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Research Article

Democratic Legitimacy, Desirability and Deficit in EU Governance

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Abstract

Longstanding concerns about the European Union's (EU) quest for democratic legitimacy are ever more acute. Many think such concerns can be best addressed if European institutions would become more effective crisis-managers. Stronger performance supposedly reinforces the EU's democratic credentials. This article rejects such 'output' oriented accounts as specious for assessment of the EU's democratic legitimacy. Drawing on Oakeshott's political theory, we argue that stronger performance addresses the desirability rather than democratic legitimacy of EU governance. We apply this insight as a heuristic device to consider the election of the Commission president and network governance.

Keywords

Legitimacy, input, output, throughput, systems theory, democratic deficit, EU, Michael Oakeshott

INTRODUCTION

That the European Union (EU) is in crisis has become almost a truism. Brexit, the sovereign debt crisis and the refugee tragedy pose existential challenges to EU cooperation. These crises make longstanding concerns about the EU's legitimacy ever more acute (e.g. Majone, 2014). There is growing disillusionment and frustration about the EU's incapacity to meet these crises with meaningful, concerted action (Treib, 2014). Yet, could we say, if the EU had brought about a swift resolution of these crises that its democratic legitimacy deserves stronger recognition? If we follow the predominant discourses on EU legitimation, it seems that this question must be answered affirmatively.

This article critiques approaches to legitimacy that ground such an affirmative answer, showing why the improved performance of a democratic political organization has no direct bearing on its legitimacy. For this purpose, we appropriate Michael Oakeshott's distinction between the *legitimacy* and the *desirability* of governance (1975a, p.325). Our turn to Oakeshott may come as a surprise since he never wrote on the EU and was generally sceptical about democracy. Nevertheless, Oakeshott stands out as being exceptionally engaged with the question of legitimacy and his reflection can be fruitfully brought to bear on the case of EU democratic legitimacy and the democratic deficit.

Our central objective is to show that the frequent failure of both sociologically-oriented and more normative accounts of democratic legitimacy to distinguish between legitimacy and desirability is analytically confused and politically costly. It prevents us from acknowledging that even an EU that excels in governance cannot on that account have a stronger claim to democratic legitimacy. It also prevents us from seeing that weak crisis-management does not diminish the EU's democratic credentials. Since there is persistent disagreement on what strong responses require, democratic procedures contribute to the recognition of governance as procedurally legitimate but cannot

command substantive approval of EU governance. Below we offer an exposition of output-accounts of EU legitimacy and explore two 'vignettes' that show the usefulness of Oakeshott's distinction.

Situated at the intersection between EU studies and political theory, this paper seeks to contribute to the conceptual precision and analytical clarity with which debates on the EU are conducted. This entails strengthening awareness of the political stakes of these discussions, whether found in academic scholarship, policy discourse or in popular polemics. In this context, our exposition of the distinction between legitimate and desirable EU action is best appreciated as an *interpretive heuristic device* that helps to sort out and clarify relevant questions about EU governance. The paper does not aspire to present or outline a comprehensive explanatory theory of democratic legitimacy, nor to formulate positive, normative proposals to close the alleged democratic deficit. Moreover, we cannot engage all the important articulations of the EU's legitimation challenges and hence do full justice to the richness of the wider debates to which they belong.

THE DEMOCRATIC DEFICIT DIAGNOSIS

Many continue to use the normative diagnosis that is (in)famously known as the 'democratic deficit' (Scharpf, 1999; Lord and Magnette, 2004). The EU's democratic deficit has been diagnosed in many different and highly sophisticated accounts (e.g. Eriksen and Fossum, 2002a; Bellamy and Castiglione, 2003; Bowman, 2006; Weiler, 2012; Theuns, 2017). Such accounts seek to highlight challenges to the EUs democratic credentials and often suggest possible remedies. Concerns with the legitimacy and the democratic deficit of the EU are often intertwined in these accounts. Indeed, legitimacy and democratic legitimacy are usually taken in the literature to be coextensive. It is important though to keep the notions analytically separate. While democratic credentials have become paramount in accounts of legitimacy, this development is historically contingent. Further, though accounts of legitimacy emphasizing democracy are dominant, the role of democratic procedures varies importantly. Some defend democratic procedures instrumentally to their securing other ends (Van Parijs, 2011 p.5-22) whereas others defend their 'epistemic' qualities (Estlund 2009, p.98-116).

EU politics is usually diagnosed with a democratic deficit for lacking supposedly key characteristics of an ideal democracy. Of course, not all EU scholars agree there is a democratic deficit at all. Majone argues that the application of democratic standards to EU governance is a category error (1994). For him, the EU is a regulatory state, which ought to pursue pareto-efficient policies (Majone, 1998 p.18-25). To frame this in the lexicon of this paper, Majone rejects talk of input *and* output democratic legitimacy, focusing exclusively on the desirability of EU policy. Moravcsik also rejects the democratic deficit through the opposite path; he argues that EU policies measure up to legitimacy standards quite as well as policies enacted in national democratic fora (2002).

