



FACULTY OF LAW
University of Lund

Charlotte Orsmark

Democracy and Legitimacy in the European Union

Will more parliamentary influence increase the democratic legitimacy and
diminish the democratic deficit in the EU?

Master thesis
20 points

Ola Zetterquist

EC law and Jurisprudence

Spring 2004

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Background	5
1.2 Purpose and basic questions	6
1.3 Method and Material	6
1.4 Outline	6
1.5 Delimitations	7
2 THE INSTITUTIONS AND THE NATIONAL PARLIAMENTS	9
2.1 EU institutions	9
2.2 Composition and functioning of the European Parliament	11
2.2.1 <i>Powers and influence - a historic background</i>	11
2.2.2 <i>The Parliament's decision-making role</i>	12
2.2.3 <i>The weaknesses of the European Parliament</i>	15
2.3 The role of the national parliaments	16
2.3.1 <i>Treaty modifications</i>	16
2.3.2 <i>Decisions and legislative measures</i>	17
2.3.3 <i>A future enhanced role of the national parliaments</i>	20
3 DEMOCRATIC DEFICIT IN THE EU	22
3.1 Democratic deficit - definition	22
3.1.1 <i>Democracy</i>	22
3.1.2 <i>Lack of democracy</i>	23
3.1.3 <i>The democratic deficit - the nature of the argument</i>	24
4 LEGITIMACY IN THE EU	28
4.1 Traditional dogmas about the European Union	31
4.1.1 <i>The two models; state-based and citizen-based</i>	31
4.1.1.1 Legitimacy and the state-based model	32
4.1.1.2 The institutions in the state-based model	35
4.1.1.3 The citizen-based model - a federal Union?	37
4.1.1.4 Legitimacy and the citizen-based model	38

4.1.1.5	Power-sharing and guarantee of rights	39
4.1.1.6	The institutions in the citizen-based model	40
4.1.1.7	The Court of Justice - a gradual democratisation of the Union	41
4.1.1.8	The Court of Justice and the European Parliament	42
4.1.1.9	The Court of Justice - safeguarding the rights of the individuals	43
4.1.2	<i>Direct and indirect legitimacy</i>	46
4.1.2.1	Direct legitimacy	46
4.1.2.2	Indirect legitimacy	48
4.2	Is a European demos necessary?	50
4.2.1	<i>Thick demos concept</i>	50
4.2.2	<i>Thin demos concept</i>	52
4.3	A missing “Market square”?	54
4.3.1	<i>Transparency</i>	54
4.3.1.1	Transparency in Treaty Provisions	55
4.3.2	<i>Public support and engagement</i>	56
4.4	Political legitimacy and the European Parliament	58
4.4.1	<i>Parliament and Commission - accountability</i>	60
5	A CONSTITUTION FOR EUROPE	63
5.1	Introduction	63
5.1.1	<i>The role of the European Parliament</i>	63
5.1.2	<i>The role of the national parliaments</i>	64
5.1.3	<i>Other provisions</i>	65
5.1.4	<i>Democracy and legitimacy in the constitution for Europe</i>	66
6	ANALYSIS	67
6.1	Democracy and legitimacy in the EU	67
6.1.1	<i>Citizen-based model</i>	68
6.1.2	<i>State-based model</i>	72
6.1.3	<i>Demos</i>	74
6.1.4	<i>Transparency and public support</i>	75
6.2	A future Europe of the Member States or of the citizens?	77
6.2.1	<i>The double legitimacy in the EU</i>	80
6.3	Concluding remarks	82
	BIBLIOGRAPHY	84
	TABLE OF CASES	89

Summary

This thesis aims to describe and examine the democratic deficit critique and the problems with democratic legitimacy in the EU's supranational system of governance. It specially addresses the role of the European Parliament and the national parliaments in the EU decision-making procedures. As parliaments traditionally, in liberal democracy theories, are considered strongholds and symbols of democratic legitimacy, directly representing the citizens, it is often argued that the way to enhance EU legitimacy and diminish the democratic deficit is through more *parliamentarian* influence.

The question of democratic deficit and democratic legitimacy has become increasingly sensitive as European integration has progressed and the supranational system has gained more importance for governance in the EU. More power have been transferred from the national parliaments to the Community and the use of QMV-voting increased which means that powers formerly subject to satisfactory degree of democratic control at the national level cease to be subject to the same degree of control once so transferred. At supranational level, there is no such representation of people as in the nation state and national democracies and the only way for the people to influence directly the decision-making procedures in the EU is through the European Parliament. Therefore, the phrase democratic deficit is often used to support arguments for increasing the powers of the European Parliament that still has limited power and influence.

To define and assess the democratic legitimacy and democratic deficit in the EU we need to answer the question of the constitutional structure of the EU and the purpose and goals of the integration process. For this thesis, I have therefore decided to use the two dominated perspectives in the debate of today and the future of how to view the EU. One perspective sees the EU as a grouping of sovereign states for the purpose of international co-operation (state-based model). The other perspective believes that the EU is a new state-like political society that unifies the citizens of Europe in a new political and legal community where the question of sovereignty of the member states must be reassessed (citizen-based model). These views can moreover be seen to be in accordance with the two traditional systems of governance, confederations and federations. Depending on how we view the EU according to these models, different forms of governance and ideals for legitimacy and democracy will be required.

According to the state-based model, it is through the Member States, which are all democratic states and enjoy political legitimacy, that the democratic legitimacy of the Union is based. Therefore, it is important that the sovereignty of the States remains and that the co-operation is merely on an intergovernmental level where the veto rights of the Member States remains important. The institutions that best represent the Member States are the national parliaments, which are the most important players in the EU.

However, in the EU today, the national governments as represented in the Council are the main channels of communication between the EU and the Member States. The authority of the national governments and their Ministers in the Council is based on the *indirect legitimacy* that these Ministers are accountable to their respective parliaments. The intergovernmental institutions such as the Council and the European Council shall therefore remain powerful in the Community. The way to enhance the democratic legitimacy in the EU further is by giving the national parliaments enhanced possibilities to influence EU decision-making.

The citizen-based theory wants democracy at European level and will never be satisfied with an institutional system that is based on *indirect legitimacy*. Instead, there must be direct channels in order to satisfy the principle of trust. This means that the EU must satisfy the same demands and the same institutional arrangements for *direct legitimacy* as the state, which would bring the EU closer to its citizens. As the European Parliament is the only institution directly authorised by the European electorate, an increase in the EP's powers will help to eliminate the democratic deficit and strengthen the democratic legitimacy. The amendments in Treaty provisions over the years have increased the EP's legislative and supervisory powers and have demonstrated that the European political system is evolving towards a *parliamentary model* in the EU's supranational governance. Nevertheless, as this theory wants to see an EP with the same powers as parliaments in the Member States, the EP should be vested with the sole power to enact EU legislation and maybe with the right of legislative initiative.

Looking at structure of the EU today, the Union is neither a traditional international organisation, nor a traditional state-hood but rather a unique structure, with its supranational entity in itself and an international co-operation of states. This means that the EU must be considered as a unique construction, which makes its democratic legitimacy double, based on the Member States, as represented in the Council and the citizens, as represented in the EP. A solution to this double legitimacy would be to recognise different levels of governance within the EU and deal with those aspects of governance separately. In those cases of intergovernmental Community governance, it would be suitable to use the state-based theory's ideals of democracy and legitimacy and make sure of a strong role of the national parliaments, ensuring that they can hold their Minister accountable in the decision-making procedures. The supranational aspects of the EU could base its legitimacy and find its democracy ideals in the citizen-based theory, which leads to a demand for a strong role of the EP in those supranational decision-making procedures where majority voting is used. These ideas seem further to be in accordance with the recently signed "Treaty establishing a Constitution for Europe".

Preface

The European Union is indeed a fascinating and dynamic project that has always been great subject of interest to me. The topics for this thesis will likely be debated and continue to play an important part in the future discussions as the European integration is progressing. With many important constitutional challenges ahead, I will follow those discussions with great excitement.

I would like to thank my supervisor Ola Zetterquist for his support and guidance throughout the work of this thesis.

I would also express my great appreciation to my family and in particular my parents Jörgen and Barbro for their invaluable encouragement during my years at Law school.

Charlotte Orsmark
Lund, November 2004

Abbreviations

BVerfG	Bundesverfassungsgericht
CML Rev.	Common Market Law Review
CMLR	Common Market Law Reports
COREPER	Committee of Permanent Representatives
EC	European Community
EC	Treaty Treaty Establishing the European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EIoP	European Integration Online Paper
EJPR	European Journal of Political Research
EL Rev.	European Law Review
EP	European Parliament
EU	European Union
IGC	Intergovernmental Conference
MLR	Modern Law Review
NP	National Parliament
SEA	Single European Act
TEU	Treaty on the European Union
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TOA	Treaty of Amsterdam

1 Introduction

1.1 Background

Democratic deficit allegations originated in discussions of the European Parliament's draft Treaty for the European Union in the early 1980's and the debates leading up to the Single European Act, whose main objectives included to rectify the democratic deficit in the Community's decision-making process. The term was discussed again during the Maastricht referenda in Denmark and France, and was made a fundamental objection by Germany's constitutional court in its Maastricht judgement.

As a result the reforms through the Maastricht, Amsterdam and the Nice Treaties, all progressively expanded the European Parliament's power and developed the principle of democratic legitimacy within the institutional system, by reinforcing the powers of European Parliament with regard to the appointment and control of the Commission and successively extending the scope of the *co-decision* procedure. However, despite that the changes in the legislative process enhanced the power of the only elected European institution, the problems of the EU's democratic legitimacy were not resolved.

In the Convention, commenced in December 2000 during the Laeken European Council, democracy and legitimacy issues in the Union were again important subjects of conversation. The Laeken declaration, in which more or less the agenda was set up for the convention debates, formulated a diversity of questions that concerned the democratic legitimacy of the Union and the need to enhance EU legitimacy through more *parliamentary* influence from both national and European level. In order to "strengthen the democratic legitimacy of the Union and bring it closer to its citizens" the parliaments must be given a distinct role to play within the EU. However, not through competition between the national parliaments and the EP, instead each had an distinct role to play but shared the common objectives of increasing legitimacy and bringing the EU closer to its citizens.

The work of the Convention led to the Constitution where it now explicitly says in Article I-45, that the European citizens are represented through the European Parliament and the through the national governments with representatives in the European Council and the Council which are accountable to national parliaments. This means that democracy at EU level is based on both *indirect* and *direct* democracy and legitimacy as complementary to each other within the EU system.

