3. In what ways has JHA become important in the EU's relations with non-EU members?
4. In which areas of JHA should the EU pursue closer integration in the future?

FURTHER READING

JHA remains an under-researched area of the EU but scholarship is expanding and improving. Monar's (2006) work remains essential reading and Geddes (2006) offers a helpful overview. Henderson's useful volume (2005) focuses on the new member states. Occhipinti (2007) examines the interface between JHA and European Neighbourhood Policy. Sasse and Thielemann (2005) compile the work of leading experts on EU border management issues. Rees (2006) makes a timely and valuable general contribution; Peers has updated his seminal work on JHA law (2006).

Geddes, A. (2006), 'The Politics of European Union Domestic Order', in K. E. Jørgensen, M. A. Pollack, and B. Rosamond (eds.), *Handbook of European Union Politics* (London and Thousand Oaks: Sage): 449–12.

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Peers, S. (2006), *EU Justice and Home Affairs Law*, 2nd edn. (Oxford: Oxford University Press).

Rees, W. (2006), *Transatlantic Counter-terrorism Cooperation: The New Imperative* (London and New York: Routledge).

Sasse, G, and Thielemann E. (eds.) (2005), 'Migrants and Minorities in Europe', Special Issue of *Journal of Common Market Studies,* 43/4.

WEB LINKS

The Commission DG Justice, Freedom and Security maintains a nice website on all aspects of JHA at ec.europa.eu/justice_home/index_en.htm. Europol's various publications on organized crime can be found at www.europol.europa.eu/. The website of the Eurojust network of criminal prosecutors and judges can be found at: http://eurojust.europa.eu/

For critical perspective on JHA, see the publications of Statewatch, a civil liberties NGO: www.statewatch.org/.

Visit the Online Resource Centre that accompanies this book for additional material: www.oxfordtextbooks.co.uk/orc/bomberg2e/

CHAPTER 8

Constitutionalism and Democracy in the EU

Neil MacCormick

Chapter Overview

Democracy flourishes in polities that have a constitution and a sense of common citizenship that leads citizens to respect it. But the European Union has so far failed to adopt a formal constitution. Is the EU undemocratic, then? Constitutions may be functional (as in the United Kingdom) or explicit texts (as in most European countries), and the EU has a kind of functional constitution. Moreover, the EU is a Union of democratic states. The question is: are these enough to characterize the EU as democratic by extension? Or does the Union require direct democratic credentials? Does this multistate, multilingual union have a sufficient sense of common citizenship to make genuine democracy possible? This chapter examines the nature of constitutionalism and democracy in the EU and how they work.

Introduction: Constitutionalism and Democracy

Constitutionalism concerns respect for the rules and values in a constitution. It means ensuring that the constitution is faithfully implemented, the powers it confers are not abused or exceeded, and checks and balances among different political institutions are successfully maintained. Constitutionalism thus involves imposing limits on government power, adhering to the rule of law, and protecting fundamental rights (Rosenfeld 1994: 3).

Over fifty years, the European Union has developed what is in functional terms a constitutional framework (sometimes called a **constitutional charter**, see Box 8.1). It exists in the Treaties establishing the Union and enabling its enlargement (Weiler 1999). This functional constitution and a more general set of constitutional values are respected in the working life of the Union and its institutions. However, the Union does not have a formal constitution: an attempt to move to an explicit constitution, with a core text proposed by a Convention on the Future of Europe (see Box 8.2), caused political turmoil and the text was never ratified.

Whether this state of affairs ensures a form of *democratic* constitutionalism is questionable. That there is a **democratic deficit** (see Box 8.1) in the EU is a frequently heard complaint. It is a complaint about the character of decision-making of the Union's institutions, especially those concerned with making rules that are binding on the member states and citizens of the Union. In all EU member states, the conditions for successful democracy exist, but there are grounds to doubt whether these conditions can exist in the Union as a whole. European constitutional debate is likely to focus on whether a full-fledged European democracy is possible, and, if so, in what form.

Constitutionalism and democracy are thus closely related. Democratic government requires some constitutional framework that allocates the various powers essential to the effective **governance** of a state (or other polity or organization) to the appropriate institutions, and lays down the conditions concerning their proper exercise. In a democratic constitution, there must also be provisions enabling citizens to participate on equal terms in elections or other forms of popular vote. Such provisions ensure the popular accountability of those who exercise power within the institutions set up by the constitution. Democracy in its fullest sense requires maximum popular accountability of both legislative and executive institutions established in a constitution. (One can even argue that it requires popular adoption of the constitution itself, through a referendum in which all citizens participate, though this question remains open.)

In any case, without adequate accountability and checks and balances, even the most ostensibly democratic constitution will become a sham because the possibility of effectively holding office-holders to account before the people would be severely diminished or even negated. So, democracy presupposes having a constitution *and* respecting its provisions (including accountability). But is the EU's functional constitution enough to anchor the Union in an effectively democratic framework, especially given allegations of a democratic deficit? We explore this question by examining the unique nature of constitutionalism in the EU.