Nevertheless, the dominant position is that the EU does suffer from some kind of democratic deficit. Two of the most important concerns in such diagnoses are 1) the lack of sufficient democratic control and; 2) the lack of sufficient citizen participation (for a helpful overview, see e.g. Jensen, 2009)[1]. Analysts emphasizing the lack of democratic control that citizens of the EU are able to exercise on its politics typically highlight certain institutional features that such control would require and that are missing from EU politics. A frequent proposal is the direct election of the European Commission (EC) president (Hix, 1998; Decker and Sonnicksen, 2011). This procedure

supposedly reinforced the EC president's mandate and accountability, allowing citizens to express (dis)satisfaction in line with the Schumpeterian ideal of a competitive democracy. A step in this direction was taken by European parliamentary groups when they unilaterally put forward *Spitzenkandidaten* (Hobolt, 2014). The relationship between specific procedures and democratic beliefs is complex. Alternative democratic procedures may offer a better contingent translation of democratic beliefs about legitimation. However, we argue that such alternatives cannot be the grounds of a critique of the democratic illegitimacy of antecedent procedures.

A second important strand in the literature concerns citizen participation in EU politics. The most evident and mediatized lack of democratic participation is the low and generally dropping participation in European Parliament (EP) elections (Mattila, 2003). Given the highly publicized introduction of *Spitzenkandidaten*, and the economic circumstances, there were expectations that turnout for EP elections would stabilize after years of decline. This proved inaccurate, with 42.54% turnout at final count continuing the trend of decline.

Concerns over citizen participation are not exclusively focused on voter turnout. Several theorists of EU legitimacy look to deliberative politics to find a metric of legitimacy analysis, inspired no doubt by concurrent trends in democratic theory (see especially Eriksen and Fossum, 2002b). Some see deliberative politics as a source rather than a metric of legitimacy. Joerges and Neyer for instance propose a notion they also call 'deliberative supranationalism', to justify the 'comitology' system of EU legislation (1997 p.292-298). Long criticized for its lack of transparency and the absence of Euro-parliamentarians, Joerges and Neyer defend such fora as unique sites of a discursive politics of persuasion, despite limited membership (*ibid*.).

The centrality of the democratic deficit thesis, both in academic discussion and, increasingly, in popular and political discourse, has had material effects in EU constitutional innovation. Particularly the continuous expansion of the competencies of the EP is often justified and - at least in part - caused by the attention this debate has received (see e.g. Costa and Magnette, 2003).

SYSTEMS THEORY ANALYSES OF DEMOCRATIC LEGITIMACY

Systems-theory approaches to EU democratic legitimacy overlap with the democratic deficit debate in that scholars who use the language of 'input', 'throughput' and 'output' legitimacy usually do so to highlight a perceived failing of the EU to measure up to one or more of these metrics (see e.g. Schmidt, 2013). The systems-theoretic approach was popularized by Fritz Scharpf in his 1999 book *Governing in Europe: Effective and Democratic?* Its influence is difficult to underestimate. He was the first to introduce the distinction between 'input' and 'output' legitimacy. This distinction has since been often applied in analyses of European political institutions and policies (Borrás, et al., 2007 pp.586-597; Risse and Klein, 2007 pp.72-74; and Lindgren and Persson, 2010 pp.450-453 focusing on institutions, and Skogstad, 2003 pp.321-327; and Borrás, 2006 pp.65-66 focusing on policies). Focusing on output legitimacy has encouraged scholars to move beyond the perceived defects in the EU's identity-based, procedural or participative credentials to look at the actual domain of governance - how well the EU is able to succeed in doing what it sets out to achieve.

Scharpf developed the input/output distinction by first identifying what he takes to be two different strands of democratic theory in the history of normative political theorizing – one focused on 'governing *by* the people' and the other 'governing *for* the people' (1999 p.6, italics in the original) –

and associated these with different legitimation mechanisms. Input theories of democratic legitimacy he takes to be part of governing by the people and thus closely associated with majoritarian rule. The core question for such theories is how to overcome 'the danger that self-interested, or hostile, majorities could destroy the minority' (*ibid*. p.7) – the usual strategy being to focus on overlapping cultural, historical, linguistic and ethnic identity. It is clear that if this were the end of the story, as some theorists of the democratic deficit have supposed, the EU would not measure up very well to the standard of democratic legitimacy.

As opposed to input democratic legitimacy, output democratic legitimacy is said to correspond to the second tradition of democratic thought, which emphasizes governing 'for' the people. While broader and more flexible, Scharpf does note that it also 'tends to be more contingent and more limited' (*ibid*. p.11). Substantively, he describes output legitimacy as deriving its force 'from its capacity to solve problems requiring collective solutions' (*ibid*.) that ordinary individual and civil actions cannot solve. We will show how Scharpf's concept of output democratic legitimacy confuses the desirability of governmental activity with procedural legitimacy.