1.2 Purpose and basic questions

The purpose of this thesis is to give an overall description and insight of the various problems about the democratic deficit critique and the democratic legitimacy in the European Union. The thesis specially focuses on the functioning and role of the European Parliament and the national parliaments within the EU's supranational structure. The questions I will try to answer is whether more *parliamentarian* influence, either from the national parliaments, the European Parliament, or from both, is likely to diminish the democratic deficit and enhance the democratic legitimacy in the Union and why.

As the question and concerns about democracy and legitimacy in the Union are closely linked to those concerning the ultimate goals of the integration process I will further present the most important perspectives of how to view the constitutional structure of the EU. Those perspectives and their ideal form of legitimacy and democracy will then be analysed in light of the EU today and the future EU to see whether parliamentarian influence is the legitimacy solution and the right way of bridging the democratic deficit gap according to these views.

The discussion of democratic deficit and democratic legitimacy also contains a social aspect of the legitimacy problem and I will therefore further try to describe the main problems with the lack of *social legitimacy*. As the Union clearly lacks public support among its citizens and a good ground for a so-called Market Square, where there is room for political discussions and different political currents to flow, possible solutions to those problems will also be given.

1.3 Method and Material

This essay is written and presented in both a descriptive and an analytical way. Legal doctrine represents the major part of the material for this essay and I have used books, legal and political periodicals and academic dissertations. Case law has to some extent been used as material. I have also used articles and internet sources for comments of the latest developments on the subject. As the material on the European integration and questions concerning democracy and legitimacy in the Union is massive, I have been selective in the process of collecting information.

1.4 Outline

This thesis is divided into five main parts. The second chapter describes the functions and powers of the institutions in the EU and the national parliaments. It especially scrutinises the legislative role of the European Parliament through a historical and empirical assessment and describes the weaknesses of the European Parliament that remain. In addition, a description of the role of the national parliaments is given, which

emphasises the proposals recommended by the Working Group for the national parliaments as to enhance their role in the decision-making procedures in the Union.

Section three describes the concept of democracy and recognises some general conditions necessary for it according to liberal democracy theories and further deals with the different features of the democratic deficits critique.

Part four gives the essential definitions of legitimacy as divided in *legal*, *normative* and *social* legitimacy. The normative democratic legitimacy is the base for the further discussion that follows, where the state-based and citizen-based perspectives are used as tools of describing and analysing the legitimacy and democracy problems in the Union. Since democracy according to the citizen-based perspective is also about a strong protection of rights, the active development of the European Court of Justice to strengthen the individual's rights and democratise the Union is explained.

Chapter four also contains a discussion about the need for a European demos in order to create a democratic Union and moreover explains the ideas of *indirect* and *direct* legitimacy on which the state-based and citizen-based theory base their legitimacy solutions. The questions of a "Missing market square" and lack of *social* legitimacy, issues that continue to contribute further constraints for EU integration, is furthermore discussed.

Finally, chapter four deals with the political legitimacy of the EP itself, the problems with the low turnout in European elections and the importance of the increased supervisory powers of the EP and its possibility to hold the Commission accountable.

Chapter five describes the most essential changes presented in the Constitution proposal concerning the role of the European Parliament and the national parliaments and also the chapter concerning "The democratic life of the Union".

Lastly, section six presents the analysis where all the theories and Treaty provisions presented are analysed in order to answer the main questions put forward in this thesis.

1.5 Delimitations

The discussions about a lack of democracy and solutions for the EU's democratic deficit have been ongoing for years and the topic is one of the most frequently debated in EU literature, therefore, the material is massive. The reason for that are the many different options about how to view the constitutional structure of EU today, the goals of the integration process and the many different ideas of what make a structure of governance democratic and legitimate. Many of the perspectives and conceptions are issues that are dealt with in political science. I have however tried to exclude many of

those theories and limit myself to use the two perspectives previously described only. Nevertheless, since political science theories are dominant in literature concerning these issues I have also used those theories regarding some aspects.

I found it necessary to include some historical background and descriptive parts concerning the theories I used to provide for an easy understanding of the democracy and legitimacy problems in the Union.

Finally, since the subjects and the European integration process is a very dynamic and new decision in the nearest future are likely to change the structure of the Union remarkably with the Constitution about to be ratified, my analysis is reserved to the time before this ratification.

2 The institutions and the national parliaments

2.1 EU institutions

The question of the democratic deficit and democratic legitimacy not just involves a discussion of the role of the European Parliament, but also an examination of the roles of other institutions, especially the need to look at the way in which these institutions relate to each other. Therefore, it is necessary to briefly describe these institutions and the existing distribution of authority and functions between them. Power in the EU is distributed among four main bodies: the Council of Ministers and the European Council, the European Parliament, the Commission and the Court of Justice. For this paper, which focuses on the parliamentary influence in the EU, the main emphasis lies on the powers and functions of the European Parliament and the national parliaments and on their role in the decision-making procedures in the EU where all these institutions co-operate.

The *Council of Ministers* has legislative powers (Article 202 TEC), with the final word on legal matters. It is intergovernmental, composed of representatives of the governments of all member states, and reaches its decision by voting. The Council actually consists of various Councils, each of which represents specific domestic departments.¹ The meetings in the Council are prepared by a Permanent Representative Committee (COREPER) that basis itself on discussions in numerous working groups, in which the member state are represented. Often the members of these groups are experts from the administration or diplomats connected to the Permanent Representation to the EU.

The Council determines the pace and course of further integration and generally acts as the “ultimate locus of [...] decision-making on all major issues”². Many decisions are now taken by qualified majority but on sensitive political issues, the unanimity rule is still required. The Council is a forum for intergovernmental bargaining and coalition making. Every Member State is protecting their national interests. A problem with the Council of Ministers and its way of operation is that the Member States do not allow their national parliaments to instruct the Ministers before Council meetings, consult them during sessions or hold them answerable afterwards. Furthermore, considerable secrecy surrounds its work. Debates and voting take place behind close doors, and no proceedings are available. Even the political leadership of Member States lack information about preparations

¹ The European Parliament has no authority to ratify appointments, and has no influence over selecting candidates as with the Commission.

² W. Wessels, “The EC Council: The Community’s decision-making center”, in R. O. Keohane and S. Hoffmann, *The new European Community*, Boulder (Westview Press) 1991, 133.

for the Council's sessions and the only "effective though not necessarily democratic watch mechanism is the network of well-informed lobbies".³

The *European Council* can be seen as the epitome of the intergovernmental ideal. The Council consists of the leaders and Foreign Ministers of the nation states together with the Commission President and a Vice-president. Each nation of the European Union takes it in turn to control the presidency of the council for a six-month period. During that time, the nation state has the possibility to influence the political agenda and provide valuable political benefits for the national government. The European Council has been a very effective policy-making organ as many decisive turning points in the history of the European Union came about at Council meetings, such as Treaty reforms.⁴

The *Commission* is the major source of legal and political initiative in the EU. It has exclusive right of initiative regarding legislation and its draft of laws and regulations are the basis for decisions in the Council. It implements community policy, manages the European Union's budget, conducts external relations on behalf of the Member States and is widely regarded as the "guardian" of the Treaty, ensuring that the provisions are applied. As Dinan describes it as a "strategic authority established by the founding fathers to guarantee continuity of the integration project despite the political or geopolitical hazards"⁵. The Commission, which has the substantial power and responsibility of proposing and forming laws, is, according to McCormick, "appointed, without reference to the people"⁶. This mighty body has a President appointed "as a result of a strange and informal little power dance among the leaders of the member states"⁷. The Commission has no mandate whatsoever from the people, European voters do not elect their Commissioners, Member State governments appoint whomever they wish and the Commission has been accused for being most unaccountable political executive in the world. This also due to the fact that the selection of the President is far removed from Europe's voters who elect national parties in national parliaments, who form the government, who then elect the head of the EU executive. As a result, the Commission President is not really elected by the Member States, but rather by the parties that happen to be in government when the choice was made. In that sense there is no real democratic contest for the President where rival candidates are compared, where the electoral choice is in favour of one candidate over the other and where the "scoundrel" can be thrown out of the office if they do not deliver on their promises or if they fail to govern effectively.⁸ Regarding the commissioners selected, they are expected to act as professional civil

³ W. Wessels, "The EC Council: The Community's decision-making center", in R. O. Keohane and S. Hoffmann, *The new European Community*, p 133.

⁴ The EC only deals with political decision and not legislative acts etc.

⁵ Dinan, *Ever Closer Union, An Introduction to the European Community*, p 210.

⁶ MacCormick J., *Understanding the European Union: a coincide introduction*, p 152.

⁷ *Ibid.*

⁸ S. Hix, *Linking national Policies to Europe*, p 67.

servants, loyal only to the Union as custodians of the “European interest”⁹. Some might suggest that these people are not always the most appropriate, but those who national governments want out of domestic politics¹⁰.

The *Court of Justice* seeks to maintain the rule of law, and shall ensure uniform interpretation of Community law. By clarifying the legal principles of direct effect, supremacy, the enforcement of fundamental human rights and through its active development of EC law the Court has played an important role in the process of constitution-making in the Union, which means that the Court has shown a tendency to reduce the differences between treaties and constitutions¹¹.

2.2 Composition and functioning of the European Parliament

In all democratic systems, Parliaments are considered the symbols of legitimacy, as directly elected bodies they represent national citizens and acts on their behalf. In the EU the Parliament differs very much from its counterparts in the Member States and is not a legislative assembly shaped according the model used in national parliaments. Still it seems to have a symbolic importance as far as legitimacy and democracy of the integration process is concerned. Its capacity to fulfil its functions and to deliver a kind of “European Legitimacy” depends largely upon the character of the system of the EU as a whole and the special role it plays within it. An empirical analysis of how the EP works and how its role has been strengthened through the Treaty amendments is therefore necessary as to define the role and position of the European Parliament.

2.2.1 Powers and influence - a historic background

Ever since the Coal and Steel Community in 1952, the European Parliament has been regarded as an somewhat ineffectual institution. This reputation can be questioned, for although the EP does not have the powers and is not as strong as the parliaments in the Member States, developments over the years have come to give the EP a considerable influence in the EU system.

In the early days of the Union, the Parliament had only few powers under the ECSC, original EEC and Euratom Treaties. It was intended to exercise consultative and supervisory powers.¹² However, the influences of the

⁹ Article 213 TEC, P. Ludlow “*The European Commission*” in R. O. Keohane and S. Hoffmann, *The new European Community*, Boulder (Westview Press) 1991, 122

¹⁰ Those below the ‘College of Commissioners’, the ‘Directorates General’, have the power of implementation over dozens of policy areas, yet these powerful people are virtually unknown to the public, and are not held accountable by them, neither through the EP nor the national parliaments.

¹¹ The development of constitutionalism will be further discussed under chapter 4.

¹² P. Craig and G. de Búrca, *EU law, text, cases and materials*, 3 ed, p 75.