BOX 8.1 Key concepts

The Charter of Fundamental Rights of the European Union seeks to strengthen and promote fundamental human rights for all persons in the EU by setting out a series of rights such as freedom of speech and fair working conditions. It was adopted as a non-binding political declaration in 2000 at Nice, and then incorporated into the draft Constitutional Treaty in 2004.

Constitutional charter is the name the European Court of Justice has given to the Treaties' constitutional elements that amount to an informal constitution enshrined in custom, law, and treaties. It is also sometimes referred to as a 'functional constitution'.

Constitutionalism concerns respect for the rules and values in a constitution, including the protection of fundamental rights. It is a value ensuring that the constitution is faithfully implemented, that the powers it confers are not abused or exceeded, and that checks and balances among the different institutions are successfully maintained.

Democratic deficit refers broadly to the belief that the EU lacks sufficient democratic control. Neither the Commission, which proposes legislation, nor the Council, which enacts it, is directly accountable to the public or to national parliaments.

Separation of powers is the constitutional principle according to which different governmental functions (executive, legislative, and judicial) should be exercised by different institutions. The idea behind the principle is to ensure that power is not concentrated in one single authority such as a president.

Constitutionalism without a Constitution?

The EU has tried, but apparently failed, to adopt a formal constitution. The European Council met at Laeken in Belgium in 2001 and set up the Convention on the Future of Europe to try to bring the European institutions closer to the citizens. Its remit included considering whether a proper constitution of the European Union was a possibility, and, if so, how to achieve it (see Box 8.2).

The Convention did succeed in drafting a 'Treaty Establishing a Constitution for Europe', which it submitted to the Council. In 2004, European leaders unanimously agreed to adopt a new treaty based on the Convention's work with relatively insignificant amendments. This Constitutional Treaty was then sent to the member states for ratification according to their own constitutional processes. But two referenda, one in France and another in the Netherlands in May/June 2005, both decisively rejected the Constitutional Treaty. By mid-2007, eighteen member states had ratified the text, two

BOX 8.2 How it really work(ed)

The European 'Constitutional Convention'

The Constitutional Treaty may appear to be a dry document drawn up by select bureaucrats. But this exhibit portrays a bustling, open, somewhat hectic Convention which prepared an important part of the draft Treaty.

The Convention on the Future of Europe, chaired by former French President Valéry Giscard d'Estaing, began its work in February 2002, and finished in July 2003. It comprised a wide range of actors:

- governmental representatives of all member states, acceding states, and candidate states—28 in all;
- representatives from the national parliaments—56 in all;
- sixteen MEPs elected by the European Parliament on a party-proportional basis;
- two representatives from the European Commission, Michel Barnier and Antonio Vitorino;
- observers including the European Ombudsman, and representatives from the Economic and Social Committee (ESC) and the Committee of the Regions;
- a Secretary-General, Sir John Kerr, former head of the UK Foreign Office, assisted by an extremely able and industrious secretariat drawn from the civil services of the Council, the Parliament, and the Commission.

Given the number of (full and alternate) members, the Convention sessions could include over 200 people in the room actively engaged in the debate, with a further thirteen observers entitled to speak. Then there were assistants, advisers to ministers, diplomats, press persons, and Convention staff. When the Convention was sitting a considerable buzz of activity floated in and around the large Committee Room in the European Parliament building, and in the adjacent public space and Hemicycle Bar.

Openness of deliberation was fostered by the Convention's website which published all its official documents, all contributions by members, all amendments proposed by them, and the verbatim record of proceedings. This site connected also to the Forum website, where citizens at large and **non-governmental organizations (NGOs)** could state and explain their opinions (see http://european-convention.europa.eu).

The Convention's work was divided into phases. The first was a listening phase, with wide-ranging consultations across Europe. Then came an analysis phase, with a dozen working groups examining issues such as **subsidiarity**, the Charter of Fundamental Rights, the EU's legal personality, how to simplify the Treaties, the role of national parliaments, defence and external affairs, and so on. Reports of the working groups were debated in plenary sittings of the Convention in 2002–3.

Last was the writing phase. The publication of a preliminary draft in late 2002 was followed by the serious job of fleshing out the skeleton table of constitutional contents with draft Articles. This phase was overseen by the Praesidium, which comprised the President and Vice-Presidents, two European parliamentarians, two national parliamentarians, two Commissioners, two national government representatives, and a delegate to watch out for the interests and concerns of acceding states. By this stage Convention members had agreed that they were discussing the Articles of a draft constitution, not just a revised treaty.

As the draft Articles were delivered, a torrent of amendments flowed in from the pens of the members and alternate members of the Convention. In May and June, the Praesidium responded to amendments and debates about the Articles by redrafting and redrafting again. The end-game in summer 2003 was exceedingly hectic. The final text was hammered out by such consensus as could be achieved in each of the subsets of the whole Convention, and in the political groups that participated in it. The President presented the Convention's final conclusions to the member states' governments at the European Council in Thessaloniki on 20 June 2003. Within a month, after final adjustments, the final text was delivered to the European Council to be discussed, and ultimately agreed, by government leaders.

(Spain and Luxembourg) by processes involving a referendum of all citizens. At this point, attention shifted to proposals to produce a revised text—which turned out to be the 2007 Reform Treaty—that would carry forward much of the substance of the Constitutional Treaty, but without ever using the term 'constitution'.