Output-oriented legitimacy serves as a metric to measure the success at which political actions are able to solve problems efficiently.[2] To this end, Scharpf identifies independent expertise, corporatist agreement, intergovernmental agreement, and pluralist policy networks as mechanisms of output legitimacy in the EU, as well as describing electoral accountability as a sort of 'hybrid' mechanism whereby the shadow of an input (elections) 'reinforces the normative orientation of office holders toward the public interest' (*ibid*., p.14). Not surprisingly, the EU is more equipped to score-high on these 'output-oriented' legitimation measures.

Before we come to criticize this conceptualization of democratic legitimacy, it is useful to see the how it works out in more detail. The interplay of input and output legitimacy would produce a two-by-two table of legitimacy judgements. It is not difficult to imagine a political institution that is well able to solve collective action problems but has no direct democratic mandate, little by way of democratic accountability, and no immediate democratic control. Such an institution would seem to score highly on output legitimacy, but low on input legitimacy. Similarly, a policy that enjoys close congruence with the 'will of the people' expressed through democratic procedures - such as for instance a measure adopted through a referendum - may fail spectacularly to 'solve the problem' that the measure was intended to address, or may prove overly inefficient.

Looking more closely at Scharpf's proposals however demonstrates that input and output legitimacy as he conceives them are not independent variables. We have already noted that electoral accountability seems to address both input and output legitimacy; one telling quote seems to go further: considering the potential of EU politics to avoid divisive decisions as a strategy for increasing output legitimacy, Scharpf writes: 'if European policy networks should be able to assure win-win solutions that satisfy all interests affected, output-oriented legitimacy would be assured, and the democratic deficit would cease to matter' (*ibid*., p.25).

It is important to note at this point that Scharpf's analysis is ambiguous as to whether output here addresses a problem of *democratic* legitimacy. When output is presented as engaging another tradition of democratic thought and as a *variable* of democracy, the assumption is that better output for the people strengthens *democratic* legitimacy and reduces a *democratic* deficit. When it is presented as independent from, say, participatory democratic input, the assumption is that better output for the people simply makes democratic legitimacy less important rather than reinforce it –

indeed, 'the democratic deficit would *cease to matter*' in Scharpf's words (*ibid*. p. 25). In the latter case, better output does not solve but helps to avoid the problem of a democratic deficit. It is in this sense, for instance, that Vivien Schmidt speaks about output or the challenge 'to get the economics right' as distinct from Europe's 'other [democratic] deficit' or the need 'to get the politics right' (2012, p.7) while at other times she also takes output as internal to a specifically democratic conception of legitimacy (e.g. 2013, pp.3-12).

Recently, scholars have proposed to add a third metric to Scharpf's toolbox, also borrowed from systems analysis - 'throughput' legitimacy. This term received some attention in the years following Scharpf's book (e.g. Wolf, 2006; Bekkers and Edwards, 2007 pp.43-46; Risse and Klein, 2007 pp.72-74), but gained in importance in EU studies literature following Schmidt's (2013) article on the subject. When applied to the EU, throughput legitimacy focuses in her words on 'what goes on inside the 'black box' of EU governance' (*ibid*. p.5). It concerns the 'processes' of EU politics, rather than the electoral procedures of input or the effectiveness of output. Schmidt takes throughput legitimacy to involve the 'efficacy of... EU governance processes and the adequacy of the rules they follow' (*ibid*.). Further, this metric also takes account of 'the accountability and transparency of the governance processes', 'the quality and quantity of EU governance processes' inclusiveness' and, 'the openness of the EU's various bodies to 'civil society'' (*ibid*.).

Schmidt's article also draws attention to the difference between the public perception of legitimacy and the normative question of whether an institution has a right to rule. This well-known distinction - between moral or normative and sociological legitimacy - has long been recognized as central to accounts of legitimacy in political theory. The question of a political agent's moral legitimacy asks whether the agent has a moral right to rule and, usually, whether its subjects have a moral obligation ordinarily to obey. In contrast, sociological legitimacy holds that an authority is *considered* to have the right to rule, supposedly leading its subjects to generally *believe* that they are under an obligation to obey.

Sociological and normative legitimacy need not be considered wholly independent, and may interact in interesting ways (Beetham 2013, pp.37-41). In our context, it is clear that the distinction cuts across the input/output/throughput distinction; for instance, without proper democratic elections (input) both the normative and the perceived democratic legitimacy of a parliament will presumably suffer. In the next section, we develop a critique of both the systems theoretic approach to the EU's legitimacy and the democratic deficit-thesis with reference to the political theory of Michael Oakeshott.[3]

OAKESHOTT'S DISTINCTION BETWEEN LEGITIMACY AND DESIRABILITY

It has been noted that systems theory regards democratic legitimacy as an 'interactive construction' (Schmidt 2013, p.11) that encapsulates the variables of input, throughput and output. From Oakeshott's perspective, by contrast, these are not variables of one interactive construction but refer to separate concepts, respectively the legitimacy and desirability of governing activities. Although his work predates the systems-theoretic approach and is far removed from its terminology, it may retrospectively be read as a premonition against the view of legitimacy as an interplay between, on one hand, participatory input and procedural throughput and, on the other hand, performance output.