Parliament increased, first with the budgetary treaties of 1970 and 1975, and subsequently with the *co-operation* and *assent* procedures under the Single European Act of 1986. Under the Maastricht Treaty in 1992,¹³ the *co-decision* procedure was introduced, by which the EP and the Council enacts laws together, and this procedure was further strengthened and extended under more areas through the Amsterdam and Nice Treaty and now recently in the draft for a Constitution. Today, the European Parliament exercises powers of legislative, budgetary and supervisory nature.

The EP is the only directly elected institution in the EU and the procedure of direct elections of the members of the European Parliament were initiated 1979. Today it consists of 732 members.¹⁴ An issue for complaint has been the fact that there is actually no uniform electoral procedure, which was set out under article 190 in the EC Treaty. This was however amended by the Amsterdam Treaty to provide for an electoral procedure based on common principles rather than uniformity but still the diversity of the Member State electoral and constitutional traditions appears to block progress on this matter.¹⁵

2.2.2 The Parliament's decision-making role

There are many different opportunities for the EP to influence EU legislation. At an early or pre-proposal stage of the legislative process, the EP can influence through participation in policy discussions with the Commission. Either the Commission propose a policy idea before an EP committee, or committee members themselves may suggest policy initiatives to the Commission.¹⁶

Secondly, the EP can adopt its own ideas for suggested legislation in two ways. First it can adopt reports that the Parliaments itself initiates, but the major weakness with these reports is that the Commission is not obliged to act upon them although it may feel pressured to do so. Because of this, the number of such reports has declined sharply in recent years. Therefore, a new article was created in Maastricht Treaty, Article 192, which gives the Parliament, if acting by absolute majority of its members, the right to request the Commission to submit any appropriate proposals on matters, which it considers that a Community act is required for implementing this Treaty. Although this article strengthens the EP's initiating powers, since it makes it difficult for the Commission not to act if there is the necessary majority in the EP, there has only been a handful request of Article 192. This because of the poor attendance in the EP plenaries, which makes absolute majorities difficult to obtain.¹⁷

¹³ Westlake. M., *The Council of European Union* (Catermill, 1995), 31.

¹⁴ *The European parliament*, European Union institutions and other bodies, at <http://europa.eu.int/institutions/parliament>. Although the upper limit will be 750 according to the Constitution, Article I-19, 2.

¹⁵ P. Craig and G. de Búrca, *EU law, text, cases and materials*, 3 ed, p 76.

¹⁶ Neil Nugent, *Governments and Politics in the European Union*, p 206.

¹⁷ *Ibid.*

Another and very important way for EP to influence EU legislation is through the annual budgetary cycle. The European Parliament and the Council are the two arms of the budgetary authority and the EP has the final word in the process, since the budget will not come into force until the President of Parliament has signed it. The EP works closely together with the Commission and the Council on this matter and the budget procedure practically means that the Commission draws up a preliminary draft budget, which is sent to the Council and the Parliament. Thereafter Parliament and the Council consider the Commission's budgetary proposals in two readings in the course of which they agree on how much money is to be spent, and on what. Parliament can amend the proposals and reject the budget if it believes that it does not meet the needs of the Union. The budgetary procedure then starts all over again.¹⁸ In addition, the expenditure limits in the annual budget, in respect of legislation is set in the budgetary process (and not the legislative process) where the EP has more power and if the understanding between the institutions has worked well, it has enabled the EP to promote favoured policies.¹⁹

The EP also has the possibility to influence the Commission's annual legislative programme, which consist of all proposals of legislative nature. Appropriate EP committees consider the programme and thereafter a resolution on the programme is voted on in plenary session²⁰.

In some special circumstances, EP's views must be sought²¹, though its approval is only required in connection with most of the EU's most important and sensitive legislation. Although it does not give the EP an indefinite veto over Council legislation, when it is obliged by Treaty to issue opinions, it gives a very useful delaying power and the Court of Justice can declare the rule, which should be viewed by the EP, invalid.²²

The EP must also give its assent - i.e. approval, to any accession of a state to the European Union and most international agreements. In the case of an international agreement or an accession, the European Parliament must be

¹⁸ European Parliament, http://www.europarl.eu.int/presentation/default_en.htm

¹⁹ Neil Nugent, *Governments and Politics in the European Union*, p 206.

²⁰ Parliament's legislative work is organised for the main part as follows: the Commission submits a legislative proposal to Parliament; one of the standing committees is instructed to draw up a report. One or more other committees may be asked to deliver opinions. Each adopts its opinion and forwards it to the committee responsible. MEPs - and the committees asked to deliver opinions - can table amendments to the draft report drawn up by the rapporteur; it is then adopted, possibly with some changes, by the committee responsible; the political groups examine the report from their own political standpoint and finally, the report is discussed in plenary session. The committee responsible, the political groups or a number of Members may table amendments to it. Parliament votes on the report, thereby adopting its position on the original proposal.

²¹ E.g. on major foreign policy decisions.

²² See case *Isoglucose* (Case 138/79) 1980 In the judgement the Court annulled a Council regulation on the ground that it had been issued before Parliament's opinion was known. N. Nugent, *The Government and Politics of the European Union*, p 206-207.

kept fully informed of the mandate and the state of negotiation and it can ask for its recommendations to be taken into account at any time.²³

Although the EP has limited real possibilities to influence the legislative procedure, especially in the initiative phase²⁴, it has a greater role to play concerning some policy areas of decision-making through various decision-making procedures, which allows for the EP in some cases to block legislative proposal.

Until the entry into force of the Single European Act (SEA), all legislation referred to the EP was subject to the consultation procedure. The SEA however created two new procedures, the co-operation and the assent procedure and the Maastricht Treaty introduced a further one, the co-decision procedure. With the new procedures, the EP has acquired a more substantial decision-making role and its wider legislative functions have been enhanced through successive Treaty amendments. The Treaty of Amsterdam, the Nice Treaty and the proposal for a Constitution all reformed and extended the application for co-decision.²⁵

The co-decision is a procedure of negotiations between the Council and the EP through committees and ministers' holdings. The key feature of the co-decision is that it provides the EP with veto right to legislative proposals. The Parliaments power is strengthened because legislation that is subject to this procedure is made in the name of the EP and the Council, whereas legislation that is made under the consultation and co-operation procedures is made in the name of the Council only.²⁶ The procedure applies, among other things, to the free movement of workers, the establishment of the internal market, research and technological development, the environment, consumer protection, education, culture and health. The problem with the democratic deficit concerns and pressures from the EP were very much behind the creation of this procedure. The increased co-decision procedure was moreover a result of the 1996-1997 IGC process which led to the negotiation of the Amsterdam Treaty, which aimed to bring European Union closer to its citizens and to review the functioning of the institutions to create a more democratic and efficient union.

Which procedure applies to a particular legislation depends on which Treaty article the proposal is based. The EP's powers are the strongest with the co-decision procedure and the weakest with the consultation procedure. The situation in broad terms after Amsterdam is that most EU legislation apart from agricultural, justice and home affairs, trade, fiscal harmonisation and EMU issues is subject to the co-decision procedure.²⁷

²³ European Parliament at http://www.europarl.eu.int/presentation/default_en.htm.

²⁴ Since in most cases, the Commission is not obliged to follow the proposal from the EP.

²⁵ P. Craig and G. de Búrca, *EU law, text, cases and materials*, 3 ed, p 79-80.

²⁶ N. Nugent, *Governments and Politics in the European Union*, 4th ed, p 208.

²⁷ N. Nugent, *Governments and Politics in the European Union*, 4th ed, p 209.

2.2.3 The weaknesses of the European Parliament

Despite the enhanced role of the EP in the decision-making procedures and ways of influencing legislation, some important “weaknesses” remain. The first and most obvious weakness is that the EP does not have full legislative powers. Unlike national parliaments, it does not have the final say over what should or should not become law. It does not have the full capacity to exercise a full “positive” legislative role by initiating, developing and passing into law its own proposals. On the other hand its “negative” legislative role is considerably circumscribed, although the co-decision and the assent procedures give a veto over most legislative proposals, under both the consultation and the co-operation procedures the Council can overturn the EP amendments that have or have not been accepted by the Commission and ignore the EP’s rejection of legislative proposals.²⁸

The second weakness is that it is not unusual that the Council take decisions or adopt common positions before the opinion of the EP has been delivered.²⁹ This is common when there is urgency about the matter or when the initial referral to the EP is delayed. Whatever reason for this, the effect is that the EP’s opinion has little effect.

The third weakness is that the EP is not consulted on all Council legislation. For example, certain international agreements, such as those in the common commercial policy field under Article 133(3) TEC, provide no role for the Parliament at all. Although the matters are being discussed between the EP, the Council and the Commission on an informal basis they are not obliged to do so and there is not much evidence of Parliament having influence during the negotiations.³⁰ This means that the directly elected European Parliament can find itself excluded from critical legislative and policy decisions that affect the whole of Europe and the public can be affected by measures over which they have absolutely no direct control.

The fourth weakness is that the EP does not have to be consulted on some Commission legislation. There are different views on the significance of this. Pointing to the political and expenditure implications of some Commission legislation, MEPs have long argued that this is another example of executive power and legislative and democratic weakness. However, the Council and the Commission mean that Commission legislation is usually high technical and of a kind that need quick decisions, and is sometimes similar to the minor legislative acts that national administrations issue and which are commonly accepted as an inevitable aspect of decision-making in the modern world.³¹

²⁸ N. Nugent, *Governments and Politics in the European Union*, 4th ed, p 212.

²⁹ This despite that the EP usually attempts to deliver opinions as soon as possible to ensure they are available to the Council at an early stage of its deliberations.

³⁰ N. Nugent, *Governments and Politics in the European Union*, 4th ed, p 212.

³¹ N. Nugent, *Governments and Politics in the European Union*, 4th ed, p 212-213.

2.3 The role of the national parliaments

National parliaments are in general only involved marginally in European decision-making.³² For a long time, nobody worried about their influence and power at European level, but this changed, as it gradually came clear that the European decisions and regulations involve political choices.³³ Today most parliaments have determined that their traditional power has seriously eroded since many of their former policy areas are transferred to EU level.³⁴ If they actually do influence European politics they can sometimes be seen to interfere only with trivial things and when they have the possibility to vote on certain laws, they are acting, as they were obliged to do it.

The loss of parliamentary influence on national level was not compensated by the foundation of similar structures on European level. Despite that there is the European Parliament which has got considerably more power than before, the EP does not overtake the traditional functions of national parliaments and there has in other words been a change in the democratic symmetry.