The Union thus could have had a formal constitution, but (so far, at least) it has failed to adopt the only one on offer. Can there then be no European constitutionalism? Is it impossible for the EU to constitute itself as a properly democratic union of European states?

The EU's Constitutional Charter

In thinking about these questions, we should note that a political entity can have a kind of constitution even without adopting a text formally entitled 'The Constitution' that compendiously defines and empowers all the principal institutions of government. The UK is a conspicuous example of a state with a long-standing democratic tradition which nevertheless has no written constitution. Yet governments and parliaments and law-courts exist in the UK, elections take place, laws are enacted, and generally the rule of law prevails. Functionally, the UK has a constitution enshrined in custom, common law, statutes, and treaties, even though it has never chosen to adopt a formal written text codifying these constitutional rules into a single text. This functional constitution seems over the decades and even centuries to have been as good a basis for a robust constitutionalism as anything found in countries that have adopted a formal constitution.

Is there some possible analogy between this example and the European Union? Yes, to the extent that the Union also functions in a constitutionalist way within the framework of the treaties that establish it. But the analogy is an imperfect one. For the UK is a state, while the EU is a treaty-based union of many states and is considered by many to be a novel kind of political entity. It is one of its own kind (*sui generis*).

On the basis of this imperfect analogy, one can argue as follows: the Union, and, as one pillar within it, the European Community (EC), were deliberately set up by the member states, starting from the original six states that agreed the Treaty of Paris (1950) and the Treaties of Rome (1957) establishing the original European Communities. The whole, cumulative set of treaties—from Paris and Rome through to Nice in 2000 and various Accession Treaties—have been considered as comprising a constitutional charter for the EU (see Box 8.1).

The phrase 'constitutional charter' comes from a decision by the European Court of Justice (ECJ). A series of fundamentally important ECJ decisions established the idea that EC law was a special new body of law 'of its own kind' (again, *sui generis*), neither national law nor public international law, but something in between. Out of these decisions emerged the doctrine of the supremacy (sometimes called 'primacy') of Community law over that of each member state in any case of conflict (see Chapter 3). Under the sister doctrine of 'direct effect', Community law directly establishes rights and duties for individuals and corporations and other persons residing in the member states, as well as conferring rights and duties on the states themselves.

This line of decisions effectively gave the Community (later the Union) and its institutions a distinctive legal order of their own, within which they interact with the member states rather than being subordinate to them. Their effect was to 'constitutionalize' the Treaties. Put another way, the treaties contain a body of fundamental rules and principles that amount to a functional, albeit not a formal constitution.

Rights

To be democratic a constitution (formal or functional) must uphold fundamental rights. One grave difficulty that arose out of the EU's 'supremacy' doctrine was the implication it had for states that enshrine fundamental human rights in their own national constitutions. The test case was (then) West Germany, where democracy was being rebuilt around the idea of 'constitutional patriotism'. The experiences of the years 1933–45 led to an insistence that a new basic law must protect human rights in absolute terms, as inviolable. This is a ground-floor element of West Germany's 1949 constitutional 'Basic Law'. If Community law could override German law, what about these fundamental rights? Had they ceased to be inviolable? If so, the ECJ's interpretations of primacy and direct effect were unacceptable. The German Federal Constitutional Court so decided, and similar tribunals in other states could well have followed suit.

The ECJ responded, in a series of judgments beginning in 1970, by holding that human rights were already implicitly present in the EU's existing treaties. Otherwise, supremacy would indeed be unacceptable. The judges' reasoning was that the Treaty regime must be interpreted as requiring full respect for the constitutional traditions of the member states. This principle applies in particular to the fundamental rights they guarantee. Also, since all EU member states subscribe to the European Convention on Human Rights (ECHR; see Box 8.3), these fundamental human rights must also be acknowledged as imposing strict limits on the law-making power of the Community's institutions.

BOX 8.3 Compared to what?

Two kinds of 'convention'

The word 'convention' is ambiguous in the present context. In one sense, a convention is a body of people gathered together to deliberate about some public question and come to decisions or recommendations about it. In another sense, it is a treaty or agreement among several states. It is the output of a 'coming together' of states to achieve common agreement about standards that should prevail amongst them.

The **Convention on the Future of Europe** (Box 8.2) was a convention in the first sense—a body of people gathered together to discuss a policy issue and reach decisions or recommendations. It was not the first such convention. It was preceded in 2000 by a similar representative convention chaired by former German President Roman Herzog, whose task was to produce a concise and coherent statement of the rights that EU citizens enjoy in their capacity as such. These included rights, such as the 'four freedoms' (free movement of goods, persons, services, and capital) directly conferred by the EU's existing treaties; rights recognized through the European Convention on Human Rights (ECHR), and rights emerging from common constitutional principles. The Herzog Convention produced a **Charter of Fundamental Rights of the European Union** which was adopted by the European Council at the 2000 Nice summit. However, at the insistence of the UK, the Charter of Rights was adopted only as a legally non-binding 'political declaration', which meant that the ECJ was denied any effective jurisdiction to enforce the Charter. Nevertheless, the Commission and the Parliament have declared their firm intention to act as though the Charter were fully binding on them.