Oakeshott's point of departure is that modern political thought has been preoccupied with two major but analytically distinct questions. The first of these questions is: *How should a governing body be constituted, composed and authorized in order to be considered legitimate?* The second problem is: *What should a legitimate governing body be engaged to do and to achieve?* Thus, the first question refers to the legitimacy or 'constitutional shape' of a governing body, whereas the second refers to the desirability of its activities or 'the character of its engagements' (Oakeshott 1975a, p.330).

Reflections on the legitimacy or authority of governance are not peculiarly modern. They are conducted in the idiom inherited from pre-modern political theory (such as Aristotle's threefold classification of constitutional regimes and their perversions) and express certain beliefs about the normative sources of the right to rule (Everson 1996, p.61-90). In modern European history, 'the grace of God' and 'the people' were foremost among these beliefs and not considered as mutually exclusive: *vox populi vox dei est* (Oakeshott 1975a, p.329). Nevertheless, in current legitimation discourses 'democracy' stands first among these considerations and has been translated more or less (in)adequately into democratic procedures by which the right to rule may be legitimately exercised. 'Universal suffrage', for instance, has overtaken 'hereditary succession' as a central source of legitimacy.

Procedures, as Oakeshott stresses, are internal to the concept of legitimacy and explain why the statement 'that 'law regulates its own creation' is not a paradox but a truism' (Oakeshott 1999, p.151). Legitimacy requires due observance of procedures and laws which imperfectly reflect currently-held beliefs and values about the sources of legitimacy. The translation of beliefs about legitimacy into adequate procedures remains as complex and context-dependent as the contingently-held beliefs themselves. For instance, in some polities the procedure of general elections for representatives is considered an adequate translation of the democratic belief in 'universal suffrage', in others it is thought to require frequent binding referendums. The translation of democratic beliefs about legitimacy in democratic procedures is therefore never a once-and-for-all achievement. It remains an open-ended, dynamic matter of contestation.

According to Oakeshott, reflections on the desirability of governance have become increasingly important in and characteristic of modern political thought (Oakeshott 1993, p.10-11). The reason for this focus is fairly straightforward. Whereas the scope of activities was restricted in pre-modern times (mainly to dispensing justice and organizing defence), modern European history has witnessed dramatic changes in the character and scope of governing activities. This development is best explained by the increased availability of resources and the concurrently increased power with which governments can pursue new activities. Increasing focus on the activities is, then, characteristic of modern political thought since hitherto no government could imagine engaging in the scope of activities undertaken in modern time. They have power to do things never done before, which invites reflection on the desirability of these activities (Oakeshott 1993, pp.10 -11).

Although Oakeshott thinks that in modern political thought a comparative shift of attention from the legitimacy to the desirability of governance is undeniable, for three reasons he is not surprised that this shift has not become more explicit. First, the shift of attention does not mean that the question of legitimacy has become obsolete. On the contrary, Oakeshott believes it remains crucial as the absence of firm beliefs on which its acknowledgment rests invariably indicate political disintegration. But he does think that modern reflection on legitimacy has been sparked by the changing and expanding pursuits of government rather than *vice versa*: 'authorization mattered more because

power and activity had increased' (Oakeshott 1993, p.11). Thus, the modern case for democratic legitimacy was built in response to growing activity: 'where it was not argued that a democratic constitution would increase the power of government, it was argued that it is intolerable that governments disposing of such immense power should not be democratically constituted' (*ibid*. p.11).

Second, the shift has remained under-appreciated because reflection on the desirability of governance has not produced a distinctive idiom of its own but has confusingly used and transfigured the vocabulary designed to address the problem of legitimacy. Notably, the adjective democratic, which properly belongs to the idiom of legitimacy, is often invoked as a 'confidence-trick' to recommend the desirability of specific activities –specific public goods or social services such as education or healthcare (Oakeshott, 1975a, p.193). Thirdly, reflection on legitimacy has retained a 'fictitious pre-eminence' because of the misguided conviction that the activities of government are a necessary function of its constitutional shape. Accordingly, it was wrongly expected that 'to have settled' the question of the legitimacy 'is to have decided the other', separate question of the desirability of governance (Oakeshott, 1993, p.11).

Oakeshott thus argues that the activities government undertakes cannot be seen as a necessary function of the authorization and constitutional shape which give it legitimacy, and that the distinction between these two concerns must be sharply observed in political theory. His contention is that a particular belief about legitimation (for instance, that it should be democratic) 'neither favours nor obstructs (much less compels or excludes)' a specific belief about what a governing body should achieve. In the historical context of Europe, he claims the administrative histories of governing bodies in modern Europe do not follow, nor even run parallel to, their constitutional histories (*ibid*., p.9; Oakeshott, 1975b, p.189).