2.3.1 Treaty modifications

The role the national parliaments do play is through the ratification of the Treaties. In the traditional measures to revise the treaties the IGC³⁵ negotiate about the revisions and then the Heads of States and Governments in the European Council take the final decisions³⁶. Thereafter the text needs to be ratified by the Member States and it is often the national parliaments that deal with the ratification, although sometimes the population are given the right to vote in a referendum. Generally speaking the, members of the national parliaments thus vote about basic Treaties and the amendments made to them.

³² Norton, 1996 'National parliaments in Western Europe' 19-35 see p 27, in: Smith, E. (ed) *National parliaments as cornerstones of European Integration*.

³³ All directives and regulations reflect in a certain way political choices and priorities and especially vision of how European society has to look like. Katz, 1999 'Representation, the locus of democratic legitimation and the role of the national parliaments in the European Union', in Katz, R., Wessels, B (eds). *The European Parliament, the national parliaments, and European Integration*, Oxford: Oxford University Press 21-44, p 23.

³⁴ Rideau 1996 'National Parliaments and the European Parliament: cooperation and conflict', 159-178 in Smith E. (ed) *National parliaments as cornerstones of European Integration*, p 161, 169.

³⁵ Intergovernmental Conference, representatives of the governments of member states negotiate in a kind of private atmosphere about the Treaty revisions, see Article 48 TEU.

³⁶ Although the parliaments do not formally have a role to play during the IGC they are often consulted on issues regarding the main features of the European Union and they are together with the EP, jointly channelled into the Treaty reform process both before the convocation of, and probably during, any IGC. See Martin Westlake, *A modern guide to the European Parliament*, p 57.

Although the parliaments involved in the ratification in theory, dispose a lot of power there is a lot of dissatisfaction in the parliaments about the procedure for revising the Treaties. In practise, an agreement is made between the governments of the Member States, which is presented to the parliaments as “take it or leave it” proposals. A refusal of ratification would immerse the EU in a constitutional crisis and this ultimate veto right can moreover be judged from a democratic point of view. In a certain way, it is the ultimate means of control, but it has to be said that it does not mean that much in practise just because it is a “yes” or a “no” and no intermediate position is possible³⁷. Furthermore, possible ratification problems could do with internal political tensions in the Member State concerned and not necessarily with the case in itself. However, the representatives of the government most often do anticipate the probable reaction of the parliaments during the negotiations and they make sure that they do not make decisions that are unacceptable for the home base.³⁸

In Nice, it was decided that a new method to prepare Treaty revisions was desirable and that national parliaments should be involved in this. As an answer to this, the European Council of the Laeken set up a Convention for the future of Europe where also representatives from the national parliaments are involved and play an important part³⁹. This is a great improvement for the involvement of the parliaments and their part in the process and the signals that can be given in an early stadium could become more important and effective than the threat of veto, which can only be declared after the negotiations.

2.3.2 Decisions and legislative measures

As we have seen, the Council plays a key role (together with the EP) in the decision-making procedures in the EU. The meetings in the Council are prepared by the COREPER, which is the basis for the discussions of the proposals in various working groups in which the member state are represented. The members of these groups are often experts from the administration or diplomats connected to the Permanent representation to the EU. A direct parliamentary control on what happens in the Council

³⁷ To avoid a constitutional crises, an alternative to a yes or no position was resolved in 1992 when the Danish people rejected the original Maastricht Treaty in a referendum which led to that a special protocol was granted the Copenhagen government meaning that Denmark did not had to follow the other members when the third phase of the EMU began. The Danish people approved the Treaty with this special agreement.

³⁸ Munro 1996, ‘The UK Parliament and EU institutions – partners or rivals ?’ , p 92 in Smith E. (ed) *National parliaments as cornerstones of European Integration*.

³⁹ The Convention was the group headed by Giscard d’Estaing, with tow vice chairmen, a representative form each state, two national members of Parliament from each country, sixteen MEP’s, and two Commission representatives to work on the future plans for Europe and Treaty revisions. Also the accession candidate countries, that now have joined the EU, were also involved in the Convention proceedings. It was the first time a “Convention method” - (the discussion method) by EU member states in the framework of an IGC, was used to produce a draft constitutional Treaty.

working groups and COREPER is lacking⁴⁰. For the Ministers who take the final decisions this can be different since they always have a responsibility to their respective parliament. Although there was a “permissive consensus”⁴¹ for a long time that parliaments did not interfere with European affairs and Ministers could do what they wanted, this changed as parliaments realised that the European affairs had impact on their powers. In all Member States, parliaments therefore have founded committees concerning European Affairs. The powers and impact of these committees differ from state to state. Some concentrate on almost every measure that has to be discussed by the Council, whereas others only follow the general guidelines of European politics. The national parliaments also follow the activities of their ministers in the Council by having access to proposed legislative documents⁴², which are set out in a protocol (no 9), annexed to the Amsterdam Treaty. Through this provision, the parliaments have the possibility to follow the current decision-making and give their opinion to the Ministers in the Council during this phase but often there is little space for fundamental changes of the proposals.

Although the parliaments have, the possibility to influence their Ministers in the Council to some extent in the decision-making procedures the fact remains that their Ministers might be outvoted, due to majority voting in the Council. In addition, another problem arises. Some parliaments are seeking to have a strict grip on the activities of their ministers and want a system with “instructed” Ministers and better supervision on how they behave. This might be a good solution in terms of democracy, at least it will give the parliaments more influence but it will definitely have an impact on the efficiency of the decision-making and slow down the process. Imagine if 25 parliaments were involved in the decision-making process and strictly defined the negotiation margins of the ministers and the working groups. The dynamics of the negotiations would suffer from this and at least with unanimously voting it would almost be impossible to reach consensus. It would probably also weaken the position of the Minister if in an open parliamentary debate a relapsed position was reached and this would in turn have the contrary effect on the parliamentary influence.⁴³ As has been put forward by Hilf and Burmeister: “Any voting on EC secondary legislation by national parliaments would not lead to ‘more’ democracy but rather inefficient, if not chaotic, situation and thus finally to demise in democratic

⁴⁰ It would also be unlikely that ambassador or national bureaucrat would assist wilfully in the process of wasting away of Member State power, thereby blighting his own career. See Mancini, *The Constitution for Europe*, in CML Rev 1989, 26 at p 599.

⁴¹ Katz, Wessels 1999, ‘Parliaments and democracy in Europe in the era of the euro’, in Katz, R., Wessels, B (eds). *The European Parliament, the national parliaments, and European Integration*, 231-247 at p 245.

⁴² This is specially set out in the recommendations of the Convention Working Group of national parliaments which we will come back to.

⁴³ See Gustavsson 1996, ‘Preserve or abolish the democratic deficit’, in Smith E. (ed) *National parliaments as cornerstones of European Integration*, 100-123 at p 116.

legitimacy”.⁴⁴ As it seems at first sight a very democratic measure to give Ministers an exact mandate, it would endanger the integration dynamics.

As it is not always recommendable for the national parliaments to influence pending legislative proposals, they might have a greater role to play in the pre-legislative phase.

There is also the possibility for the parliaments to get involved in the phase before proposals are actually put forward by the Commission. If the Parliaments keep themselves well informed about European politics through the expected work programme of the Commission⁴⁵ or the request of the Council, EP and EC to launch proposals in certain area, or programme of the Council, they will get a feeling or sense for European politics and estimate what topics that will be discussed. If then the parliaments have a certain opinion it can present this for example by a written statement to either an expert in the working group or a MEP who might be able to influence in the co-decision procedure.

Another way of influencing EU decision-making is through the EP or rather inter-parliamentary cooperation as it is called is a mechanism that has been used for a long time. Representatives of the EP meet representatives from national parliaments, committees or interest group and exchange opinions in the pre-legislative phase. The most well known form for this is through the Conference called COSAC⁴⁶. The way of lobbying and possibilities of influencing the EP and MEP’s does vary much in the different member state. This because they all have various forms of groups or committees that are responsible for these matters and this bilateral cooperation depends very much on the approaches and mechanism developed by the national parliaments to scrutinise and supervise European activities. There are also similarly approaches to the involvement of the MEP’s in the work of the national parliaments. This might create difficulties for the efficiency of the work and the differences limit the possibilities of those who are involved to go beyond exchange of information.⁴⁷

⁴⁴ Hilf, M., Burmeister F. 1996, ‘The German Parliament and European integration’ in Smith E. (ed) *National parliaments as cornerstones of European Integration* 64-79, at p 74.

⁴⁵ That is for example set out in various documents such as the yearly work programme of the Commission, its long-term action programmes, statements etc.

⁴⁶ COSAC consists of committees within the national parliaments specialising in Community affairs together with the European Parliament. The first Conference group like this was held in Paris 1989, thereof the French acronym COSAC, ‘*conférence des organes spécialisés dans les Affaris communautaires*’, see M. Westlake, *A modern guide to the European Parliament* p 60.

⁴⁷ M. Westlake, *A modern guide to the European Parliament*, p 62.

2.3.3 A future enhanced role of the national parliaments

Despite the different possibilities the national parliaments have to contribute to the decision-making process, one can question if the necessary pre-conditions for these possibilities are really sufficient for the parliaments to realise these functions and prove their value in the European system. There has been a request for a new role of the national parliaments. A number of proposals about ways of institutionalising the involvement of national parliaments in the legislative process in the Community have circulated over the years,⁴⁸ though these proposals were never adopted the influence of the national parliaments remained marginal.

The Laeken Declaration dealt with these questions and thus a more influential role was set out in the final draft for a constitutional Treaty (although not to a large extent), as a result of the recommendations from the Conventions' special Working Group on national parliaments. The reason for increasing the role of the parliaments lied mainly in the problem with the democratic legitimacy of the Union and the need to enhance EU legitimacy through more parliamentary influence.

In the Convention⁴⁹, founded in December 2000 during the Laeken European Council this topic was an important subject of conversation. The Laeken declaration, in which more or less the agenda was set up for the convention debates, mentions the matter explicitly and formulates a diversity of questions:

“The national parliaments also contribute towards legitimacy of the European project. The declaration on the future of the Union, annexed to the Treaty of Nice, stressed the need the examine their role in European integration.[...]”

A[...] question, which also relates to democratic legitimacy, involves the role of the national parliaments. Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between the Union and member states, for example through preliminary checking of compliance with the principle of subsidiarity?”⁵⁰

⁴⁸ See further M. Westlake, *A modern guide to the European Parliament*, p 58

⁴⁹ The Convention was founded to discuss the Future of the European Union and to out forward proposal for Treaty amendments. The work of the Convention included the final draft of a Constitution for Europe, which was accepted by the Member States in June this year.

⁵⁰ European Council (2001), The future of the European Union, Laeken Declaration, Laeken 15 December 2001. at: http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

However, the questions from the Laeken Declaration can be said to be the starting point of the discussion about the future role of the national parliaments, the set up of the ‘Convention Working Group IV on the role of the national parliaments’⁵¹ created more concrete proposals and amendments that could enhance the parliaments’ role.

