An Indirect Legitimacy Argument for a Directly Elected European Parliament.

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Abstract

Can a directly elected European Parliament help deliver standards by which the EU can be indirectly legitimated through its component national democracies? This paper argues that the Union can be indirectly legitimate where it helps member state democracies meet their own obligations to their own publics. The Union can do just that by managing externalities in ways needed to secure core values of justice, democracy and freedom from arbitrary domination within member states. Yet that poses a predicament. For if any one member state has an interest in imposing negative externalities or in free-riding on positive externalities provided by another, then so may its voters and democratic institutions. The paper argues a directly elected EP can help manage that predicament both by identifying externalities and by ensuring their regulation meets standards of public control, political equality and justification that are owed to individual national democracies.

1. Introduction

It has been argued that a directly elected European Parliament (EP) is redundant to the democratic legitimacy of the European Union, since the EU is a composite of national democracies that has no *demos* of its own (Majone 2005). This paper argues, to the contrary and perhaps counter-intuitively, a directly elected EP can help deliver standards of indirect legitimacy by which the Union can be legitimate through its component national democracies.

To appreciate the originality and importance of that argument, consider some disagreements about the EP's contribution to the legitimacy of the Union. Jürgen Habermas (2012) has argued that it is of equal moral importance that individuals should be able to influence EU decisions as citizens of the Union and as citizens of member state democracies. Hence, in his view, power-sharing between a directly elected EP and representatives of national democracies in the Council is desirable. For sure, the EU has yet to fill out that institutional design with a democratic politics that allows citizens to deliberate, form and communicate opinions on EU matters. As he puts it, 'the EP is supposed to establish a bridge between the political battles of opinions in national arenas and the momentous decisions taken in Brussels. But there is hardly any traffic on this bridge' (Habermas, 2015: 3). Yet, creating and empowering a directly elected EP is, in Habermas's view, something the EU has got right. It means the Union is not 'so far... from transnational democracy' (2012: ix) in its institutional form, though, admittedly, not yet in its politics.

ther contributions are, however, more sceptical. According to one critique, the EP is a Potemkin parliament which provides a false façade of parliamentary legitimacy, without, in reality, giving citizens much extra control over the authoring, amendment and administration of EU laws through representatives they themselves elect. The EP can only co-decide legislation, budgets and political leaderships within fairly tight constraints of what is acceptable to the Commission and Council (Bartolini 2005). The EP continues to be elected in low turn-out contests which offer voters limited choice over EU policy. Preoccupied with building grand cross-party coalitions amongst themselves and grand cross-institutional coalitions with the Commission and Council, sheltered from much linkage between their chances of re-election and their own record in the last parliament or their own promises for the next parliament, yet anxious to please national parties who control their careers, Members of the European Parliament form just the kind of supranational parliament that might be expected of a Europe of cartel parties (Katz & Mair 1995). They control and limit political competition, instead of employing it to ensure responsiveness and responsibility to voters.

Whether, though, they are paeans or laments, most evaluations assume that the test of an elected EP is whether it contributes direct legitimacy. Here I assume any direct legitimacy needs to be conferred on Union decisions by citizens themselves. In contrast, indirect legitimacy can be derived (Beetham & Lord 1998: 11), mediated, or even borrowed (Lindseth 2010) from the Union's participating democracies. Since an elected European Parliament allows citizens a direct choice of their own over one of the institutions that exercises important powers of the Union, it might seem obvious enough that the EP is best placed to deliver an element of direct legitimacy. Likewise, it might seem that any indirect legitimacy is best secured by national governments and national parliaments. Indeed, the Treaties themselves endorse that division of labour. As Article 10 of the Treaty on European Union

puts it, ‘Citizens are directly represented at the Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or government, themselves democratically accountable either to their national parliaments, or to their citizens’.

Yet, I argue, a directly elected EP can also contribute to the indirect legitimation of the EU *via* its component national democracies. To do that, I develop an original normative understanding of indirect legitimacy. Section 2 distinguishes direct and indirect legitimacy more fully. Section 3 argues that the Union should be understood as indirectly legitimate where it helps its Member State democracies meet their own obligations to their own publics. Yet Member State democracies are likely to face an ‘indirect legitimacy predicament’ where it is hard for them to satisfy both output and input requirements needed to meet their own obligations to their own publics. Section 4 identifies where a directly elected EP can help manage the ‘indirect legitimacy predicament’.