While the distinction Oakeshott develops has become more important with the widening activities of government, its analytic foundation has earlier roots. For instance, in the *Leviathan* Hobbes distinguishes, on one hand, the authorization and constitutional shape (Ch. XVII and XIX) and, on the other hand, the office or specification of tasks (Ch. XVIII and XXX) of a governing body (Hobbes, 1651 [1996]). It also finds support in Locke's claim in the *Second Treatise* that a commonwealth is not reducible to democracy or any particular constitutional shape that bestows legitimacy, but that it signifies a certain kind of association, namely one that is independent (Locke, 1689 [2003], Ch. X). Relatedly, in *The Social Contract*, Rousseau is keen to distinguish beliefs about the desirable activities of a governing body, inferred from 'the limits of the sovereign power' and specified in 'the signs of a good government' (1762 [2002], Ch. IV Book II and Ch. IX Book III), from beliefs regarding the best constitutional shape of a governing body (*ibid*., Ch. II – VIII Book III).

Thus, from Oakeshott's perspective, our answer to an even more basic question – *What is the character of this political association?* – informs our beliefs about the desirability of its governance and a commensurate apparatus of power to adequately undertake these activities. But this answer does not dictate any particular belief about which constitutional shape legitimates governance (Oakeshott 1975b, p.196). Among those who have treated concerns about the legitimacy and the desirability of governance in terms of an 'interactive alliance', Oakeshott points to Kant for arguing incorrectly that a republican constitutional shape necessarily imposes the pursuit of peace among the activities of government and to Paine for wrongly asserting that democratically legitimate government 'would confine its activities within limits he approved and would be inexpensive' (Oakeshott 1993, p.10). Similarly, Hume (1777) and most offshoots of utilitarianism stand out for

their insistence on the inseparability between these concerns, as the recognition of legitimacy rests on desirable outcomes of governance (for which the evaluative measure is 'utility') rather than on democratic and procedural qualities.

From the above exposition, it is clear that Oakeshott's approach challenges the systems theoretic approach to legitimacy on several fronts. Three points of critique stand out. First, if we adopt Oakeshott's perspective, it becomes redundant to specify the concept of legitimacy with the compound expressions 'input legitimacy' and 'throughput legitimacy'. By this we mean that they are two inseparable properties of democratic legitimacy, both necessary and neither independently sufficient. 'Input', as noted, is primarily concerned with 'participatory quality', whereas 'throughput' is 'process-oriented' (Schmidt, 2013, pp.4-5). The former refers most explicitly to the democratic credentials of governance, whereas the latter specifies certain characteristics, such as 'accountability' or 'openness', to which procedures must conform should its activities, like the laws it enacts or the policies it adopts, be acknowledged as democratically legitimate. While it is useful to parse out these different characteristics of democratic legitimacy, they ought to be viewed as two sides of the same coin rather than two independent though interrelated metrics for measuring democratic legitimacy.

This procedural character of democratic legitimacy, as we shall stress further, is distinct from beliefs about the substantive desirability of governing activities. Procedures are concerned with 'how' governance unfolds but indifferent to 'what' is done within the bounds of authorization. In other words, to the extent that legitimacy is believed to require a democratic anchorage and conformity to procedures, it is concerned with input and throughput inseparably and by definition. There can be no democratic input which is not itself regulated and bound by throughput procedures.

In contrast to input and throughput, output does not enter this conception of democratic legitimacy. From the perspective explored here, the compound expression output legitimacy is an oxymoron since it denies a central condition of possibility for legitimacy, namely, that particular laws and policies may be ascertained as democratically legitimate even if their problem-solving quality is considered to be deplorable. 'Output' is not concerned with the legitimacy but the *desirability* of governing activities or, in the language of systems analysis, the appreciation of performance.

Indeed, debate on the desirability of certain activities presupposes the acknowledgment, be it rapturous or stingy, that governance has a measure of legitimacy (Nardin, 1983, p.265).[4] If an action of government lies outside its authorized scope then that action is illegitimate regardless of its character as desirable or undesirable. When we fundamentally deny a governing body's claim to legitimacy, our real stake is not to change but to stop its activities altogether and terminate its existence. Only when some recognition of legitimacy is given can we be said to have a stake in altering the activities of government according to what we find desirable. And, most importantly, it is because we do not expect disagreement about what constitutes desirable governance to disappear that we find democratic procedures most suitable to ascertain the legitimacy of laws and policies which some applaud and others taunt. In other words, if the legitimacy of governance is made contingent upon its expediency, fairness, wisdom or other criteria of desirability, the concept of legitimacy loses its distinct force.

This approach does not assert, as Oakeshott seems to suggest, that the legitimacy of governance completely transcends its contingent performance. Oakeshott has been criticized for insulating the recognition of legitimacy from consequential considerations about what rulers (fail to) achieve (e.g.,

Parekh, 1995, p.178). For instance, why should citizens recognize a claim to legitimacy if it cannot assure basic physical security or minimal economic prosperity? In this regard, Oakeshott's distinction seems counterintuitive.