Conventions in the other sense (multilateral international treaties) are also relevant to human rights in the EU. A striking example is the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (sometimes abbreviated to 'European Convention on Human Rights' or just ECHR). The ECHR was agreed originally in 1950 and has remained in force with occasional amendments ever since. Based partly on the Universal Declaration of Human Rights agreed by the UN in 1947, it lays down basic standards for the protection of human rights. It is designed to stamp out the kinds of inhuman conduct that characterized so much of Europe's history in the middle part of the twentieth century. The Convention is not limited to the EU; it was agreed in the framework of the Council of Europe, which is quite distinct from (and broader than) the EU. It is enforced by the Court of Human Rights based in Strasbourg. Although the ECHR is not one of the EU treaties, observance of the rights contained in this Convention is obligatory also for (nearly all) member states of the EU.

In due course these implicit constraints were made explicit in the process of treaty revision. Since 1992, Article 6 of the (Maastricht) Treaty on European Union acknowledges the binding character of the principles common to the constitutional traditions of the member states, and of the rights guaranteed in the European Human Rights Convention. Under the 2001 Treaty of Nice, a Charter of Fundamental Rights of the European Union (see Box 8.1) has been adopted in the form of a political

declaration that stipulates all the rights that EU citizens (and other residents) enjoy by virtue of their citizenship.

Separation of Powers, Checks, and Balances

Separation of powers (see Box 8.1) is the political-cum-constitutional principle according to which different governmental functions should be exercised by different agencies. Executive decision-making concerns the pursuit of policies and their development through decision-making in individual cases, with possibly some delegated rule-making functions. Ministers in the executive branch of government are the proper executive decision-makers. Executive powers should be distinguished from those of general law-making, which belong to a more broadly based and representative legislature, usually a Parliament, in which all parts of the polity, all shades of opinion, and all classes and kinds of people can be represented.

The third great public power exercised within states is that of adjudication. Once the rules have been made, someone has to decide how they properly apply in particular cases, whether in cases of disputes between government and citizen or between citizen and citizen. The separation of powers doctrine demands that there be a system of courts staffed by competent and conscientious judges who are independent of the executive and the legislature, and who determine such disputes solely on the basis of the established law according to what they consider its most appropriate interpretation. Without courts to 'hold the ring', legislative power is apt to collapse into the hands of the executive.

The independence of the judiciary is of the greatest importance. Without it, the citizen has no real protection against corrupt or oppressive governmental action. But it is an open question how far this means that judges should be able to go in checking or overruling executive decisions or acts of the legislature. Different constitutions take very different lines on what is known as 'judicial review' of the acts of the other arms of government (see Box 3.7).

Whether and how far executive power must be strictly separated from legislative power is a more controversial matter, and different constitutional traditions handle this question in different ways. For example, the French, German, and American constitutions differ significantly in the ways in which they handle the separation of powers. The British system differs from all three. In the UK, ministers belonging to the executive branch of government also sit as members of one or other House of Parliament, and fully participate in its legislative activities. Indeed, the government, by virtue of its control of the majority party in the House of Commons, can normally secure the passage of legislation in a form that has effectively been decided by the **cabinet** or some committee or subcommittee of it.

Despite all these variations, and whether or not there is ever a perfect separation of powers and functions between different institutions of government, constitutionalism requires that government powers be 'checked'. That is, power must be distributed among institutions and agencies that can effectively check the propriety of each other's

actions, and hold them within the limits of power conferred. When this is achieved, the rule of law may be said to apply. Government is conducted under, and shows respect for, laws and the fundamental rights of human beings. The rule of law is the political value that is realized when constitutionalism prevails.

The distribution of functions among the institutions of the Union allows for some mutual checking and balancing. For instance, the Commission is answerable to the Parliament for the way it exercises its powers, but it is also subject to guidance from the European Council. Under the **co-decision procedure**, neither the Council of Ministers nor the Parliament can enact binding laws without the agreement of the other. The Court of Justice is the final arbiter of the legality of conduct, whether by the other institutions or by states or corporations or citizens.

A final check comes from the people themselves. The democratic character of a constitution depends upon the accountability of law-makers and executive ministers to the people who are bound by the laws, and by executive decisions that implement the laws. Election by universal suffrage to the principal chamber of the legislature (such as the House of Commons in the UK or the *Assemblée Nationale* in France) is essential to accountability. The chief executive is in some states directly elected (as is the President of the French Republic), in other cases indirectly (such as the UK Prime Minister).

Constitutionalism in the EU

We are now in a position to ask whether the EU does not merely have a functional constitution, but whether in that light it achieves the virtues of constitutionalism. Is there an actually functioning separation of powers among the institutions of the Union? Does the rule of law prevail within the Union? Are the affairs of the Union conducted in ways that sufficiently respect the constitutional rules, rights, and principles expressed and implied in the constitutional elements of the treaties? One useful way to approach these questions is to explore how the EU makes policy in different areas, and the power of the different actors in this process.