2. Direct and Indirect Legitimacy

If legitimacy is direct where it is conferred by citizens themselves, how exactly might citizens confer legitimacy on Union decisions by electing its Parliament? Amongst leading EP scholars, Simon Hix and others (2007: 50) defend the view that Union decisions need to depend on a competition for the people’s vote if they are to be democratic. So, presumably, a popularly elected EP can contribute direct legitimacy in so far as: a) citizens actually vote in European elections; b) citizens are offered choices in European elections that allow them to exercise public control over Union decisions; c) the EP has powers over Union decisions and

d) the EP is internally organized for the coherent representation of voters in the exercise of Union powers.

Of course, what would count as adequate satisfaction of each of these conditions requires more specification than is possible here. Yet, even roughly sketched, they are enough to identify both the originality and difficulties of attempting to legitimate Union decisions *via* the direct election of its Parliament. Member States have not just allowed citizens to elect their own European Parliament. They have also shared important powers over Union decisions with that Parliament. The EP now co-decides a) legislation, b) budgets and c) the designation of the political leadership of the European Commission. For sure, not all power is shared. Scholars rightly distinguish the ‘Community Method’ where the Union uses its own powers to make its own laws from the ‘Union method’ where it mainly co-ordinates national competence (Bickerton et al 2015). Yet that distinction demonstrates the consistency, more than the equivocation, with which Member States have shared powers with the EP. Where the Union uses its *own* competence to make precisely those decisions that need legitimacy – notably laws that might need to be coercively enforced and budgets that redistribute resources – Member States have usually empowered the EP.

Still, a directly elected EP has turned out to be more ‘superstructure’ than ‘sub-structure’. It has powers. It has cohesive party groups. Yet, it is less clear that it has voters who vote in ways relevant to the exercise of the EP’s own powers (Reif & Schmitt 1980). Moreover, the more the EP is empowered, the less obvious it is that the problem of its electoral link is one of institutional design, rather than political community. Without shared communication and civic engagement, even a powerful EP may struggle to motivate voter participation, public

debate and a competition for the people's vote on how it should use its powers. Hence, Giandomenico Majone's (2005) claim that a directly elected EP without a *demos* is the prime example of a 'category mistake' by which the EU has been misclassified as the kind of polity that is capable of developing its own democratic politics and institutions. A directly elected EP cannot, in Majone's view, represent 'a non-existent European people' (*ibid* 25).

Parliamentary politics presuppose that majorities of representatives elected by majorities of voters have the legitimacy to contribute to collectively binding decisions. However, a majority can only be legitimate as a source of decisions if the people of which it is a majority is also legitimate as a collectively binding agent (Näsström 2011).

Recent scholarship has responded by asking how the Union might be legitimated by its component *demoi*, rather than a single *demos*. Peter Lindseth (2010) uses a 'legal-historical' analysis to argue that the Union continues to 'depend' on national sources of legitimacy (*ibid* 14). Yet, Lindseth continues, a series of mechanisms allow the Union to 'borrow' the legitimacy of its Member State democracies. Those mechanisms include 'collective oversight of the supranational process by national executives, judicial review by national courts... and increased recourse to national parliamentary scrutiny' (*ibid*; 12).

Demoicracy likewise asks how the Union might be legitimated as a *demos* of *demoi*? Assume the following. First, national and even sub-national democracies continue to be valued forms of political community. Second, other ingredients of democracy – public spheres and key democratic infrastructures – are also only available at the national level. Yet, third, national democracies need to co-operate to solve shared problems. And, fourth, both individuals and whole democratic peoples need to be units of value and holders of rights in any co-operation

between democracies. Given those assumptions, Francis Cheneval and Frank Schimmelfennig (2013: 341) ask what would be a fair scheme of co-operation between the democratic peoples of the EU? How, Kalypso Nicolaïdis asks, would they legitimately ‘govern themselves together but not as one’ (2013: 351)?

The foregoing innovations are original and ambitious. However, I want to go further by defending and developing a ‘second-generation’ understanding of indirect legitimacy. I argue that it is the obligations national democracies owe their own publics - and not just the consent of national democracies to EU policies and institutions - that confer indirect legitimacy. I explain and justify that distinction. I then argue that the Union should be understood as indirectly legitimate where it helps national democracies meet their own obligations to their own publics to secure rights, as well as core political values of democracy, justice, and freedom from arbitrary domination. I then show how interdependent democracies are, nonetheless, likely to struggle to meet all their obligations to their own publics simultaneously. I finally use that predicament to propose a standard of indirect legitimacy which can be applied even to a hard case such as a directly elected European Parliament where we might least expect a contribution to indirectly legitimacy. All the foregoing, I conclude, can help us think more creatively about democratic deficits, questions of institutional design and possible ways of distributing parliamentary powers between the national and European levels.