Of course, Oakeshott agrees that governments are always legitimated to act and govern, rather than being on a permanent holiday. What he stresses is that if a governing body fails to act altogether (and thus deliver 'output'), its *de facto* existence rather than its claim to democratic legitimacy is at stake.[5] Nevertheless, we can attenuate Oakeshott's sharp distinction by saying that there is clearly a continuous interplay or dialectic between legitimacy and desirability. On this interpretation, democratic procedures, such as competitive elections, serve to channel ongoing contestation about what desirable action substantively requires. Thus, instead of joining Oakeshott in a radical separation between legitimacy and desirability, we favour a plastic and dynamic usage of his distinction which is at once careful to avoid confusion and eager to investigate the precise interplay between what is done and how it is legitimated.

We are suggesting, then, that important and ongoing contestation about the (lack of) democratic legitimacy of the EU as a body politic takes place alongside and simultaneously with the exchange of views on what desirable performance requires. Indeed, questions of legitimacy often resurface as concerns about the kind and scope of desirable activity grow - because the EU's 'power and activity' continues to increase, its 'authorization' matters more. Yet, changes in the procedures through which the EU's legitimacy is placed on a firmer democratic footing do not offer any guidance about the desirability of what it does. Stronger democratic procedures in the EU are indifferent to beliefs about the relative desirability of stimulus or austerity and of measures to promote labour mobility over those guarding against social dumping. None of these alternatives can be excluded as a possible result from the adoption of more democratic decision-making procedures in the EU. In short, the EU's democratic legitimacy neither transcends nor depends upon desirable output.

From this perspective, the EU's nonconformity to international treaties or its disregard of the results of referenda are properly identified as concerns of democratic legitimacy. While it is therefore a question of legitimacy to ascertain whether the EU's bail-out programs of Greece stand the test of legitimacy for instance, in light of their alleged violation of the Maastricht Treaty, the EU's pressure to call off a Greek referendum on the bailout in 2011 or its defiance of the 2015 referendum, it is an altogether different concern to critique the poor problem-solving quality of these programs in terms of the desirability of stimulus, austerity or structural reforms. Similarly, the ECB programme of quantitative easing through the buying up of sovereign bonds confronts us with questions of legitimacy (does this engagement fall within the ECB's mandate to assure price stability?) and desirability (is it wise and effective from a monetary and economic perspective?) that should not be conflated. Democratic legitimacy requires that relevant procedures are observed (conformity to treaties, taking referenda results into account, perhaps), but has nothing to say on the substantive desirability of the EU's performance.

These two points, that legitimacy concerns input and throughput by definition but that output addresses the desirability rather than the legitimacy of governing activities, imply a third. The inclusion of output in the trinity of variables makes it difficult to see if systems analyses offer a specifically democratic conception of legitimacy. Imagine governing body A scoring 6/10 on democratic input (for instance, open and competitive elections, low levels of abstention) and throughput (for instance, parliamentary procedure followed in legislation, freedom of deliberation, publicity) but only 3/10 on output (for instance, the quality of public goods like infrastructure,

healthcare and public schools). Governing body B scores only 4/10 on input and throughput but 8/10 on output.[6] If we follow systems analyses, according to which input and output involve 'complementarities and trade-offs' (Schmidt 2013, p.3ff.), we are forced to the absurd conclusion that governing body A should be believed, not merely to be less legitimate, but less democratically legitimate than governing body B.[7]

This conceptual amalgamation of legitimacy with expectations about what governance should achieve is also found, for instance, in the work of Richard Bellamy and Dario Castiglione (2013). Offering alternative models of democracy to scrutinize the EU's legitimacy, support for extensive public goods provision is taken to be a necessary function of 'thick' beliefs about democracy (*ibid*. p.211). But the alleged link is questionable. Governing activity can be judged to excel in such output as high-quality public goods provision ('for the people') without being democratic. Conversely, a thick democracy with strong claims to normative legitimacy may be found wanting in terms of output.[8]

If output evaluation is postulated as internal to legitimacy, we are not only left wondering whether we are presented with a specifically democratic conception but, more broadly, whether the concept has become indistinguishable from other sociologically measurable concepts like credibility, public opinion or popularity. To be sure, just as Madison (1787/1788) claims in *Federalist* No. 47 and 49 that 'all government rests on opinion', so does the normative claim to legitimacy continuously rest on sociological belief. This is formally and explicitly so in democracies, where changing beliefs about the legitimacy of governing bodies function as iterative inputs in every election cycle. Yet the acknowledgment of this does not equal, much less necessitate, approval of or favourable attitudes towards what is substantively done within legitimate, authorized bounds. Systems theory is unable to account for this distinguishing mark of the concept and hence cannot provide a satisfactory analysis of the EU's claim to democratic legitimacy.