We can begin with the method by which the majority of policy is made, the so-called **Community method** (see Box 6.4) employed to decide policy emerging in the Union's first pillar. Here, where the majority of **single market** and related policies are made, we can reasonably and confidently answer the above questions in the affirmative, while acknowledging that there may be many minor irregularities here and there. As 'guardian of the treaties' the Commission must ensure that the Community law is upheld both by the Commission and its officials and by the member states, against which it can take action before the ECJ in the event of a failure to settle a point of complaint consensually. To the Commission also belongs the task of ensuring that the single market is kept in proper working order, including by the proposal of new legislation.

In areas governed by co-decision, the Commission's proposals go before the European Parliament (EP) and Council of Ministers for consideration. Parliament may amend the Commission's proposal at both of two different stages of scrutiny (first and second 'readings'), and in response the Council adopts a 'common position' that either endorses or not the Parliament's amendments. At any point the Commission may withdraw a draft if it finds unacceptable the amendments insisted on by the EP or Council. Finally, in the event of continuing disagreement, a conciliation committee (representative equally of Parliament and Council) is set up to try to achieve by compromise a final text, which then goes back for a third reading by Parliament and for final consideration by the Council (for an illustration, see Box 5.4). Only by the final resolution of both Parliament and Council (not necessarily a foregone conclusion even at this stage) does the legislation come into force as law.

In terms of rigorous scrutiny and ensuring that the executive cannot make laws without full parliamentary debate and endorsement, the co-decision process generally works well. Indeed, the EP functions with far greater independence from the executive (the Commission, in this case) than is typical of contemporary national parliaments. Similarly, the Parliament fulfils other requirements of constitutionalism, such as ensuring real answerability for any executive misdoing.

A clear illustration is found in the fate of the Santer Commission (Peterson 2006: 86–7). In 1999, President Jacques Santer and the whole of his Commission resigned en bloc in the face of near-certainty that the EP was about to carry a vote of no confidence. The Parliament had found evidence of wrong-doing by two Commissioners in a report by a Committee of Independent Experts (that the EP itself had appointed), and an absence of effective acceptance of common responsibility by the Commission.

Finally, in the first pillar the European Court of Justice (ECJ) has exercised its functions with full independence of judgment, and has ensured the lawfulness of the acts of the Commission, the Parliament, the Council, and the member states. At least once, in the case of the Directive on Tobacco Advertising in 2000, it has struck down Community legislation on the grounds that it lacked an adequate legal base in the Treaties. The rule of law in the EU is secured through an interaction of the ECJ and the Courts of the member states, seemingly to good effect in the great majority of cases, although often with a painful slowness in reaching final results. As far as citizens and corporations are concerned, most of the occasions when EC law is enforced on their behalf or against them, the effective decision that binds them is one by their own national court. As in all human institutions, there are blemishes here and there, some graver than others. But it could not be seriously contended that there is any deep failure in constitutionalism in the EU's first or 'community' pillar.

The EU's other two pillars (covering, respectively, Common Foreign and Security Policy (CFSP), and Justice and Home Affairs (JHA)) were established under the Maastricht Treaty with the deliberate intention that they should function on an intergovernmental basis and avoid the Community method. Decision-making for these pillars was designed to lie outside the 'constitutional charter' and to work in a different way. Not surprisingly, constitutionalism is a less salient feature of these pillars.

Is Democracy Possible in the EU?

Democracy, as we have suggested, depends on the accountability of law-makers and executive ministers to the people they govern. This accountability requires election by universal suffrage to the principal chamber of the legislature, and either direct or indirect election of those who exercise executive power. At the level of EU member states this requirement applies reasonably clearly and not very controversially. While it applies less clearly to the European Union as a whole, it is most visible in the 'supranational' form of governance exhibited in the first or Community pillar.

Supranational Democracy in the Community Pillar

Throughout the Community pillar, to the extent that co-decision between Parliament and Council prevails, decision-making is substantially democratic in character (although often quite different from decision-making at national level). We can explore the extent of and limits to this 'supranational democracy' by focusing on the powers and accountability of key institutions.

Legislative Initiative

The right of legislative initiative is vested mainly in the Commission. Although they may call for new legislation on certain matters, the Parliament and Council can normally act only on a proposal put forward by the Commission. In response to the Commission's proposal a kind of two-chamber legislative process kicks in, with the directly elected Parliament representing the Union's citizens as such, while the Council operates as a chamber of the states. The consent of both is required before any legislation can be adopted. Parliamentary amendments to Commission proposals are extensive. It seems clear that the European Parliament actually has a *more* proactive role in law-making than most, perhaps all, member-state parliaments. At the national level the government of the day usually has a fairly powerful degree of control or at least influence over members' voting through party whips and other inducements.

Nevertheless, it is clear that the EP is not yet the primary chamber of the legislature. On many sensitive topics—such as taxation and the Common Agricultural Policy (CAP)—the Council remains the primary legislator and the directly elected Parliament is often only consulted. In the case of enlargement (an executive decision rather than a matter of 'legislation') the EP is called upon only to assent or dissent. But on other topics—a growing list of them—co-decision prevails, and the Parliament exercises the full powers normally associated with the lower house of a state's legislature. The Parliament has also acquired similar budget-setting powers on certain elements of the spending power of the Union. But that budgetary power does not extend to the huge expenditure on the CAP, or to any matter of taxation.