3: An Indirect Legitimacy Predicament

The structure of my argument is as follows:

- 1) The EU is best understood as indirectly legitimate where it helps its national democracies meet their own obligations to their own publics;
- 2) The EU can help its component democracies meet their own obligations to their own publics by managing externalities between those democracies;
- 3) Managing externalities *between* democracies can, however, be difficult to combine with more procedural obligations to *individual* democracies. The one seems to presuppose some control *over* national democracies. The other control *by* national democracies. There would seem, then, to be an indirect legitimacy predicament.
- 4) A directly elected European Parliament can contribute indirect legitimacy by improving on alternative solutions to the indirect legitimacy predicament.

Argument 1: The EU is best understood as indirectly legitimate where it helps its national democracies meet their own obligations to their own publics. Why rethink indirect legitimacy so that it follows from the obligations, and not just the consent, of national democracies? Consent may be neither necessary nor sufficient for legitimacy. Even powers to which actors have consented can be unjustly used (Beetham 2013). Conversely, it may be wrong to withhold consent from forms of authority needed to meet obligations (Estlund 2008). Hence, a more satisfactory understanding sees power as legitimate where it helps actors meet their own moral and political obligations (Buchanan 2002). If, ‘legitimacy entails

the moral justifiability of power relations' (Beetham 2013:5) any demonstration that particular power relations can help the governed meet their own moral or political obligations would be a persuasive argument for their 'moral justifiability'. If polities are legitimate where they 'find addresses' who 'bind' themselves of their own 'free will' (Habermas 1996: 67), polities are most likely to do just that where those over whom they exercise power can accept them as the kind of institutions they need to deliver their own moral and political obligations.

What, though, of indirect legitimacy? At its broadest, it simply means that the legitimacy of one body can be derived from that of another (Beetham & Lord 1998: 11). Hence, the EU is normally held to be indirectly legitimate where its legitimacy can be derived from that of its member state democracies (Majone 2005: 27). Yet, if, power is ideally legitimate where it helps those over whom it is exercised meet their own obligations, the legitimacy of the Union is presumably best understood as derived from that of its national democracies where any obligations it helps meet are those of national democracies themselves.

Argument 2: The EU can help its component democracies meet their own obligations to their own publics by managing externalities between those democracies. Now there is one kind of policy outcome at the European level that is structurally well suited to helping national democracies meet their own obligations: namely, those policy outcomes that can help manage externalities *between* member state democracies in ways needed to meet obligations *within* member state democracies. The problem of externalities is familiar. Externalities are uncompensated harms or benefits that are not reflected in rewards to those who produce them (Laffont 2008). Externalities are negative where actors do not pay the full

cost of harms they impose on others. They are positive where actors do not receive the full benefits of their own actions. Negative externalities will be over-produced. Public goods – which function as ‘very strong’ positive ‘externalities’ (Begg *et al* 1984: 352) – will be under-produced.

Managing externalities has long been understood as a core justification for political authority. David Hume (1978 [1739]: 538-9) famously remarked that ‘political society easily remedies’ the ‘difficulty’ that individuals will seek to ‘free’ themselves of the ‘trouble and expense’ of providing some goods by laying ‘the whole burden on others’. Thus, political authority can solve the free-rider problem that otherwise constrains the elimination of negative externalities and the provision of positive externalities. The result is that ‘bridges are built, ramparts raised, canals formed, fleets equipped and armies disciplined everywhere under the care of government’.

Still, useful though building bridges may be, the instrumental benefits from managing externalities hardly create moral obligations to particular forms of political power. For that, managing externalities must be a condition for the delivery of basic rights and values owed to others (Buchanan 2002). So, is managing externalities a condition for securing rights and core political values? Surely, yes. Taking democracy itself to be a core political value, democracy may fail to ‘empower... free and equal citizens to form and change the terms of their common life together (Bohman 2007: 2)’, where democratic institutions are unable to manage externalities in matters as fundamental to ‘living together with others’ as providing security, a functioning system of economic exchange or a sustainable eco-system.

Justice and injustice are likewise externalities. Take Rawls's argument that justice is a matter of how 'political and social' institutions, laws, norms and practices all 'hang together as one' more or less 'fair system of co-operation' (2003: 8-10). So difficult is it to exclude any one individual from the external costs and benefits of the overall political, legal, social and economic systems under which they live that, Rawls continues, those 'basic structures' must be sufficiently just for individuals to live 'entire lives' under them. Finally, if freedom is the absence of arbitrary domination, it will be incomplete without freedom from polluters, monopolists, or free riders; or, in short, freedom from externalities (Pettit 1997). Indeed, those examples show that managing externalities and securing rights are not alternative sources of legitimacy. Rather democracies need to manage externalities if they are to secure rights.