In many of its manifestations, the democratic deficit-thesis to scrutinize the EU's legitimacy runs on the same conceptual conflation as the systems-theoretic analysis. This diagnosis often muddles democratic and procedural legitimacy with expectations about the EU's performance. This holds true not merely for scholarly debate on the deficit but also its invocation in popular and official discourse. Take, for instance, the *Staat van de Europese Unie 2013* ('State of the European Union 2013') which then Dutch Foreign Minister and current First Vice President of the EC Frans Timmermans presented to the Dutch Parliament. In his discourse, Timmermans claimed that:

> 'The Achilles heel of the EU is its democratic deficit. This deficit can only be tackled if, on one side, the EU performs better and, on the other, if democratic control within the EU is enlarged. What the EU and its Member States do they must do better, more transparently, more efficiently *and* more democratically' (2013, p.5).

This is a clear example of how the notion of a democratic deficit, which properly belongs to the idiom of legitimacy, at once lumps output performance, democratic input and procedural throughput together *and* separates these considerations ('on one side', 'on the other'). It is revealing in this regard that the adjective democratic is not reserved for considerations of performance. If the deficit-thesis is to offer a clear contribution to analyses of EU politics, it restricts itself to concerns about 'how' the EU should be procedurally legitimated in order to ascertain its democratic legitimacy but not with 'what' makes its governance substantively desirable. In the final section, we propose to interpret some empirical cases and proposals taken to bear on the alleged democratic

deficit, showing how the distinction between legitimate and desirable EU action may be useful as a heuristic device.

LEGITIMACY AND DESIRABILITY: THE DISTINCTION APPLIED

How can challenges about EU legitimation be illuminated from the perspective so far developed? In this section, we examine two cases: a) proposals to strengthen democratic control through a new procedure to elect the EC's President and b) proposals to intensify democratic participation through 'network governance'.

These two cases are intended to function as vignettes - space restrictions limit a fuller application here. Further, this paper deliberately refers to the legitimacy and desirability of EU action in general terms. The pertinence of this distinction is not restricted, in our view, to specific areas of EU action or particular EU institutions. For instance, it seems tempting to focus on the EP for 'input' legitimacy and on the EC for desirable 'output'. In our view, however for every instance of governmental activity and for every institution or actor involved, we ought to pose the twofold question: first, is this (set of) institution(s) formally authorized and legitimated to undertake this action? Second, is this action substantively desirable? To illustrate, let us first consider the election of the EC's president.

(a)

The vein of democratic deficit literature that attempts to increase the level of democratic *control* by the electorate is pertinent given our objections to output-oriented approaches to EU legitimacy. Its proponents argue that the outcomes of EU political processes tend to poorly reflect the interests and preferences of EU citizens. Generally, the argument runs on a premise regarding the (lack of) transparency of European Union decision-making (Héritier, 2003; Risse and Kleine, 2007; Schmidt, 2013, pp.4-7). To address this, many commentators suggest increasing the politicization of EU politics, for instance through strengthening European Parliament competencies, though some suggest alternative avenues of constitutional reform (Mény, 2003). Such proposals *are* geared to the processes of democracy, not its outcome, and therefore seem to be insulated from our critique.

Arguably though, democratic processes that are considered problematic insofar as they poorly reflect the interests or preferences of EU citizens cannot straightforwardly be charged with democratic illegitimacy. The outcome of a political process is legitimate if it meets existing procedural standards of legitimacy. It is democratic if the underlying source of legitimation is the participation of citizens who each have an equal stake in the procedure. Procedures that meet both these criteria are thus democratically legitimate, according to the existing standards of democratic legitimacy.

We could take the election of the European Union president as a representative example to illustrate this point. Barosso, Juncker's predecessor as President of the EC, was elected via the traditional bargaining processes between heads of state and government in the European Council. Juncker, in contrast, was the *Spitzenkandidat* for the European People's Party – the party that went on to win the largest number of seats in the EP elections. Those that were responsible for the

change in procedure could well have argued that the new procedure was more 'direct', even that it increased 'democratic control'. They would not however be able to find fault with the legitimacy of Barosso's appointment – it was done in accordance with the existing (democratic) rules of procedure. Barosso was irrefutably a legitimate EC President, irrespective of whether the new election procedure better translates evolving beliefs about the legitimation of the office of the EC president. If we accept this point, then it becomes a matter of logical consequence that this new election procedure cannot be said to 'fill' an antecedent democratic 'deficit' (though it may be more desirable, just, wise, righteous, etc.).

Changing the process by which future Presidents were to be elected displaced the site (or the character and standards) of democratic legitimacy from indirect democratic legitimation via heads of state and government to indirect legitimation via elected majorities of the EU parliament. It did nothing to suggest a democratic or legitimacy deficit of the procedures it replaced. Once more, we are agnostic as to whether the new procedure for electing an EC President better translates beliefs on the sources of legitimacy than the old procedure. All we are saying is that is anachronistic, and wrong, to apply the standards for the legitimacy of Juncker's appointment to the question of whether Barroso was appointed legitimately. More generally, changes to the site (or character and standards) of legitimacy do not necessarily indicate, much less demonstrate the existence of a legitimacy deficit, democratic or otherwise.