Electing the Executive

We have established that where co-decision does prevail, the Parliament has somewhat greater practical power over legislation than is normally found in a national parliament. Yet this democratic 'surplus' arises directly from what some consider a serious deficit in the Union's striving towards democracy: the unelected nature of the executive (in this case, the Commission). The Commission is not directly elected, and the element of indirect election—Commissioners are nominated by elected national governments—is weaker than in any of the member states (although broadly similar to the system for selecting the Swiss executive).

The Parliament's role in choosing a President is growing, but still limited. After each EP election, it falls to the Council to nominate a new Commission President. Since the 1999 Amsterdam Treaty, this nominee has had to be approved by Parliament, so the Council must be sensitive to the outcome of the EP election and must nominate someone who will receive at least majority support in the Parliament. But there is no party leader of a victorious party who can lay claim to the presidency in the way a British Prime Minister or German Chancellor can claim office by virtue of his or her party's winning an election, or taking the role of senior partner in a coalition.

Next, the Council in consultation with the new Commission President puts forward a list of nominees for the remaining seats in the Commission, and this list is sent to the Parliament. The Parliament holds hearings of all the nominee commissioners, and at the end Parliament votes to confirm or reject the new Commission as a whole. In the hearings of autumn 2004, Parliament made clear that it would refuse to confirm the Commission under José Manuel Barroso's presidency unless the Italian nominee, Rocco Buttiglione, was withdrawn from nomination (Peterson 2006: 93; see also Chapter 3). It used to be thought that Parliament's powers in relation to the Commission were too much of a 'doomsday weapon' ever to be effectively invoked, but it is no longer so. The real answerability of the executive to the Parliament is now an established fact, and the Parliament can even in practice use its power of en-bloc approval or rejection to exclude a particular nominee.

Institutional Accountability

The unelected nature of the Commission also affects its accountability. On one hand, the Commission is much more closely subject to democratic accountability than is usually acknowledged. Its composition does have to be approved by the democratically elected Parliament, which can also throw the College of the Commission out of office on a vote of no confidence. Yet nominees to the College still come forward from the member states, not the EP, and are vetted first by the Council. Arguably, this process falls a long way short of the way in which an election determines the formation of a government in Spain, Sweden, or Slovenia. The Commission has a genuine degree of democratic **legitimacy**, but it is not comparable to that of an elected government in the member states of the Union.

Conversely, the Commission lacks the tight grip on Parliament that a dominant and successful Prime Minister and Cabinet can have on, for example, the British Parliament. The Council also lacks such a grip. Although ministers from each member state will find in Parliament representatives of their own national party, and may use normal inducements to try and secure their support for the national government's line, they have no similar influence over other members of the same political group from other member states. Thus, although the EP remains ultimately accountable to voters, it is not subject to the same sort of party or executive control found in most member states.

Party control of MEPs is further weakened by the way in which the EP exercises its functions through specialist committees, dealing with such domains as legal affairs, the single market, human rights, industry and research, and so on. Members working in these committees can acquire very substantial expertise and the style of deliberation is often rather non-partisan, with the weight of a member's argument counting for as much as her or his party affiliation. The report which emerges from the committee under the care of a ***rapporteur*** (see Box 5.1) decisively shapes the debate and voting in the plenary session at which the whole Parliament comes to its conclusion about the matter at issue. This process contributes to a more discursive, deliberative, and less fiercely adversarial approach to decision-making than may prevail in many national parliaments. Expertise sometimes trumps party doctrine in the legislative process, especially under co-decision. While this consensual, committee-based approach makes agreement possible in a Parliament of over 700, it also weakens control of national parties over 'their' MEPs.

Our discussion suggests that the democratic element in the European legislative process in some ways falls short of that which prevails in most or perhaps all member states. The absence of direct elections of the executive or strong party control weakens accountability of the EU's key institutions. But other distinctive elements of the EU system—such as its incentives for consensus or the autonomous and growing role of the elected Parliament—suggest the contrasts are not all to the disadvantage of the Community model.

Intergovernmentalism and the Council

More problematic for accountability are the domains in which the Community model and co-decision do not apply, chiefly in relation to agriculture and fisheries within the single market, and the pillars for JHA and the CFSP. An instance of **intergovernmentalism** at work is the European Arrest Warrant (see Box 8.4). Its adoption illustrates how the Council of Ministers operates as the legislative powerhouse of the EU when not constrained by co-decision with Parliament.

The Council has partly a diplomatic, deal-making character. Deals made behind closed doors in the Council can ease the path to common agreements. It also has partly a democratic, law-making character in that ministers are publicly accountable through domestic parliaments for the line they take and the votes they cast at Council

BOX 8.4 How it really works

The European Arrest Warrant (EAW)

An EU-wide arrest warrant was agreed by government leaders in 2006. This is how it works: if you were a suspect under this agreement a warrant could be issued for your arrest in any member state and then taken to the courts of the member state where you are currently resident. Subject to minimal scrutiny, these courts (or the specific court authorized for this purpose) must then 'execute' the warrant by having you arrested and delivered to stand trial in that other country according to *its* rules and procedures.