However, politics, democracy, institutions and law are often misaligned with the externalities they are supposed to manage. Interdependence increases the ability of democracies to impose negative externalities, such as pollution, on other democracies and decreases their ability to provide their own citizens with the positive externalities of public goods. Thus, interdependent democracies may need to manage externalities between themselves if they are to meet obligations to their own publics to secure rights, justice, freedom from arbitrary domination and democracy itself (Lord 2015).

Argument 3. Managing externalities between democracies can be difficult to combine with procedural obligations to individual democracies. Even if co-operation is needed to manage externalities between democracies, that would, however, only allow interdependent democracies to meet some, but not all, of their obligations to their own publics. Even benign

technocracies can manage externalities. Yet, unlike technocracies, democracies also owe their publics procedural obligations of public control *with* political equality *and* individual rights to justifications for decisions. Why those obligations? Briefly summarised, it does not matter whether democracy is intrinsically justified as a means of allowing citizens to author their own laws or consequentially justified as way of avoiding arbitrariness. Either way, publics will need to be able to control the authoring, amendment and administration of those laws as equals (Weale 1999: 14; Bohman 2007: 2). Were, indeed, the right to public control to be distributed unequally – maybe because some people have more votes than others – then there would not be a straightforward rule of the people. Rather there would be an element of rule of some of the people over others of the people (Estlund 2008: 37). However, even public control with political equality is insufficient. For even majorities elected by citizens who exercise public control with equal votes will need to justify decisions if the latter are not to be arbitrary acts of will (Forst 2007).

So, briefly summarised, my argument so far implies that a body such as the Union can be indirectly legitimate where it satisfies two conditions:

The output condition for indirect legitimacy: Union laws can be indirectly legitimate where their outcomes help national democracies meet their own obligations to their own publics to secure core political values, such as justice, democracy and freedom from arbitrary domination.

The input condition for indirect legitimacy. Union laws can be indirectly legitimate where they allow national democracies to meet their procedural obligations to their own publics to ensure standards of public control, political equality and justification

However, it is not hard to see how these output and input conditions for indirect legitimacy may conflict. As seen, Union policy outcomes can help member states meet their own obligations to their own publics by managing externalities between member states in ways that help secure values of democracy, justice and freedom from arbitrary domination within states. On the other hand, the most obvious inputs and procedures which would secure indirect legitimacy by ensuring Union policies and laws are still covered by standards of public control, political equality and justification that national democracies owe their own publics are presumably those that would reserve significant powers to national electorates and national parliaments. Yet, if any one member state has an interest in ‘externalising’ harms to others or in free-riding on external benefits supplied by others, its own voters and parliaments will have a similar interest. The most obvious ways of securing input and output conditions for indirect legitimacy seem to conflict. The one seems to presuppose control *by* national democracies. The other seems to presuppose at least enough control *over* national democracies to manage externalities. Call this the indirect legitimacy predicament.

Argument 4: A directly elected European Parliament can contribute indirect legitimacy by improving on alternative solutions to the indirect legitimacy predicament. Two things are important to note about the indirect legitimacy predicament. First, it may be a general problem of contemporary democracy. If, voters are purely self-regarding, electoral

competition within any one democracy may only be in ‘equilibrium’ (where those competing for power have done everything possible to win votes) at precisely the point that maximises negative externalities and free riding between democracies (Grant & Keohane 2005).

Second, it seems unlikely that the indirect legitimacy predicament can be solved by giving priority to either its output or input components, as I defined them above. Both components derive from obligations national democracies owe their own publics. Moreover, input and output justifications for democracy itself are, arguably, irreducible to one another (Christiano 2004). No attempt to justify democracy by its consequences for other values can be persuasive where there is not already a democratic procedure that can specify which outcomes can justify democracy and how. Conversely, ‘purely procedural’ conceptions of democracy can presumably only be ‘purely procedural’ where they assume other important rights and values are already presupposed by democratic procedure itself (Habermas 1996).

If, however, it consists of conditions that are jointly necessary for indirect legitimacy, the indirect legitimacy predicament cannot be ignored as a standard for indirect legitimacy. Combining the input and output conditions set out on page 12, any one institutional arrangement can help manage the indirect legitimacy predicament in so far as it helps a) manage externalities *between* interdependent democracies in ways that are consistent with obligations of b) public control c) political equality and d) justification owed to *each* of those democracies. How might that standard be used to complete my argument that a directly elected European Parliament can help manage the indirect legitimacy predicament? The next section considers where a directly elected EP can contribute to each of a)-d) in turn.