The general aims with the proposals put forward was to “strengthen the democratic legitimacy of the Union and bring it closer to its citizens”⁵². This by giving the parliaments a distinct role to play within the EU. However the Group underlined that the issue was not one of competition between the national parliaments and the EP and that each has a distinct role to play but shared the common objectives of increased legitimacy and bringing the EU closer to its citizens.

The main proposals of the Group focused on providing better mechanisms and possibilities for national parliamentary scrutiny. The importance of the national parliaments’ role in relation to the Council was emphasized and it was suggested that the parliaments should use all their possibilities to influence the Council through their governments.⁵³ In order for the national parliaments to be able to control truly their governments’ actions, greater transparency and openness in the Council decision-making procedures was needed. The COSAC group was given the possibility to better co-ordinate inter-parliamentary conferences between the national parliaments and the EP in order to increase the effectiveness of national parliamentary scrutiny through better systematic exchange of information⁵⁴. The Group also suggested all Commission proposals for legislation should be transmitted directly to national parliaments at the same time that they are transmitted to the Council and the EP and stipulated a six-week shell elapse between a legislative proposal made available in all language and a date when it is placed on a Council agenda for decision.⁵⁵

Regarding the principle of subsidiarity the group considered that the Commission, the Council, the EP and the national parliaments all should share the responsibility for ensuring that the principle is complied with and the national parliament shall be involved as early as possible in the process and convey their views.⁵⁶

⁵¹ The European Convention, Final Report of Working Group IV on the role of the national parliaments: CONV 353/02.

⁵² CONV 353/02, p 2.

⁵³ CONV 353/02, p 3.

⁵⁴ CONV 353/02, p 5.

⁵⁵ CONV 353/02, p 6-7.

⁵⁶ CONV 353/02, p 10 and 12.

3 Democratic deficit in the EU

3.1 Democratic deficit - definition

After looking into the functioning of the various institutions in the decision-making procedures it is now at stage to more carefully scrutinize and explain the theoretical aspect of the democratic deficit and its critique in the EU. To understand the democratic deficit dilemma, we need first of all to define the concept of democracy. There are many different meanings of democracy and different models have circulated for over two thousand years, which makes it complicated to define a correct and clear concept of the term. Nevertheless, discussions of a certain deficit of a particular system must be grounded in some more particular conception of democracy. In this thesis, I will not go into a deeper discussion of the concept of democracy but generally recognise some conditions necessary for it.

3.1.1 Democracy

“Democracy is the government of the people, by the people, for the people”⁵⁷

There are many possible definitions of what democracy means. Schumpeter wrote that “the democratic method is institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of competitive struggle for the people’s vote”⁵⁸. Similarly, Downs stated that a democracy must have periodic elections decided by majority rule with a one-person one-vote standard⁵⁹. Lipset defined democracy as “a political system which provides regular constitutional opportunities for changing government officials [...] and permits the largest possible part of population to influence decisions through their ability to choose among alternative contenders for political office”⁶⁰.

Decades later, Hunnigton followed these theorists by “defining ‘a twentieth-century political system as democratic to the extent that its most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote”⁶¹.

⁵⁷ Abraham Lincoln (American 16th US President 1861-1865) at http://en.thinkexist.com/quotation/Democracy_is_the_government_of_the_people-by_the/6959.html,

⁵⁸ Schumpeter [1942] (1976:269) *Capitalism, Socialism and Democracy* in T.D Zweifel, *Who is without sin cast first stone: The EU’s democratic deficit in comparison*, Journal of European Public Policy 9:5 October 2002: 815.

⁵⁹ A. Downs, *An Economic Theory of Democracy*, 1957:23, in Zweifel *ibid*.

⁶⁰ S. M. Lipset, *Political Man*, 1960:71, in Zweifel *ibid*.

⁶¹ S. Hunnigton 1991:7, *The third wave: Democratization in the Late Twentieth Century*, in Zweifel *ibid*.

Although democracy is measured differently by different analysts their indicators come from a limited pool of common measures and some elements can be said to be generally recognised.

Democracy is about power in decision-making and effective control mechanism. In a democratic system of government, the whole population, usually through elected representatives, participate. Furthermore, it is recognised that the population should have the ability to change the government and hold them responsible for their acts when they are dissatisfied with the government's way of governing. Democracy also constitutes the best and most effective protection for a wide range of rights.⁶²

In the Western vision on democracy, parliaments traditionally are considered as the locus of democratic decision-making. Although the interpretations differ from state to state it is basically a fact that in *parliamentary* democracies, laws are made and amended by a Parliament that also controls the government in its exertion of the executive power.⁶³ Parliaments are considered the strongholds and symbols of legitimacy, as directly elected bodies they represent national citizens and act on its behalf. It is acknowledged that democracy is an organising principle, which is not reserved for states only but can be applied to all kinds of social structures.⁶⁴

3.1.2 Lack of democracy

It is often argued that the European Union suffers from a lack of democracy and seems inaccessible to the ordinary citizen since its methods of operating are so complex. The term democratic deficit has been applied both in the context of citizens, who feel remote from an unelected "government", what has been called the *social legitimacy crises*, and of national parliaments who see erosion of the former powers, the *formal legitimacy crises*.⁶⁵ The expression refers specifically to powers transferred under the Treaties from the national level to the Community level, and to the extent to which powers formerly subject to a satisfactory degree of democratic control at the national level cease to be subject to the same degree of control once so transferred. At supranational level, there is no such representation of people as in the nation state and national democracies. The only way to influence

⁶² SOU 1994:12, p 91. Although some basic rights can be seen to contradict with the idea of democracy and majority-decision making, e.g. concerning the basic rights of freedom of speech.

⁶³ Norton 1996 p 27, National Parliaments in Western Europe, in Smith, *National Parliaments as cornerstones of European Integration*, 19-35

⁶⁴ Anne Peters, 'A Plea for a European Semi-Parliamentary and Semi-Consociational Democracy', European Integration Online Papers, EiOP, Vol 7 (2003) N 3, at <http://eiop.or.at/eiop/texte/2003-003a.htm>. Although the state is often considered having the necessary institutional frame-work to realise democratic decision-making by means of coercion and enforcement.

⁶⁵ F. Carroll, The European Union and the democratic deficit, ProQuest Information and Learning 2003, In Focus, Know Europe; www.knoweurope.net

the decision-making procedures in the EU and the unique institutional system, is through the EP⁶⁶ and therefore the phrase, democratic deficit, is commonly used to support arguments for increasing the powers of the European Parliament that, despite the various Treaty amendments, still has limited power, influence and importance.⁶⁷

3.1.3 The democratic deficit - the nature of the argument

It is important to understand that the phrase *democratic deficit* has a number of different features that must be distinguished and the problem does not solely consist of institutional matters. I will here present the different features used by Weiler.⁶⁸

First there is the lack of accountability within the Community and the critique of the decision-making in the Community for being unresponsive to the democratic pressure. As have been pointed out a main feature in democratic regimes is that voters can change the government, this is not the case in the EU. Since power is divided between the Council, the Commission and the EP and the EP is the only elected component in the legislative process, a change in the Parliament's composition through European elections will not necessarily lead to any major shift in EU policy.⁶⁹ This because the Commission is not accountable to Member States, only to the EP but as a collective body and the Council of Ministers is not accountable as collective institution. However, Ministers in the Council can be accountable to its national parliament but it is not accountable as an institution to any other institution in the EU.

A second aspect of the democracy deficit arguments concerns "executive dominance". The transfer of competence to the Community increases the power of the executive at the expense of the national parliaments. In the Community's decision-making process the Council and the European Council still dominate and national parliamentary bodies have difficulties exercising any real control over decision made in the Community. The governance structure of the Community has effected national institutions, specially the balance of power between the parliament and the government at national level. Since the Council of Ministers consists of national Ministers, the national governments become national legislators at Community level. This empowers national governments over national

⁶⁶ Also the European Court of Justice to which individuals have the possibility to bring cases directly.

⁶⁷ However, some oppose to such an increase point to the greater role that national parliaments might also play in ensuring that decisions are taken in a democratic way. T. Bainbridge, *Democratic Deficit*, The Penguin Companion to European Union 2002.

⁶⁸J. Weiler, U.Halter, and F.Mayer, 'European Democracy and its critique', in *the Crises of Representation in Europe*, ed. J. Hayward (Frank Cass, 1995), 32-3: J.Weiler, 'European Models: Polity, People and System, in *Lawmaking in the European Union* in P. Craig and G. de Búrca, *EU law, text, cases and material*, p 178.

⁶⁹ P. Craig and G. de Búrca, *EU law, text, cases and materials*, 3 ed, p 168-169.

parliaments who lose legislative functions in all areas developed in Community level and it has effects even on the regional level.⁷⁰

Further, the increased use of QMV-voting in several policy areas bring problem in terms of accountability. Even if the Minister in the Council is accountable to national governments and parliaments, he or she can be outvoted and still be forced to implement the legislation. There is a risk with this procedure that the citizens of the states of the losing side would feel that the EU is imposing policies against their interests.⁷¹ The question posed by Smith is a very important one: “Who should you charge in an instance where your own minister, in a case submitted to decisions by qualified majorities, actually voted against a controversial decision by which you are bound anyhow?”⁷² This kind of supranationalism in the Council will create increasingly angry electorates, as a growing number of groups feel that they are on the losing side in the EU.

The question is whether the European Parliament has sufficient powers to make up that deficit. While the existence of the EP alleviates this problem, by providing a directly elected forum at the European level, it does not remove it. This is in part because of the EP’s limited powers and the key role the Council plays in legislation, and in part because of lack of voters interest in elections to the EP, which will be further discussed, and it is in part because of the absence of any developed party system within the EP.⁷³

All these elements seem to be concerned with the institutional set-up and decision-making procedures in the EU, but there are also other features of the critique.

Fourthly, there is the “distance issue”. As the Community competence on many issues has increased, powers over policy areas have been transferred from nation state to Brussels. It is problematic since the Community is far away from local structures and means that matters are moved away from the citizens.

A fifth feature of the democratic deficit phrase is the transparency and complexity issue. Traditionally much of the decision-making in the Community especially that of the Council, has taken place behind close doors, which can be compared to the open debates of national parliaments. In addition, the very complexity of the legislative procedures has meant that it is more or less impossible for anyone, other than an expert, to understand them.⁷⁴

⁷⁰ P. Craig and G. de Búrca, *EU law, text, cases and materials*, 3 ed, p 168-169.

⁷¹ S.Hix, ‘Linking National Policies to Europe’, *European Democracy A Manifesto*, p 66

⁷² Smith 1996, ‘Introduction: Sovereignty’- national and popular’, in Smith E (ed) *National parliaments as cornerstones of European integration*, 3-18 at p 15.

