *sui generis* would argue that the problem is theoretical-normative: it is a matter of whether we have theories and concepts that adequately capture the EU. There may be something to that but it is far from the whole story. It could simply serve as a convenient cover along the lines of "anything goes". Or it could serve to gloss over an important political problem: the EU leaders' and architects' *unwillingness* to declare what type of political project the EU is, and should be. The problem is particularly acute given that the member states' officials play such a central role in the EU. The EU is – compared to any other federal-type system – unprecedented in the amount of control that the executive officials of the member states can exercise at the political center. Member states crucially regulate the resources available to the EU. The debate on Eurobonds is a case in point. It is likely that this situation is creating what I would call a *competence – delivery gap*: there has been a clear tendency to saddle the EU with a broad range of tasks but without equipping it with the proper means for delivering on these tasks. A further pathology with direct reference to EU polity ambiguity could be what I would label as an *expectations-performance gap*: those tasks, that people expect the EU to perform well, are particularly important for it to do well. Failure to do so will likely have serious legitimacy implications. Since it is so unclear what the real scope of EU action is, the EU is highly likely to suffer from an expectations-performance gap.

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[4] As underlined by C. HARLOW, *The Limping Legitimacy of EU Lawmaking*, cit., p. 31.
[5] J. BOHMAN, *Democracy across Borders: From Dêmos to Dêmoi*, Cambridge: MIT Press, 2007.

Somewhat ironically, the unwillingness to engage with the polity question served as a convenient mechanism to defer some of the difficult questions to the future in the days of the permissive consensus. The scope for deferring questions is greatly narrowed at a time of constraining *dissensus*.[6] Polity ambiguity is likely to make the EU particularly susceptible to criticism, because the ambiguity surrounding the EU's nature and status can be utilized by opponents as a strategic resource: they can exaggerate and distort the EU with relative impunity. In effect, EU polity ambiguity provides no filter for differentiating between justified and unjustified criticism.

The EU, even though it has served as a means of surpassing the narrow nationalism of the past, has fewer "buffers" than the nation-state, insofar as its leaders do not permit it to occupy a space in the normative imagination that can at least match the hegemony of the nation-state. For leaders to do so would be demanding: they would be expected to deliver on their commitments. But failure to do so makes the EU very vulnerable: there is no good mechanism for distinguishing between weak output performance and systemic weakness; hence Europhobes can refer to any shortcoming as a systemic failure.

Harlow does engage with some of these issues, but does not address them with explicit reference to what we may term "polity legitimacy", which refers to the basic system parameters within which input and output processes take place. There is a link between delegation and polity legitimacy: insofar as the EU-level performs tasks that are delegated to it, such a system of delegation does not require an elaborate system of democratic representation, or political participation. But given that the EU contains a directly elected European Parliament that is basically equal with the Council in many areas, as Harlow notes, it is natural to consider the EU's democratic legitimacy with explicit reference to the EU's own system of representation and participation.[7] Any assessment of the EU's legitimacy must therefore take a stance on the type of polity involved. The political reality of the EU is such that those in charge of the EU have refused to offer this element of intellectual and political accountability. The task is effectively left to analysts to try to pick up the slack.

Of course, efforts at specifying the nature of the EU polity can easily degenerate into an artificial exercise in classificatory statics. One of the thorny issues we confront when trying to typecast the EU as a polity is precisely its dynamic character. Thus, we confront the issue of assessing legitimacy in a process of coming together (or what is

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[6] L. Hooghe, G. Marks, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, in *British Journal of Political Sciences*, 2009, p. 1 *et seq.*

[7] Harlow discusses delegation and its limits. In addition, she notes that a "surreptitious transfer is taking place, draining power and authority from Member States and from their Parliaments. Indeed, the integrative nature of Union lawmaking seems to be reducing national lawmakers from principals to agents obliged to implement texts promulgated by the EU lawmaker". C. Harlow, *The Limping Legitimacy of EU Lawmaking*, cit., p. 43.

now increasingly appearing as a process of *trying to hold together*). Establishing what type of polity the EU is at a given point in time may not yield much in terms of the direction in which it is developing. I therefore think that we need to supplement attention to the nature of the political system with explicit efforts at developing the best possible theory for capturing the core relationships involved. In the present EU context, we do not however get to such a theory if we take delegation as our point of departure.

The most suitable term that captures both the empirical and the normative dimensions involved is *authorization*. In authorizing and mandating supranational integration, post-war constitutions embedded national constitutions in a broader supranational legal framework. In effect, post-war constitutions *mandated* integration, or what is the same, clearly pointed to wider and more encompassing political structures, decision-making processes and substantive norms that could realize the ideal of the Social and Democratic Rechtsstaat *beyond* the nation-state. That forms the core of the theory of constitutional synthesis.[8] Constitutional synthesis entails that the constitutions of the participating states take on a new *seconded* role as a part of the emerging collective constitutional law of the new polity. Each national constitution then starts living a "double constitutional life": each continues as a national constitutional arrangement, whilst it also simultaneously forms a part of the collective – European – constitution. Constitutional synthesis therefore presumes a substantive identity between national constitutional norms and Community constitutional norms. In this scheme European integration presupposes the creation of a new legal order, but not the creation of a new set of constitutional norms; a key source of the legitimacy of the new legal order is indeed the transfer of national constitutional norms to the new legal order.