4: The European Parliament and the Indirect Legitimacy Predicament

a): *Externalities*. Politics and law are needed to manage externalities. But the literature disagrees on what kind of politics and law. A politically centralized approach would prohibit some negative externalities outright, directly provide some positive externalities, and use taxes and subsidies to realign private with social costs (Pigou 1920). A politically decentralized approach merely assigns property rights, otherwise leaving it to the affected parties to bargain solutions to externalities between themselves (Coase 1960). A ‘multilevel and polycentric’ approach shows how some externalities may require solutions that stretch the whole way from the local to the global: from face-to-face communication in small communities or networks to international rule-making. Elinor Ostrom (1998) showed through exhaustive case studies and experiments how both public policy solutions and assignments of private property rights can work badly without norms that are i) specific to each externality and ii) continuously up-dated to local, real-time changes in information. Above all, those norms work better between actors who can themselves participate in defining, deliberating, monitoring and building trust in their reciprocal commitments. Yet, norms developed in smaller scale participatory relationships can be overwhelmed by single large-scale externalities. Nor can local solutions deal with diffuse externalities with millions of culprits or victims. Hence, to paraphrase Ostrom (2012), the challenge is to ‘scale-up’ so that the benefits of managing externalities in smaller units are also available to larger systems of representation and legislation.

The only aspect of ‘scaling up’ that interests us here is any contribution a directly elected EP can make to representing national democracies in the shared management of externalities at

the European level. But can a directly elected EP represent national publics at all? As seen, even after 8 European elections and many empowerments of the EP, European elections still struggle to provide much competition for the people's vote over how the EP's powers should be used, or much opportunity to sanction the actual use of those powers. Yet competition and sanction are not the only bases for representation. As Jane Mansbridge (2009) argues, representatives can also be selected in ways that make it likely they will already be internally motivated to represent voters in predictable ways. Now, there is one way in which MEPs are chosen that makes it likely that they will 'already have policy goals much like the constituents' (*ibid.*: 369-70). The very fact that national parties continue to structure voter choice in European elections enables voters to choose MEPs on the basis of the known views of national parties. Thus, studies have identified a high correlation between the views of candidates in European elections and those who vote for them (Schmitt & Thomassen, 2000; Lefkofridi & Katsanidou 2014). Even with limited competition, debate, knowledge or attention to EU matters, citizens' own choices between the normal range of national parties do something to provide them with representatives who are likely to use the EP's powers to make broadly similar left-right choices as they would themselves.

For sure, as I discuss elsewhere (Lord 2014), the foregoing is an imperfect form of representation. Yet, it is hard to argue that it has *no* value. It up-loads to the European level (Eriksen & Fossum 2011) a left-right form of representation that is common to most Member States; and, when, voters' left-right opinions change, their left-right choices between the national parties which contest European elections will, to re-iterate, change the left-right composition of the EP. Furthermore, precisely because the EP is elected in member states, and in contests in which national parties structure voter choice, the composition of each five-year Parliament is very much one of national party delegations. The European party groups

depend on 200 or so national party delegations for their own cohesion and attempt to decide voting instructions by a consensus of them (Ringe 2010). In the case of conflicts between national party delegations and European party groups, MEPs are four times more likely to vote with their national parties (Hix *et al* 2007: 193). Moreover, Gail McElroy and Kenneth Benoit (2012: 162) have found that, in choosing European party groups, national parties are ‘mainly driven by a concern to minimize policy incongruence between the national and transnational levels’. Indeed, Richard Whitaker (2005: 8-9) argues that MEPs ‘take account of the full range of views’ within their national parties, rather than risk ‘intra-party disputes’.

Hence, the EP can pivot between representing a left-right politics that is common to national democracies and concerns more particular to Member States. That is important where laws need to be justified both as laws national democracies can adopt together and as laws sensitive to externalities experienced by each. But why not just rely on deliberations between elected national executives to provide that dual justification? Against that possibility, I first argue for *some* form of parliamentary representation in law-making aimed at managing externalities between democracies, leaving aside for the moment what form that parliamentary representation should take.

Managing diffuse externalities may require public debate, politicisation and representative institutions. As Dewey put it (1927 [1954]: 35), people need to be made aware of themselves as a mutually affected public, and made ‘effective’ by representatives with powers to legislate solutions. That politicisation is also helped where parliaments are composed of political parties with competing understandings of how markets, security policies and ecological

problems create externalities and with what implications for values of fairness, non-domination or democracy (White & Ypi 2011).

Yet, even where preferences are so complete and consistent that they require little further communication or deliberation, actors are likely to manage externalities sub-optimally. It is hard to discover what everyone is prepared to pay to eliminate externalities where anyone has incentives to over-state the costs and under-state the benefits of co-operation (Cornes & Sandler 1986: 114). In the case of inter-democracy management of externalities, that difficulty arises where governments have an incentive to exaggerate risks that proposals to manage externalities will be politically unsustainable in their own democracies (Collignon 2003). But that can, in turn, be countered by including domestic opponents of governments in a parliamentary procedure that requires them to take positions *of their own* on whether they are going to accept, reject or amend laws aimed at managing externalities between their democracies.