(b)

Concern with citizen participation constituted the second strand of democratic deficit. Some proposals putatively addressing the inadequate level of citizen participation in EU governance can sometimes be assessed in similar ways to proposals addressing the lack of democratic control. Rather than changing the site of legitimation, some of these proposals change certain characteristics of democratic processes, for instance publicizing them (as EuroparlTV publicizes the debates of the EP) or increasing the scope for deliberation. As above, changing such features may enhance the EU's democratic credentials, but they do not in themselves substantiate the charge of a prior democratic deficit.

The main problem with attempting to include 'affected' parties into the design and implementation of EU policies is that it is already a political decision who is and who is not affected by any particular policy proposal; this decision ought therefore itself be subject to democratic legitimation (Goodin, 2007). Any top-down attempt to impose a particular view over which parties or individuals are and which are not affected by a decision is therefore a depart from the democratic principle that all views are to be given an equal stake. This is particularly problematic where such a decision over who is affected impacts the subsequent decision-procedure over what final form the policy is to take. A further concern is that participative strategies of governance may lack in democratic accountability (Papadopoulos, 2010; Hazenberg, 2015). Where such aspects are already features of EU governance – described in the literature under the title 'network' 'new' and 'multi-level' governance – this is potentially a source of democratic *illegitimacy* rather than a source of legitimacy (Smismans, 2008).

Adding layers and actors to decision-making beyond the existing formal (and formally regulated) democratic procedures can compromise the competences of those *with* a democratic mandate (heads of state and government in the European Council, MEPs, ministers of the national

governments, etc.). Scharpf (1999) suggests that such pluralist policy networks, insofar as they may decrease the gap between EU legislative output and desirable output, constitute one aspect of EU democratic legitimacy, a position our argument rejects explicitly.

CONCLUSION

The main contention of this article has been threefold. First, predominant discourses on EU legitimation hold that better output performance reinforces the EU's claim to legitimacy, but equivocate whether this strengthens the specifically democratic quality of its legitimacy. These accounts can be confused as to whether stronger output reduces or avoids the problem of a democratic deficit.

Second, via our reading of Oakeshott, the article stresses the importance of observing the distinction between the legitimacy and the desirability of governance, pointing to the frequent failure of systems theory and democratic deficit analyses to observe this distinction. The legitimacy of governance neither transcends nor depends on the desirability of its output performance. Because of the peculiar interplay or dialectic between democratic legitimacy and desirability, it is unhelpful to collapse the distinction between them.

Finally, with the help of this distinction it is possible to scrutinize many specific proposals that purport to address the democratic deficit, which often displace rather than reduce the deficit. In the current context of multiple crises, a sobering conclusion therefore imposes itself: even if the EU became an admirable crisis-manager and would perform beyond all expectations, the democratic credentials of its claims to legitimacy would remain unaffected.

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ENDNOTES

[1] These two strands are by no means exhaustive, but introduce concerns important to the application of the interpretative heuristic device this paper proposes in section four. The most important omission concerns the putative lack of a common democratic culture in the EU. (See e.g. Dekker, 2002; Chevenal and Schimmelfennig, 2013; Nicolaïdis, 2013)

[2] As such, Scharpf's input/output distinction seems to mirror Dahl's earlier concerns over citizen participation versus systems effectiveness (1994).

[3] The reconstruction of Oakeshott we offer is neither exhaustive of his position nor exegetically pure. It is self-consciously instrumental and highlights only those aspects of his theory we find useful for the task at hand.

[4] Weiler makes this point very clear: 'If I am a lifelong adherent of the Labour party in the UK, I might be appalled by the election of the Tories and abhor every single measure adopted by the government of the Tory prime minister. But it would never enter my mind to consider such measures as 'illegitimate'. In fact, [...] the deeper the legitimacy resources of a regime, the better able it is to adopt *unpopular* measures critical in the time of crisis where exactly such measures may be necessary.' Weiler (2012, p.827).

[5] As Hobbes makes clear: 'The obligation of subjects to the sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them.' (1651, Ch. XXI).

[6] For instance, in the US majority rule is well-entrenched and there are various (even if imperfect) ways to hold governing agencies accountable, but its performance in public goods provision is considered to be relatively weak. Alternatively, the constitution of Singapore's government, say, relies on some electoral procedures but these do not have strong democratic credentials. However, its performance on the provision of certain public goods is often considered to be of a comparatively higher quality than that of the US.

[7] This example assumes that the three variables are weighted equally, but similar examples could take account of a variable weighting.

[8] Some justifications of democracy run on it being a necessary procedure to *define* the political 'good', but even here the lack of adequate resources to subsequently realize the desirable good can result in a low 'output' evaluation.

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