This may be an excellent idea, well geared to preventing or deterring or punishing cross-border criminal activity in the Union. But the basic rules that established this system were made intergovernmentally in the form of a framework decision of the EU's Council of Ministers (see Chapter 7). The EP had to be consulted about the terms of this framework decision, and did suggest amendments to the original idea for the European Warrant. But the Council was under no obligation to act on the Parliament's comments. It could be argued that law-making by the Council alone on issues that concern the rights of the individual, which are in the area of what one would expect to be within the basic constitutional parameters of a democratic system, is open to strong challenge.

Moreover, once a framework decision came into force, it was binding on the national parliaments of the member states. Each of them had to put it into effect as part of their own law. They did have some choice as to the legal instrument used to bring the Arrest Warrant into operation, whether to couple it (for example) with a more general revision of the law about extradition to other countries of persons accused of crimes there, and how to involve their national parliaments (such as via pre-legislative scrutiny). But national parliaments had no opportunity to reject the very idea of the EAW after it was agreed, even in countries (such as Germany and Poland) where there were questions about its compatibility with national constitutions.

Is this somewhat alarming? Here is an issue that affects the liberty of every citizen. It is an issue that affects a citizen's right to the protection of the familiar rules and procedures of the courts in her/his own state, such as conducting all their decision-making in the citizen's own language. Yet, no Parliament had any real say about the rules adopted in the framework decision—not the EP, which was only consulted, and not the national parliaments, which did not even have to be consulted. The principle that a citizen's liberty should be limitable only under laws agreed by his or her elected representatives had gone out of the window. It could be argued that the EAW illustrates clearly a democratic deficit in the context of the intergovernmental pillar of JHA. It also suggests that the constant tension between security and liberty faced by national governments is also present at the EU level.

meetings. But since much of the work of the Council goes forward in private, under wraps of secrecy, this form of accountability is very weak.

It may be said, of course, that national governments are also elected. The ministers who attend the Council are members of the elected government in each state, so why is this not democratic? The reply must be that not all democratically elected

or accountable officials ought to have powers of general law-making. Indeed, the democratic understandings built into the constitutions of essentially all the member states insist in one way or another on a separation of powers. Elected national presidents in France or Finland, for instance, are not allowed to usurp the law-making powers of their national parliaments or assemblies. How does it then become acceptable at the European level?

For this reason, the strict intergovernmentalism that applies to the JHA domain is viewed with deep concern by those who accuse the EU of a democratic deficit (see, for example, the citizens group Statewatch.org). Yet it was the deliberate strategy of EU leaders at the 1992 Maastricht EU summit to keep these matters for decision on an intergovernmental basis, most commonly with a requirement of unanimity, and to keep the Commission, Court, and Parliament at arm's length. The UK and certain other states insisted on this condition in the intergovernmental conference (IGC) leading up to Maastricht. They feared for the integrity of the domestic system of justice if the Community institutions were to acquire power to override domestic law under the principle of supremacy. They feared further that as a consequence the ECJ would be enabled to second-guess domestic courts and overrule them on issues of interpretation of new European laws—for example, on matters such as the European Arrest Warrant (EAW). Over time, however, concerns about both the lack of democratic legitimacy of JHA policy, *and* the inability to take decisions by unanimity in an enlarged Council, led to moves at successive, subsequent IGCs to subject it to the Community method and, eventually, to eliminate the pillars system altogether.

European Democracy: Competing Views

It is on those very grounds of democracy that those who uphold intergovernmentalism do so. They see it as vital to preserving democracy in Europe. They claim that the necessary preconditions for democracy obtain fully in the member states, but only weakly if at all at EU level (see Allott 2002; Siedentop 2000). The more supranational Community method, and the EP's key role in it, are phoney democracy because democracy demands genuine and widespread citizen involvement in government, particularly via participation in democratic elections on a scale that Europe will never achieve. Member states have real citizenship: not just a constitutional formality but a real sense of social solidarity and common 'peoplehood'. Etymologically, democracy signifies rule by the demos; the demos means the people, so where no 'people' exists, no real democracy is possible. Europe is a union of peoples, not a polity with a single people. Citizenship of the EU exists, but only as something that is additional and even extraneous to the citizenship that gives most Europeans their sense of identity, namely that of their own member state. It is in the member states that democracy can flourish.

According to this reasoning, the European Union's licence to act should be kept strictly in the intergovernmental mode. Governments have the care of democracy in their own countries, and the people, the press, and the parliaments watch jealously over

what governments do. A transfer of authority over to European institutions deciding by co-decision and with QMV in Council cheats on democracy. Such a transfer does not represent a new flowering of greater democracy on an all-Europe level, for that level does not satisfy the conditions for a working democracy. There is no sense of common peoplehood. There is no vibrant European political class that shares an agenda of concern and debate. There are no common media of communication to focus a shared public attention on current European issues. Even EP elections are contested more as mid-term votes on national politics, for or against governments, rather than expressing citizens' judgments about the proper future course of European governance and law-making. Finally, this intergovernmentalist view of EU democracy suggests that only bureaucrats in Brussels, and some in member states, are expert in European affairs. So, instead of controlling the bureaucrats, the European Parliament and its elected members are effectively co-opted into the great 'bureaucratic quagmire' of Brussels.