If politics and parliamentary representation are useful to discovering solutions to externalities, they are even more important to legitimating any laws aimed at regulating them. The very argument that managing externalities between democracies might be needed for the deeply normative tasks of securing obligations, values and rights within and across those democracies, implies that confining any necessary legislation to executive actors may be a category error. The ‘norming’ of laws – that is, the specification of the exact obligations, values and rights that laws aimed at managing externalities should secure and respect– may require some role for a specifically parliamentary form of representation. Only some form of parliamentary representation can ensure:

a): justifications for laws are tested in public, during

- b): the course of legislation, by
- c): representatives elected on a basis of 'one person, one vote', all
- d): within institutions that have some encompassing control over the making, amendment and subsequent administration of laws (Habermas 1996: 170).

However, a need for parliamentary standards in managing externalities does not prove a need for a directly elected EP. Why not just rely on national parliaments or even a European Assembly of national parliaments as before 1979? To identify where a directly elected EP might improve on those alternatives, I now turn to the challenge of combining the management of externalities with more procedural standards of public control, political equality and justification owed to each national democracy.

b): *Public control.* As seen, a solution to the indirect legitimacy predicament requires both control *over* national democracies and control *by* national democracies: enough control *over* national democracies for those democracies even to have the choice of voluntarily binding themselves to ways of managing externalities they can all accept as needed to deliver their own values of justice, democracy and freedom from arbitrariness: enough control *by* national democracies to meet procedural obligations of political responsibility, political equality and justification to each national public.

Lindseth (2010) offers an elegantly simple solution. Elected national governments can have shared, but not individual, control of Union decisions. Qualified majority voting (QMV) gives vetoes to combinations of governments, working in multiple and variable blocking minorities, not to single governments. Thus, the Union is supervised by the club of elected national governments. Yet, the EU is not so much under the control of any one government

that it is blocked from managing externalities between member states. Control *by* national democracies is combined with control *over* national democracies.

However, collective oversight by national executives is precisely what others see as executive domination of Union decisions to the exclusion of public contestation, debate or parliamentary supervision (Habermas 2012). Without those further elements, collective control of Union decisions by governments does not amount to *public* control. Lindseth, as we will see, seeks the answer in national parliamentary scrutiny. But that, in turn, is open to the objection that it gets power relationships the wrong way around. How can national parliaments supervise what their governments do in EU institutions when, in many member states, governments control their parliaments? Indeed, national executives can, arguably, practise forms of ‘reverse agency’ (Bohman 2007:7). Instead of controlling Union decisions on behalf of national parliaments and publics, national governments can use Union decisions to co-manage and constrain their own national democracies. Hence, Habermas’ complaint that euro-crisis decisions were dominated by a ‘self-authorising European Council...confined to heads of governments’ who – far from being supervised by national parliaments - undertook to ‘organise majorities in their own national parliaments under threat of sanctions’ (2012: viii) for failing to deliver those majorities.

Indeed, governments may only use any shared control to evade, rather than make and enforce, rules aimed at managing externalities. That, arguably, happened in 2003 when the Council effectively suspended the Stability and Growth Pact aimed at limiting fiscal externalities within a shared monetary union. As the European Central Bank’s Chief Economist put it, ‘potential transgressors’ may not be the best people ‘to pass judgement on

actual transgressors' (Issing 2008: 199). The shared interest of national executives in avoiding personal political inconvenience or embarrassment may not correspond to the interest of their publics in managing externalities.

If, however, shared control by national executives cannot reliably share out control enough, how might control of decisions aimed at managing externalities be shared out further? One solution would be to use the Community method. That would give national executives in the Council a collective veto, but not a monopoly, on rules aimed at managing externalities. Agreement or changes to those rules would also require a proposal from the Commission, and risk a veto by the EP.

More, however, than avoid a Council monopoly over decisions on externalities, a directly elected EP can also improve the representation of each national democracy in those decisions. Consider two possible 'shareholdings' national democracies can have in EU institutions: a simple share in the powers of the Council *versus* a more complex 'shareholding' in two institutions – the Council and the EP – which together share decision powers (Fabbrini 2015) over the making, amending or supervision of rules designed to manage externalities. Neither shareholding can allow any one national democracy to control Union decisions on its own, if the aim is, indeed, to manage externalities. Yet the shareholdings can connect to individual national democracies in different ways. Only parties of government get access to the Council of Ministers. In contrast, delegations from national parties of opposition can participate in the powers of a directly elected EP. Indeed, representatives of national parties of opposition are structurally likely to form the larger part of an elected EP – and to be more numerous in the EP than in their own national parliaments – so long as the EP is elected in somewhat second-

order contests that do not coincide with most national electoral cycles (Bardi 1994). That, ironically, is one advantage of second-order elections.