⁷³ P. Craig and G. de Búrca, *EU law, text, cases and materials*, 3 ed, p 168-169.

⁷⁴ *Ibid.*

Another problem is the lack of *social* legitimacy. Eurobarometer polls and low voting turnouts indicate insufficient trust in EU institutions. Even though the institutions in the EU were democratised, structural preconditions for a proper democratic process would still be lacking. There are no European parties or political leaders, no European media for debates in policy issues and choices, and no Europe-wide competition for government officials.⁷⁵ In other words, there is no room for a European “Market Square”. This has moreover created a lack for European interest among the citizens and the increasing apathy towards the EU will not only make the EU vulnerable for critics, this disengagement will also make it hard and in some cases impossible for a change in the constitutional order⁷⁶.

This leads us into the lack of a European demos. Most democracy theories, because of its statal orientation, presume that the system they assess is based upon a certain peoplehood or demos.⁷⁷ In the EU that people or demos is though not yet defined and therefore some writers means that a currently missing prerequisites for democracy in the Community includes a European people or a “European demos”. They argue that a common European identity among the citizens of Europe and a European demos is a necessary requirement for a legitimate political society. They mean that it is essential for the democratisation of the Union that there is a development of a sense of community among its component, the citizen.⁷⁸

In the light of these arguments, it is not surprising that it is the belief of many commentators that in order to reduce the democratic deficit within the European Union, the European Parliament has to receive more power. The structure of the European Community seems to be lacking such parliamentary influence, which at least according to traditional democratic ideals is essential for a democratic system.

An increased influence for the EP would increase the accountability and balance towards the other institutions and the ability for the citizens of Europe to influence politics through direct channels via the Parliament, which would be in accordance with democratic principles. This might, together with increased transparency in decision-making, resulting from an open parliamentary debate and the possibility for the Parliament to influence the decision-making procedures better by having access to documents, also gradually increase the citizen’s interest in European politics, which also might strengthen the public support for the system as a whole.

⁷⁵ Fritz Scharpf, (1997) ‘Introduction: the problem-solving capacity for multilevel governance’, *Journal of European Public Policy* 4(4): 520-38.

⁷⁶ Since the people must, in some constitutional changes such as ratification of the Treaties, approve the new order in a referendum.

⁷⁷ Weiler, ‘European Democracy and its critics: Polity and System’, *The Constitution of Europe*, p 269.

⁷⁸ Chrysochoou, in F. Caroll, *The European Union and the democratic deficit*, Proquest Information and Learning 2003, In Focus, Know Europe at www.knoweurope.net

However, different analysts suggest different arguments of the democratic deficit and some mean that there does not even exist something as lack of democratic legitimacy at European level. Andrew Moravcsik from Harvard University even goes as far as saying that the democratic deficit is a myth and means that the EU is democratically legitimate.⁷⁹ This due to the fact the EU is not a state and shall not be compared to one and the critique might sometimes stem from the fact that the EU is being judged by the direct comparison of its institutions with those of national democracies when one can question if such criterion is appropriate. According to Moravcsik, as long as the Member States remain the main actors in the EU and the Community is mere an international organisation, the legitimacy of the system shall be based upon and founded in the Member States. This view rather sees an increased influence of the national parliaments in the European co-operation as a solution to the democratic legitimacy problems.

⁷⁹ A. Moravcsik, *In defence of the “democratic deficit”, Reassessing Legitimacy in the European Union*, Centre for European Studies Working Paper No. 92

4 Legitimacy in the EU

To understand and assess the arguments of democratic deficit in the EU we need to describe the basic definitions of what political and democratic legitimacy actually is and draw some classical distinctions between different forms of legitimacy ideals, in order to answer if the EU really lacks such democratic legitimacy and whether the critique is justifiable. This is necessary since the ideas of democracy and legitimacy is often used interchangeably or thandem. It is though for example argued by Weiler that the two do not necessary coincide, he means that it is still possible for a democratic structure to be illegitimate⁸⁰ but it would be almost impossible for a non-democratic government or political system in the West to attain or maintain legitimacy.⁸¹

Political legitimacy generally emphasises the justification of the right of institutions to govern, maintain authority, and exercise political power within the state⁸² and rules the basic questions on whether the society should be respected by its citizens and the reasons therefore.

There are different senses of legitimacy that are interrelated but must be distinguished to analyse the political legitimacy of the EU, that is *legal-*, *normative legitimacy* and *social legitimacy*.

Laws and authorities are legally legitimate if they are enacted and exercised in accordance with constitutional rules and are normatively legitimate insofar as they can be justified to the people living under them and impose a moral duty on them to comply.⁸³ Social legitimacy requires that the population believe that the institutions are normatively legitimate and furthermore that laws and authorities actually are abide by them⁸⁴ and in short terms these forms of legitimacy stands for legal validity, justifiability of rules and expressed consent.⁸⁵

⁸⁰ Weiler, The 'Transformation of Europe', in *The Constitution of Europe*, p 79.

⁸¹ Ibid. The opposite position might exemplified by German government during National Socialism. The system continued to enjoy widespread legitimacy but the democratic values (non-discrimination, fundamental rights ect) were surely oppressed once Hitler rose to power.

⁸² Beetham and Lord, *Legitimacy and the European Union*, Harlow: Longman, 1998 in A. Muntean, The European Parliament's Political Legitimacy and the Commission's "Misleading Management": Towards a "Parliamentarian" European Union?, *EioP* Vol.4 (2000) No 5 p 1

⁸³ A. Follesdal, *Democracy in the Euroepan Union: The Need for Theory*, Arena Working Papers, at 1997 p 4.

⁸⁴ The beliefs that matters for the individuals' extent of compliance are that institutions and practices are in compliance with the principles of justice, equality, equality, freedom and solidarity. These three distinct but interrelated senses of legitimacy have been put forward by e.g. Beetham and Flathman, see Beetham, *The Legitimation of Power*, 1991, London Macmillian and Flathman, R.E, "Legitimacy" in Goodin and Pettit (eds), *Companion to Contemporary Political Philosophy*, Oxford (Blackwell) 1993, pp 527-33, in A. Follesdal, *Democracy in the Euroepan Union: The Need for Theory*, Arena Working Papers 1997 p 4.

⁸⁵ Beetham, *The Legitimation of power* 1991p 15

The criteria of legality and normative justifiability are essential for the EU to act as a legitimate system of governance. However, the legal legitimacy of the EU is derived from the Constitutions of the Member States. The rules are normative justifiable as derived from the rightful source of institutional authority and a supranational organisation.⁸⁶ Social legitimacy derives from a broad, empirical determined, societal acceptance of the system⁸⁷ and in other words, we can measure the social legitimacy in terms of public support for the political system or political institutions. The latter view of legitimacy might be closest to the general opinion among people of what legitimacy actually is. However, to estimate the social legitimacy of the EU does not answer all the questions relevant for this essay, since this type of legitimacy, ignores the legitimacy based on the foundation structure and working methods that underlies the system⁸⁸.

According to Weiler the legal or formal legitimacy is distinct from the definition of simple “legality” and the reason for that is the connection between legitimacy and democracy. Weiler means that, “legitimacy in institutions or systems implies that all requirements of the law are observed in the creation of the institution or system”⁸⁹. In Europe and the Western World this would mean that the political system must be based upon democratic principles, where the power of authority is based upon the citizens and that everyone are equal to the law. Legitimacy then becomes dependent of democracy, at least in the formal sense of legitimacy, which “must rest on some democratic foundations, loosely stated as he people’s consent to power structures and process”.⁹⁰

The quite limited role of the EP was according to Weiler, a result of the democratic process of approving the Treaties in the national parliaments of the Member States which some might use as an argument for saying that the EU does not lack democratic deficit since it was never created to be democratic system. The problem then arises with this view of Weiler as he means “in this formal sense, the existing structure and process rests on a formal approval by the democratically elected parliaments of the Member States, and yet undeniable, the Community process suffers from a clear democracy deficit in the classical sense”.⁹¹ This view however seems to reflect only the legal legitimacy of the system. However, to just base the legitimacy of the EU on the creation of it thus seems a bit too incomplete. Moreover, as stated earlier the legal legitimacy of the EU is derived from

⁸⁶ See Beetham 1991, *The Legitimation of Power*, and Beetham and Lord 1998, *Legitimacy and the European Union*, A. Muntean, The European Parliament’s Political Legitimacy and the Commission’s “Misleading Management”: Towards a “Parliamentarian” European Union?, *EioP* Vol.4 (2000) No 5 p 2.

⁸⁷ Weiler, 1999, ‘The Transformation of Europe’, *The Constitution of Europe*, p 80.

⁸⁸ The problems with social legitimacy and public support will still be discussed under chapter, A Missing “Market Square”, 4.3.

⁸⁹ Weiler, 1999, ‘The Transformation of Europe’, *The Constitution of Europe*, p 80.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

the Constitutions of the Member States⁹² and in that sense it is only relevant to look at the normative or material legitimacy of the EU for answering the questions whether there is sufficient democratic legitimacy and how this legitimacy can be strengthened further.

In the European Council in Dublin 1990 the question about democratic legitimacy in the EU was discussed and possible measures to improve it set out.⁹³ It was specially important that the principle of democratic accountability was ensured at Community level and as the transfer of power from the Member States continued to increase the power of the Community institutions the, democratic control at Community level should be strengthened accordingly. Among the measures suggested was to enhance the powers of the EP, increase accountability, and increase involvement of the national parliaments. In other words, traditional democratic principles with a strong parliamentary influence was set out to have a Community system, working in a democratic manner, as to enhance EU legitimacy. As democracy and legitimacy are related in this way, a democratic deficit in the EU will then therefore also mean a legitimacy deficit.

Because of the complexity of the EU, it is not easy to consider the degree of legitimacy in the EU and for long, there has been a process of theoretical search to estimate the normative legitimacy in the EU.

The generally accepted normative legitimating arguments have historically been derived from various premises – religious, traditional, formal, legal or ideological. However, under modern conditions, legitimacy has come to rest on *trust in institutional arrangements* that are thought to ensure that governing process are generally responsive to the preferences of the governed, the European citizenry (*direct legitimacy*)⁹⁴ and/or that the policies adopted represents effective solutions to common problems of the governed through the domestically authorisation originated from the popular authority of the Member States (*indirect legitimacy*)⁹⁵. These two types of arguments constitute the core notions of democratic legitimacy and we will come back to them. Both these ideas can though be said to start from the premise that a legitimate government must serve the “*common good*”⁹⁶ and that this function must be protected against any other interests.