The theory of constitutional synthesis provides us with benchmarks for establishing when we should develop explicit legitimacy expectations to the institutions at the EU-level, which is one of the questions that Harlow is grappling with. The theory is also useful in the sense that it provides us with benchmarks for assessing when EU actions are legitimate and when they are not.[9] If we apply this analytical framework to today's EU we will get a sense of how the crises and the EU's responses have made it veer off from the constitutional principles it was authorized to abide by from its origins.

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[8] J.E. FOSSUM, A.J. MENÉNDEZ, *The Constitution's Gift – A Constitutional Theory for a Democratic European Union*, Boulder: Rowman and Littlefield, 2011.

[9] Because the theory focuses on the core aspects of democratic constitutionalism, it offers an important antidote to executive dominance, whether at the EU-level or at the member state level.

II. A MISSING PIECE: THROUGHPUT LEGITIMACY

One piece of the legitimacy puzzle that required attention was what I have here termed polity legitimacy. The other missing piece is throughput legitimacy. Throughput legitimacy ties the two elements of input and output legitimacy together by focusing on the quality of the governance processes. It so-to-speak fills in the black box between input and output in the famous Easton scheme.[10]

There are three reasons for bringing in throughput legitimacy here. The first is that any account of legitimacy in modern polities is inadequate without including it. The second is that several of the aspects that Harlow discusses under the heading of output legitimacy appear to be more suitably located under the heading of throughput legitimacy. The third is that throughput legitimacy is fundamentally important in the assessment of the legitimacy implications of the EU's crises-driven mutations.

There are two accounts of throughput legitimacy in the EU context.[11] Eriksen considers this notion as an intrinsic element in a deliberative theory approach to decision-making:

> "democratic legitimacy is not merely a matter of congruence between addressees and authors of the law but is a matter of the presumed rationality of the decisions reached - that the reasons for political decisions are accepted by the ones affected by them. Only decisions that have been critically examined by qualified and entrusted members of the community through a reason-giving practice can claim to be legitimate. It is the *through-put procedures* of the political system that generate democratic legitimacy and which can lend support for the claim of democratic quality in post-national orders".[12]

Schmidt relates throughput legitimacy more specifically to "governance processes with the people, analyzed in terms of their efficacy, accountability, transparency, inclusiveness and openness to interest consultation".[13] Schmidt usefully stresses the difference between participation at the level of input and participation within the system; these forms are differentiated because they fulfil different functions. The former is widely representative; the latter is more narrowly epistemic.[14]

Both accounts of throughput legitimacy combine inclusion of stakeholders with qualities of decision-making and governing procedures. Both accounts underline the

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[10] Easton devised the model of the political system where the categories of input and output figured centrally. D. EASTON, *A Systems Analysis of Political Life*, New York: Wiley, 1965.

[11] E.O. ERIKSEN (ed.), *Making the European Polity – Reflexive integration in Europe*, London: Routledge, 2006, pp. 262-263; V. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, in *Political Studies*, 2013, p. 2 *et seq.*

[12] E.O. ERIKSEN (ed.), *Making the European Polity*, cit., pp. 262-263.

[13] V. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, in *Political Studies*, 2013, p. 2.

[14] Ivi, pp. 12-19.

close link that exists between democratic legitimacy and public justification. The notion of throughput legitimacy is intrinsically linked to deliberative democracy as a distinct theory of democracy.

The second reason for bringing in throughput legitimacy is because Harlow discusses some of the relevant items under different (input – output) headings, and may therefore inadvertently downplay the salience of the elements that figure under throughput legitimacy. Harlow discusses the "Better Regulation" movement under the heading of output legitimacy.[15] I think it would fit better under the throughput legitimacy heading. In a similar vein, the interesting section on transparency where Harlow pits input and output notions against each other may instead be discussed within the framework of throughput legitimacy.[16] Even if throughput legitimacy places a strong onus on transparency, it strikes me that the argument between the CJEU insisting on openness, and the Council seeking to qualify this, is an argument that is fought out on the turf of throughput legitimacy. Harlow notes:

> "[o]n the point of overriding public interest, the Council argued that the general interest of increasing transparency and openness of the decision-making process could not stand on its own as a justification for release as this would make it virtually impossible for the institutions to claim privilege for advice on legal questions arising in debate on legislative initiatives".[17]

The Council's concerns may qualify as less legitimate, but the relevant standard of reference is throughput legitimacy.