Of course, a European Assembly of delegations from national parliaments would also allow national parties of opposition to participate in EU legislation. However, the representation of each national democracy in any European Assembly would be the same as its representation in its own national parliament. Moreover, the club of governments in the Council would be close at any one time to enjoying a majority in any Assembly appointed from national parliaments. A directly elected EP - with a more pronounced bias towards the over-representation of national parties of opposition – would seem more likely to counter dangers of executive domination by the club of governments in the Council or collusion between those governments to evade, rather than enforce, rules agreed to manage externalities.

c:) *Political equality.* The view that the EP is, in part, also structured for the representation of national democracies finds some support in the German Constitutional Court's ruling on the Lisbon Treaty: 'as seats are allocated to the Member States, the EP remains a representation of the Member States...designed as a representation of peoples' (GFCC: para: 280-4). Indeed, the allocation of EP seats by 'degressive proportionality' gives some weight to both the equal representation of each Member State democracy and the equal representation of individuals (Lord & Pollack 2013).

Yet, in addition to contributing to the equal formal representation of each member state democracy, a directly elected EP can also contribute to the equal representation of different opinions within each of those democracies. Here, it is important to understand that political

equality requires equal inclusion of different opinions and not just formal numerical equality in apportioning representatives (See esp. Dryzek & Niemeyer 2010: 46). Thus, standards of justification and political equality overlap. Only with fair representation of a range of opinions can justifications for those opinions be ‘tested in adverse controversy with one another’ (Mill 1972 [1861]: 239). Yet, fair representation of a range of opinions may be more likely where different institutions represent a public in different ways, given that any one majority of that public is likely only to be a majority at one particular moment, at one level of aggregation, and according to just one method of counting votes (Rosanvallon 2008). Direct election of the EP makes it more likely that opinion within each national democracy will be represented differently in the EP, the Council and its own national parliament.

However, a directly elected EP can also help with a problem of political inequality that is likely to be aggravated by use of the Union to manage externalities between member state democracies. Consider Fritz Scharpf’s argument (2007: 182) that, to operate as a democracy of democracies, the Union needs to use consensus decision-rules that provide each national democracy with some protection from simple majorities of the whole. Now, a need for a democracy of democracies to use consensus decision-rules need not be inconsistent with a need for member state democracies to accept majority decisions if they are to be constrained in how far they can individually block decisions aimed at managing externalities. Consensus decision rules that require less than unanimity but a lot more than simple majorities may be enough to prevent a handful of countries blocking decisions aimed at reducing negative externalities or free riding.

Imagine, though, that, over time, the Union thickens up into an overall system of laws aimed at managing externalities. After all, externalities are pervasive. There may also be increasing returns from managing them. The very institutions, norms, communications and relationships of trust that are generated in managing externalities may themselves create new opportunities where the marginal returns exceed the marginal costs of further initiatives to tackle externalities. However, the more the Union develops a dense system of laws aimed at managing externalities, the more it will need a fair procedure for changing laws and not just for passing them. For, as Scharpf also notes (*cit*), the Union's consensus decision-rules create at the European level – and reinforce at the national level - a political *inequality* between those who prefer to keep any one Union law and those who would rather alter it. Today's majorities can even manipulate that inequality by passing laws at the Union level they know their successors will find hard to change.

That difficulty can be mitigated by ensuring decisions on externalities are not monopolised in the first place by national majorities assembled together in the Council to the exclusion of all alternative points of view in any one national democracy. That brings us back to the advantages of including national parties of opposition in the exercise of the Union's legislative powers. Although delegations from many individual national parties of opposition are only likely to be small in any European Parliament, experience with a directly elected EP suggests they can matter. To illustrate, at the time of writing the 2014-2019 Parliament has held 82 votes on Ordinary Legislative Procedures (See www.votewatch.eu). On average those OLPs were agreed with 592 votes in favour (86.3 per cent), 65 against (9.5 per cent) and 29 abstentions (4.2 per cent). Even assuming that all absentees, abstentions and no-votes come from national parties of opposition, such a figure is only possible if, on average, two-thirds of national parties of opposition participate in legislative majorities of the EP. Moreover, the EP

has a structural reason to seek large majorities that will necessarily have to include many national parties of opposition. Large majorities increase the chances of the EP getting what it wants from the Commission and Council, which themselves, arguably, have an interest in finding compromises acceptable to the greatest number of those national parties of opposition represented in the EP whose compliance may one day be needed as national parties of government responsible for enforcing the legislation under consideration.