There is some force in this critique, but it also rests on questionable assumptions (see Moravcsik 2001; MacCormick 2005a). First we must beware of a mystification that comes through personifying the 'demos'. National identity is a contested issue in many member states, and nearly all contain some minorities, often sizable ones with their own strong sense of nationhood, as, for example, in Wales or Catalonia. An attractive feature of the EU is that even large national groups are minorities there—everyone belongs to a minority though some are larger than others. To the extent that there is a common constitution (or, for now, constitutional charter), there is a basis for a common civic citizenship, a shared 'constitutional patriotism'. The very fact of common political institutions, above all a single representative parliament, creates the conditions for the progressive emergence of a relatively unified European political class.

Moreover, it could be argued that the power of the Council is as much a threat to member state democracy as a bulwark of it (see Box 8.4). At the domestic level, legislative and executive powers can check each other. At the EU level, intergovernmentalism violates the separation of powers within the member states. The Council (only indirectly elected) participates in law-making activity whose output binds the national legislature. This is the central conundrum of European constitutionalism and European democracy.

Conclusion

The intergovernmentalist conception of democracy that we have considered urges Europeans to cherish their states and to ensure that democracy flourishes within them, both centrally and at regional and local levels. Democratic self-government is realizable among citizens in these contexts. Citizenship of the EU is too thin a kind of citizenship to bear the weight of true continent-wide democracy. Intergovernmental cooperation

should thus remain the main basis of operation at the all-Europe level, even if it does to some extent weaken democratic accountability for law made through EU institutions.

A rival supranational conception of democracy says that there is already a serious form of democratic accountability and democratic decision-making at the European level, chiefly through the European Parliament. What is needed is to extend and strengthen the Community method to areas where it makes sense, and to bring the two other pillars progressively into alignment with that method (with exceptions for certain areas, such as foreign affairs). This is what could have been achieved by adoption of the Constitutional Treaty. It acknowledged that democracy at the national, regional, and local levels remains vital to all citizens, and called for respect for the principle of **subsidiarity** (Box 2.2) to ensure continuing vitality of democratic self-government at these levels.

Both arguments are powerful ones. Both need to be considered seriously. Current and future debates about Europe's constitutional settlement—even if the word 'constitution' is now effectively banned—and about the direction and style of **European integration** will in the end determine which argument prevails.

DISCUSSION QUESTIONS

1. In what, if any, sense does the EU have a constitution?
2. To what extent is the Union democratic in its way of working?
3. Is democracy possible at a level above that of the member states?
4. Assess intergovernmental and supranational conceptions of democracy in the EU.

FURTHER READING

For clarification of the character of current EU constitutional law and the constitutionalization of the treaties, see Douglas-Scott (2002), especially Chapters 1 and 15. See also Weiler (1999), whose Chapters 6–8 are relevant also to the issue of democracy at the European level. Allott (2002) and Siedentop (2000) both cast grave doubt on the possibility of EU-level democracy, at any rate in present conditions. For critiques of these positions, see Moravcsik (2001) and MacCormick (2005a). MacCormick (2005b) and Norman (2003) give accounts, Norman's much more detailed, of the working of the European Convention. MacCormick (2005b) also gives a short and readable summary of the draft Constitution, and the reasons for believing its adoption might have improved the quality of European democracy and diminished the democratic deficit.

Allott, P. (2002), *The Health of Nations: Society and Law Beyond the State* (Cambridge and New York: Cambridge University Press).

Douglas-Scott, S. (2002), *The Constitutional Law of the European Union* (Harlow: Longman/Pearson Educational).

MacCormick, N. (2005a), 'The Health of Nations and the Health of Europe', in *The Cambridge Yearbook of European Legal Studies* 7: 1–16.

____ (2005b), *Who's Afraid of a European Constitution?* (Exeter: Imprint Academic).

Moravcsik, A. (2001), 'Despotism in Brussels? Misreading the European Union', *Foreign Affairs* 80:3: 114–22.

Norman, P. (2003), *The Accidental Constitution* (Brussels: Euro Comment).

Siedentop, L. (2000), *Democracy in Europe* (Harmondsworth Allen Lane/Penguin Press).

Weiler, J. H. H. (1999), *The Constitution of Europe* (Cambridge and New York: Cambridge University Press).

WEB LINKS

Several official EU websites provide further information on the issues raised in this chapter. The first listed here is that of the Convention on the Future of Europe, the second the Commission's information page concerning current and recent constitutional developments, the third an historical account of the development of constitutional law in the EU.

- http://european-convention.europa.eu/
- http://europa.eu/constitution/index_en.htm
- http://europa.eu/roadtoconstitution/index_en.htm

Euractive http://www.euractive.com is a commercial website discussing European developments relevant to democracy and constitutionalism.

The following two websites give illustrations of academic discussion of issues covered in the present chapter.

- http://www.jeanmonnetprogram.org/papers
- http://erg.politics.ox.ac.uk/projects/index.asp (then click on national identity project)

Visit the Online Resource Centre that accompanies this book for additional material: www.oxfordtextbooks.co.uk/orc/bomberg2e/

PART IV

The EU and the Wider World