The third and final reason for why it is important to focus on throughput legitimacy pertains to the assessment of the effects of the crises on the EU. It is widely known that the crises have altered the decisional centre of gravity in the EU and have shifted it towards bodies (intergovernmental ones such as the European Council) that are able to operate quite informally, are not subject to close legal oversight, and are quite intransparent. Insofar as this situation solidifies as a kind of permanent European emergency politics[18] the fallout will be great in terms of throughput legitimacy. Note that it will be the case whether the EU is perceived as scoring high or low on output legitimacy.

Emergency politics will obviously have detrimental effects on polity legitimacy. Insofar as Europe's distinctive form of emergency politics solidifies, the legitimacy problems are exacerbated. The EU's intractable nature may also make it difficult to stake out a valid course for returning to normality in contemporary Europe. Emergency politics solidified may therefore alter the very conception of normality in Europe with profound

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[15] C. HARLOW, *The Limping Legitimacy of EU Lawmaking*, cit., pp. 35-42.

[16] Ivi, p. 29 *et seq.*

[17] Ivi, p. 46.

[18] J. WHITE, *Emergency Europe*, in *Political Studies*, 2015, p. 300 *et seq.*; J. WHITE, *Authority after Emergency Rule*, in *The Modern Law Review*, 2015, p. 585 *et seq.*

legitimacy implications. We need all four elements of legitimacy presented here to get a full sense of these transformations: polity legitimacy, input legitimacy, throughput legitimacy, and output legitimacy.

III. Issues of representation

In this final section, I will address some issues of representation that Harlow's article brings up.[19] My comments are simply meant to strengthen her concerns through briefly engaging with theory and practice of representation.

The standard principal-agent conception of representation suffers from several shortcomings. Harlow rightly notes that the EU does not operate in accordance with this framework.[20] Part of that no doubt relates to the complex EU. In addition, there are shortcomings with the principal-agent model from a representative perspective, as well. One problem is that the principal-agent framework stacks the analysis in a certain manner with clear normative overtones: the representative (agent) is supposed to be responding to the wishes, concerns and interests of the represented (the principal). That ignores the fact that representatives play a central role in structuring the representative relationship through the manner in which they depict those they claim to represent. Representation is therefore a dynamic interaction between representatives and represented. The complex and dynamic nature of representation is well depicted in Saward's representative claims-making apparatus.[21]

In the EU context the principal-agent framework may reify the national level or national executives. As already suggested above, the issue in the EU is not whether EU institutions operate as good or faithful delegates, but whether the EU operates in line with the basic constitutional principles common to the member states. That could also include deviating from a set of instructions from member states if these are not consistent with the core constitutional traditions of the member states (if for instance EU institutions were to respond to Hungarian demands when these relate back to those of Orban's reforms that deviate from the core tenets of constitutional democracy).

A further issue is that the principal-agent framework by frontloading certain normative expectations pertaining to accountability may serve to render us less attentive to actual representative behaviour. Michael Saward talks about "shape-shifting representation", which refers to representatives adopting distinct representative roles that they strategically adjust to the particular settings that they are addressing or relating to.[22] I extended that notion from the level of representative to the level of body, which al-

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[19] C. Harlow, *The Limping Legitimacy of EU Lawmaking*, cit.

[20] Ivi, p. 33 *et seq.*

[21] M. Saward, *The Representative Claim*, Oxford: Oxford University Press, 2010.

[22] M. Saward, *Shape-Shifting Representation*, in *American Political Science Review*, 2014, p. 723 *et seq.*

lowed me to claim that certain EU bodies are almost shape-shifting by nature.[23] The European Council and the Council configurations are cases in point. Both bodies receive and mediate between two sets of institutional inputs, one from the European level and the other from the member state level (individual member states and the collective of member states).[24] Wallace labels the Council a "complex and chameleon-like beast", and notes that:

> "[i]t is both-and, and depending-on: Both executive and legislative in its functions, both national and European in its interests and incentives, both intergovernmental and supranational in its procedures, much depending on the policy area and the policy agenda of the day".[25]

We could make a similar argument with regard to the European Council, which lacks the legislative power but still occupies a range of different roles directed to different constituencies: as a strategic driver of the integration process and directed to the European constituency; as a national champion because each head of government is elected by and responsible to its respective national constituency; and as a second-order constitutional agent, because it is the key body in charge of constitution-making. The many roles that the Council and the European Council are supposed to fulfil in relation to their various contexts leave considerable scope for representatives for shape-shifting – how much scope depends on the specific elements of the representative relationship, such as whether they are instructed to act as delegates or are more free, to act as trustees.

Harlow's incisive article can be seen as a useful point of departure for a necessary rethinking of the theory and practice of representation.

[23] J.E. FOSSUM, *The structure of EU representation and the crisis*, in S. KRÖGER (ed.), *Political Representation in the European Union – Still democratic in times of crisis?*, London: Routledge, 2014, p. 52 *et seq.*

[24] H. WALLACE, *The Council: An Institutional Chameleon*, in *Governance: An International Journal of Policy, Administration and Institutions*, 2002, p. 325 *et seq.*

[25] Ivi, p. 342.