d:) Justification. Those who make shared laws aimed at managing externalities between themselves often develop elaborate standards of justification. Christian Joerges and Jürgen Neyer (1997: 294) argue that key features of Union law and institutions require Member States to justify the ‘extra-territorial’ effects of their own behaviours. But, under assumptions of indirect legitimacy, shared disciplines aimed at managing externalities have also to be justified to individual national democracies. Lindseth sees national parliamentary scrutiny as a particularly promising means of reconciling high standards of justification to individual democracies with limits to how far any one of those democracies can overturn frameworks aimed at managing externalities. In Lindseth’s view, national parliamentary scrutiny can reconcile the two precisely because it does not involve control ‘in its fullest sense’ (Lindseth 2010: 21&8). Parliamentary scrutiny does not ‘make and break’ governments on a day-to-day basis. Rather, scrutiny works by exposing inadequate justifications and weakening the credibility of insufficiently justified policies. Union policies aimed at managing externalities can be exposed to national parliamentary scrutiny on the assumption that national parliaments will have few means of challenging those policies other than making credible arguments that those policies are not, indeed, the best means of managing externalities.

However, the difficulties of extending in-depth national parliamentary scrutiny to European Union decisions should not be under-estimated. Keith Krehbiel (1991) has shown that scrutiny depends on how far parliaments can overcome asymmetries of information that favour the executive bodies that are supposed to justify decisions to them. That difficulty is made acute by the Union's administrative and regulatory practices. As Charles Sabel and Jonathan Zeitlin have documented, the Union often depends on an experimental form of decision-making in which 'actors have to learn what problem they are solving, and what solution they are seeking, through the very process of problem solving' (2010: 11). Hence national parliamentary scrutiny may need to be continuously up-dated as EU policies aimed at managing externalities – as well as justifications for those policies – evolve in response to experience with the policies themselves.

A further difficulty is that expertise in scrutinising Union policies is probably also a capability that national parliaments can only accumulate over time (March & Olsen 1996). Here there is an opportunity cost. Time spent monitoring Union decisions is time not spent following domestic decisions. Those opportunity costs may be unattractive to national parliamentarians whose careers are rewarded by contributions to domestic politics (Saalfeld 2005).

If, however, there are 'information costs to national parliaments' (Lindseth 2010: 247) in following EU decisions, scrutiny by a directly elected European Parliament can, in complete contrast, operate as a positive externality from which national parliaments cannot be excluded. A directly elected EP can be focussed full-time on the scrutiny of Union decisions, as well as being specialised in weighing and sifting justifications for EU decisions. Moreover,

national parliaments can be structurally linked to the EP's scrutiny through the high overlap between national party delegations in the EP and national parties in national parliaments (Crum & Fossum 2013). A directly elected EP and national parliaments need not be stand-alone solutions. Rather they can be mutually reinforcing ways of connecting domestic and European arenas.

Conclusion

Against the assumption that no *demos*' means no directly elected European Parliament, I argue a directly elected EP could even help national democracies meet their own obligations to their own *demoi* to secure conditions of democratic self-government. Co-operation to manage externalities between EU democracies may be needed to secure core values of justice, democracy and freedom from arbitrary domination within those democracies. Yet that poses a predicament. For, if any one member state has an interest in imposing negative externalities or in free-riding on positive externalities provided by another, then so may its voters and its national parliament. I have argued a directly elected EP can help manage this predicament both by identifying externalities and by ensuring their shared regulation meets procedural standards of public control, political equality and justification that are owed to individual national democracies. Thus, a directly elected EP can help reconcile acute difficulties in delivering output and input conditions for indirect legitimacy simultaneously. If that is so, a directly elected EP may even be required by a Europe of national *demoi*, not incompatible with it.

Yet exploring where the EP can contribute indirect legitimacy neither excludes a role for the EP in the direct legitimation of the Union nor ignores other ways in which the Union can be legitimated via its member states. It merely challenges a received wisdom (reproduced in Article 10 of the Lisbon Treaty) that legitimation by individuals is – or ought to be – concentrated on the EP and legitimation by national democracies on the Council and European Council. Indeed, a role for a directly elected EP in the indirect legitimation of the Union may work best precisely in combination with other mechanisms that are more commonly understood as connecting the Union to the democratic politics of its member states. Thus exploring where the EP can represent different value positions in national democracies through a selection model of representation, where the EP can contribute to public control and political equality by including national parties of opposition in EU law-making, and where the role of the EP in extracting information and justifications for Union policies can be a public good for national parliaments in their own scrutiny has, I hope, demonstrated how the range of possible solutions to the democratic deficit can be expanded by asking where the EP might contribute indirect, as well as direct, legitimacy.

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