⁹² In this aspect there does not exist a clear legal or formal legitimacy at EU-level since the supreme norm or criterion exists in the Constitutions of the Member States, from which the rules of the EU’ s legal system derive (compare Kelsen’s “Grundnorm”). Instead there exists substantial criterion for material or normative legitimacy directly.

⁹³ See European Council Dublin Summit 28 April 1990, Annex I at 3.

⁹⁴ Legitimacy or “government by the people” is directly derived from the appreciation of the EU by the European public. The political essence of the direct legitimacy is based on competition in which the electorate is able to choose by voting through Europe-wide elections and majority representation. See F. Scharpf, *Problem-Solving Effectiveness and Democratic Accountability in the EU*, p 2 and F. Scharpf, *Governing in Europe: effective and democratic?*

⁹⁵ This “Government for the people” views the legitimisation of the EU as derived from an agreement among Member States and the permission of the citizen to participate in the Union. See F., Scharpf, *ibid*.

⁹⁶ I.e the Common wealth and *res publica*.

4.1 Traditional dogmas about the European Union

“Each generation describes what it sees but it uses words transmitted from the past.”⁹⁷

To define and assess the legitimacy and democracy in the EU we must further try to answer the question of the constitutional structure of the EU; “the nature of the beast” as Neil Nugent puts it⁹⁸, its origin, purpose and extent of state power. Questions concerning the structure and purpose of the integration process are closely linked to those concerning the democratic deficit and legitimacy in the Union. As Majone argues, “arguments about Europe’s democratic deficit are really arguments about the nature and ultimate goals of the integration process”⁹⁹, which states in essence what the debate today is about.

4.1.1 The two models; state-based and citizen-based

When Weiler discusses the problems of democracy and legitimacy in the Union he underlines that the problem in the democratic deficit critique in literature is that the very language of modern democracy, its grammar, syntax, vocabulary evolve around the state, the nation and the people- its demos.¹⁰⁰ Nevertheless, it is generally accepted that the EU is not a state that leaves us with two options to view the EU. One side believe that the EU is a grouping of sovereign states for the purpose of international co-operation.¹⁰¹ and the question of democracy can be presented as a case of the domestic democratic control of foreign policy. The other view believes that the EU is a new state-like political society that unifies the citizens of Europe in a new political and legal community where the question of sovereignty of the member states must be reassessed¹⁰². This view sees or tries to solve the democracy problems as if the Community or Union were a state. Applied to the EU, these two positions can respectively be called “the EU as a Europe of the States” and “the EU as a Europe of the Citizens”¹⁰³. Hereinafter I will use the terms the state-based model and the citizen-based model to exemplify these two perspectives. These views can be seen to be in accordance with the two traditional systems of governance, confederations

⁹⁷ W. Bagehot, English Constitution, The Cabinet, at:

<http://www.bibliomania.com/2/1/328/2415/27962/1/frameset.html>

⁹⁸ N. Nugent, *Governments and Politics in the European Union*, p 491.

⁹⁹ G. Majone, *Europe’s democratic deficit, The question of standards*, European Law Journal No 1 March 1998, p 5.

¹⁰⁰ Weiler, 1999, European Democracy and its critics: Polity and system, *The Constitution of Europe*, p 268-269.

¹⁰¹ O. Zetterquist, *A Europe of the Member States or of the Citizens*, see part II

¹⁰² *Ibid.*

¹⁰³ O. Zetterquist. *A Europe of the Member States or of the Citizens*, p 288.

and federations and therefore the Union's characteristics according to these different systems will be described.

Depending on how we view the EU according to these options, different forms of governance for a legitimate and democratic structure will be required. Therefore, it is necessary to explain the democratic legitimacy of the EU according to these perspectives separately before evaluating if certain changes in the institutional structure between the institutions, such as enhancing the parliamentary influence, is the solution for legitimacy inefficiency in the EU and bridges the democratic gap.

These approaches moreover attempt to find an overall framework for explaining the entire phenomenon, i.e. the three-pillar structure of the EU. Though the approach towards the second and third pillars in the debate about democracy is not that they are not democratic but that they are of more primitive form of integration and are controlled by the member states, the Community pillar is the one referred to when discussing these issues.¹⁰⁴

4.1.1.1 Legitimacy and the state-based model

It is the question of sovereignty of the Member States that dominates the state-based view and the key components of this concept are in turn, power and control. The European Community is based on authorization from States that remain sovereign and rules the integration through intergovernmental co-operation.

The theory can be seen to agree with the philosopher Thomas Hobbes ideas of a legitimate state which sees a close link between obedience and legitimacy, and implies that an individual has a duty of obedience to the sovereign when the sovereign offers protection against terrors prevalent exist in the state of nature¹⁰⁵, if the criteria of statehood are met. According to international law the key characteristics of statehood are: *territoriality* – the state is geographically based and bound; *sovereignty* - the state stands above all other associations and groups within its geographical area and its jurisdiction extends to the whole *population* of that area, *monopoly of governance / effective control* – the institutions of the state monopolise public decision-making and enforcement.¹⁰⁶

Although these features do not need to be present in a pure uncontested form for a state to exist, they do need to feature prominently and constitute the basic ground of the system.¹⁰⁷ In the EU these features are present but in a limited way (except territoriality). It enjoys some sovereignty through the primacy of EC law and its jurisdiction applies to the

¹⁰⁴ See further Weiler, *The Constitution of Europe*, p 271.

¹⁰⁵ Thomas Hobbes, *Leviathan*, Conclusion p. 491, in O. Zetterquist. *A Europe of the Member States or of the Citizens* p 287.

¹⁰⁶ Neil Nugent, *The Government and Politics of the European Union*, p 494.

¹⁰⁷ *Ibid.*

whole population but the sovereignty is limited by the policy areas where the EU's remit is established. Concerning monopoly of governance, the EU monopolises only a few policy areas and is far from being in a position of dominance. Since EU has no own means of enforcement, it is also highly dependent on the member states for policy enforcement. These weaknesses make the EU far from being a state, as statehood is traditionally understood.¹⁰⁸

As the criteria of statehood must be met according to the state-based model, the EU is instead seen as an intergovernmental system, which primarily rests on nation states, which remain sovereign and that have come together to co-operate for certain specified purposes. The main channels of communication between the EU and the member states are the national governments, which also control the direction of Community decision-making. The governments, and therefore the states, are not obliged to accept decisions on major issues to which they are opposed and instead remain sovereign.¹⁰⁹ The Member States are furthermore representatives of their citizens and the actions taken are for the good of all and on the behalf of all. It is most important that the Member States completely control the Community and not their servants, the Ministers. The Minister must act in the name and spirit of the sovereign, which in a modern context means that a Minister may never act contrary to the instructions of the popular elected parliament. National parliaments will have a strong role since according to this view since it on Election Day it is the electors that are the sovereign power. This further means that the government in the state is subordinate to the parliament since the parliament is closer to the sovereign than the government.¹¹⁰

In the case of the Maastricht Treaty in 1993 the German Bundesverfassungsgericht ruled, that the EU fell short of statehood and was a union of states, "Staatenverbund". The German court argued that the Maastricht Treaty, like all European treaties, is an international agreement among sovereign states who remain the lord of the Treaties and never surrendered their power to secede the Union. To the extent that the Member States are representative democracies it is thus through their own Parliamentary Assembly that citizens of the union legitimise the Community in its organs, as well as exercising control over it;

"because German elector essentially exercises his right to participate in the democratic legitimation of institutions and agencies entrusted with sovereign powers by means of elections for the German Bundestag, the Bundestag must also decide on German Membership of the European Union and its continuation and development".¹¹¹

¹⁰⁸ *Ibid.*

¹⁰⁹ N. Nugent, *Governments and Politics of the European Union*, p 497-498.

¹¹⁰ O. Zetterquist. *A Europe of the Member States or of the Citizens* p 288.

¹¹¹ 2 BvR 2134/92 & 2159/92, "Brunner v. European Union Treaty", (1994) 1 C.M.L.R. Volume 69, p 88 § 47 (p 57-108).

This view surely sees the Unions's confederal characteristics of the EU since a traditional confederation is founded on an international agreement and the international co-operation in itself cannot exercise any binding power over the Member States. Moreover, in a confederation, the states have a veto right in decisions and democracy questions and binding rules remain on the national level.¹¹² The Court in the Maastricht case clearly pointed out the Member States as "Master of the Treaties" and meant that the States also decides what power they will confer to the Union and therefore the EU does not have the so-called *Kompetenz-Kompetenz*, which means the competence to provide itself with new competencies. This means that any further responsibilities and extension of powers to the EU must come from Treaty amendments that have been decided upon by the national parliaments.¹¹³

The Treaties, according to the Court, creates the basis for a union of States, "Staatenverbund" or confederation, to put into effect a closer co-operation between the organised people of Europe in the various Member States.¹¹⁴

However, the Court does mention, although not very detailed, the importance of a reasonable balance between efficiency and democracy on European level. The increased used of majority voting in the Council and the introduction of a common currency and EMU creates new problems regarding democracy according to this model. These new opportunities are not, yet corresponded by a sufficient democratic foundation. According to the Court, the solution could be read from the Maastricht Treaty in which a new level of integration will be created where democracy and efficiency shall characterize the work¹¹⁵. The Treaty further prescribes that the Union shall respect the national identity in the Member States, and their governing structure that are built on democratic principles. This implies that the Union shall independently develop towards a democracy as integration is progressing and at the same time respect the democracy in the Member States.¹¹⁶

According to this theory, those parts or elements of the EU that can be characterised as intergovernmental, can be legitimate through the democratically elected national Parliaments whereas there still is some uncertainty where the legitimacy of the supranational characters of the EU should come from. A minimum requirement is that the development in the EU is predictable for the national parliaments and that the Community only can function within the structures these Parliaments have accepted. The main rule is the competence of the sovereign Member state and the competence of the Community is the exception. The further limit for

¹¹² SOU 1994:12, p 93 ff.

¹¹³ SOU 1994 : 12, p 97 ff and 2 BvR 2134/92 & 2159/92, "Brunner v. European Union Treaty", (1994) 1 C..M.L.R. Volume 69.

¹¹⁴ SOU 1994: 12, p 97.

¹¹⁵ Artikel F.1 Maastrichtfördraget. (See also Article 6 TEU).

¹¹⁶ SOU 1994: 12, p 98.

integration is, according to the Court, the statement that the EU never can become a state.¹¹⁷

4.1.1.2 The institutions in the state-based model

John Major in 1994 commented that;

*“the European Parliament sees itself as the future democratic focus for the Union. But that is a flawed ambition, because the European Union is an association of States, deriving its basic democratic legitimacy through national Parliaments...it is national parliamentary democracy that confers legitimacy on the European Union.”*¹¹⁸

The Member States are sovereign and stand above the EU and therefore the EU's institutions cannot either be said to exercise sovereignty. However, the state-based model still has some interest in the institutional structure of the EU. The EU consist of 25 co-operating and sovereign participating states which are not subordinated to a common sovereign and it is important to ensure that the EU institutional system is also adequate to the purpose that it has been created to achieve.¹¹⁹

According to this model, the European institutions are meant to be function as tools at the disposals of the member states to achieve the objectives of security, stability and economic progress.¹²⁰ Since the institutions do not have significant independent powers in their own right, they can neither bind the States against their will nor constitute a political society. Instead, they have the position of advisory organs to the Member States and function essentially as agents and facilitators of the collective will of the national governments.¹²¹

A political assembly like the EP, which outwardly resembles a Parliament, should therefore have the task of giving advice, which was also the view of the Bundesverfassungsgericht in the Brunner case, which described the European Parliament “...as the source of supplementary democratic support for the politics of the European Union”¹²².

The people of the Member States via their nationally elected representative bodies instead secure legitimacy, according to the Court, and the European Parliament is seen as a marginal player lacking the quality and attributes of

¹¹⁷ In principle the Court's approach is that the democratic legitimisation of the supranational elements in the EU also stems from the national parliaments. The European Parliament, although directly elected is just 'supporting functions' for the legitimisation of the Union. SOU 1994: 12 p 98-99.

¹¹⁸ John Major, 'Europe: A Future That Works', William and Mary Lecture, Leiden University, September 7th, 1994. <http://www.fco.gov.uk/europe/leiden/fulltext.htm>

¹¹⁹ O. Zetterquist. *A Europe of the Member States or of the Citizens*, p 290.

¹²⁰ *Ibid.*

¹²¹ Neil Nugent, *Governments and Politics in the European Union*, 4th ed p 498.

¹²² “Brunner v. European Union treaty” (1994) 1 C.M.L.R., p.86, §40.

national representative assemblies considered as Parliaments in the full sense of the term.¹²³

As we have seen in chapter two the European Parliament had the function of advisory in relation to the organs of the Member States in the early days of the EU. The development that has taken place of the EP, which also was due to the activities of its own; “the EP was born hungry and frustrated and has developed into a habitual struggler”¹²⁴, is a dangerous development according to this model, since the EP’s increasing independence and powers does not correctly reflect the actual conditions of sovereignty.¹²⁵

Since the main and essential source of legitimacy is the Member States, via its elected bodies, the national parliaments, this view has the certain democratic dilemma that the EU is getting into a “legitimacy trap”; the more it assumes new competencies and exerts them through supranational structures and procedures of decision-making, the less is it able to be regarded as legitimate, simple because its moving away from the sources of this legitimacy – the member state.¹²⁶

The state-based model instead requires, that the most influential organs, that the Council and the European Council, are controlled by the Member States and therefore wants that legislative power remain in the Council. Moreover, this view wants to give that the national parliaments more influence and enhanced control-mechanisms in the EU’s institutions.

The problem with this model is not only the danger of the development of a more independent and supranational European Parliament but also the decision-makings procedures in the Council which take place behind close doors that sometimes makes it impossible to hold individual Ministers responsible for their votes¹²⁷. Furthermore, as long as more policy-areas will only require qualified majority voting instead of unanimously in the Council, Ministers who represent their sovereign Member States can be outvoted. It is clear that, according to this view, it is more suitable with unanimously voting in the Council to secure the sovereignty of the Member States, irrespective of the outvoted states from a majority decision will follow the decisions or not.

¹²³ W. Wessels and U Diedrichs, ‘A New Kind of Parliament- The Evolution of the European Parliament’, European Integration Online Papers (EIoP), at <http://eiop.or.at/eiop/texte/1997-006.htm> p 3.

¹²⁴ Martin Westlake, *A modern guide to the European Parliament*, p 28.

¹²⁵ O. Zetterquist. *A Europe of the Member States or of the Citizens* p 291.

¹²⁶ W. Wessels and U Diedrichs, ‘A New Kind of Parliament- The Evolution of the European Parliament’, p 5.

¹²⁷ Although , according to this model, the Ministers are controlled by the states and a Ministers may never act contrary to the instructions of the elected Parliament. See Thomas Hobbes, *Leviathan*, ch XXIII, p. 167 in O. Zetterquist. *A Europe of the Member States or of the Citizens* p 289.

4.1.1.3 The citizen-based model - a federal Union?

Although the EU falls short of being a state, as statehood is traditionally understood it does display some of the characteristics of a state. Therefore the concept of a state is still of some use helping to promote an understanding of the nature of the EU, and this specially since the continuing development of the integration process will inevitably strengthen the state-like characteristics of the EU.

Since the elements of traditional state-hood are breaking down in the modern world, especially due to the international interdependence between the states no states can claim they are completely *de facto* sovereign¹²⁸ the conceptualising of a state has been changed. In this new concept of state that is evolving, the EU thus has many state-like features.¹²⁹

The theory that uses the state-like features of the EU as basis for conceptualising the Union is closely linked to federal theory.

A federation is considered a state from an international point of view. Power is divided between central independent decision-making institutions on a federal level, and independent regional decision-making institutions on a national level.¹³⁰ The institutions on both levels, established by legal instruments, have the authority to take decisions on laws binding on the legal personalities making up the federation.¹³¹ The national or regional governments have some amount of autonomy, but in conflict with a federal norm the latter is supreme.¹³² The division of power between central and regional levels is specified and protected in a constitutional document and a supreme judicial authority, which has jurisdiction over the legal personalities of the organisation/federation, settles disputes over the division of power. Power is further divided between the levels so that both have responsibilities for important spheres of public policy. Some policy areas that are concerned with the identity, coherence and protections of the system are though primarily the responsibilities of the central level. Such policy areas include foreign affairs, security and defence and the federal level is responsible for the representation of all the entities included in the political society on matters affecting international legal relations with the outside world.¹³³

Other policy areas on federal level concerns the specification and protection of citizen's rights which sometimes means rights that have direct effect in relation to legal subjects at the lower level (e.g. the Bill of Rights in the American Constitution have that effect).

¹²⁸ EU Member States can not even be said to be *de jure* sovereign.

¹²⁹ N Nugent, *Governments and Politics of the European Union*, p 494.

¹³⁰ *Ibid.* p 496.

¹³¹ O. Zetterquist. *A Europe of the Member States or of the Citizens* p 196.

¹³² SOU 1994: 12, p 93 ff.

¹³³ O. Zetterquist, *A Europe of the Member States or of the Citizens*, p 197

A final requirement for a federal state is that it disposes over means of coercion and enforcement of the laws enacted (either internal, external or both).

The character of the EU is often explained in terms of federalism because of its legal structure and divided governance between the EU and the Member States. However the EU cannot be said to be a state or federation or that it will lead to it but it does have some features of federalism¹³⁴.

Power is first of all divided between central decision-making organs and regional decision-making organs, the supranational institutions on European level such as the ECJ, the Commission and the European Parliament being independent institutions from the national governments. The division of power between the levels is also specified in constitutional documents (the treaties) with a judicial supreme authority to settle disputes over the divisions. Furthermore, the legal order of the EU has federal features through the legislative competence, the majority decision in the Council, the existence of the Court and a legal system with supremacy of EC law, which can also have direct effect in the Member States.

Finally, both regional and central levels in the EU have important powers and responsibilities for public policy and the central level is particularly responsible for the economic sphere, although not exclusively.

However, the EU does not have exclusive legal personality in international law. At European level there is still no responsibility for international relations or control over foreign or defence policy and the EU does only have the competence to conclude treaties on matters within the EC Treaty¹³⁵. Furthermore, the EU is not endowed with the institutionalised means of coercion and enforcement.

Analysts that see the EU as a political society of its own, parallel to those in the nation states, and with clearly many federal features, see it as vital to guarantee the rights of the individuals through the common and supranational institutions. Therefore, the required institutional arrangements for a legitimate political society of this kind differ much from that of the state-based view.

4.1.1.4 Legitimacy and the citizen-based model

The citizen-based perspective sees the individual as the most important political actor and the political society shall always be organised so that the rights of the individuals are upheld. The EU and the institutions, which have created a new legal order distinct from the legal order of the Member States, has according to this model an important role, since it can strengthen the

¹³⁴ Federalism is often seen as synonymous with leagues of states where each state has a separate identity in the common nation.

¹³⁵ See Case 22/70 (*Commission v. Council*) AETR (1971) ECR 263.

citizens rights towards the state. Legitimacy, according to this view, rests first upon the citizens of Europe or even a European people, which gradually have developed a kind of European identity as complementary to their national, regional and local orientation.¹³⁶

According to this view, there exists a trusteeship between those who govern and the governed, where the tasks of those who govern is to protect and give effect to the already existing moral rights of the governed. These balancing elements of rights and trust constitute political democracy.¹³⁷

Although this theory, which can be said to be based upon John Lockes ideas of the role of the state, argues that these rights exists as Law of Nature regarding other individuals, in relation to government, they arise only as a result of consent of the individual. According to Locke, this consent of the individuals is a necessary condition for the existence of a legitimate government and forms the basis for a legitimate right for the authorities to have their decrees obeyed.¹³⁸

The ideas of trust and consent means that there must exist permanent institutions, with people working in the institutions and exercising power that are known and that both the legislative and executive power must be appointed by and work under continuous control of the governed, the individuals.¹³⁹ This is necessary in order to ensure that those who govern can be hold responsible for their acts and when trust no longer exists, it must be possible for the governed to dismiss those who exercise power. In a political society today, it means that individuals have the right to choose in free general elections those participating legislative powers and the right to control those who govern, is the most basic guarantee that they do not act against the interest of the society in general and that the government is acting in the interests of all.

4.1.1.5 Power-sharing and guarantee of rights

“Power corrupts; absolute power corrupts absolutely”¹⁴⁰

“The concentration of all powers into the hands of one individual or group must place them in a position to abuse that power and thus to instil fear into the common man.” The principle is founded on Lord Acton’s assumption which seems to square well with the federal or citizen-based model.

¹³⁶ W. Wessels and U. Diedrichs, ‘A New Kind of Parliament- The Evolution of the European Parliament’, p 3.

¹³⁷ O. Zetterquist, *A Europe of the Member States or of the Citizens*, p 292.

¹³⁸ See John Simmond, *On the Edge of Anarchy*, p 5 in O. Zetterquist, *A Europe of the Member States or of the Citizens*, p 292.

¹³⁹ O. Zetterquist, *A Europe of the Member States or of the Citizens*, p 293.

¹⁴⁰ Lord Acton at <http://www.acton.org/about/lordacton/>

The federal model sees the importance of dividing powers in a political society between different institutions independent of one another to avoid that one group, through an institution, uses political power for their own purposes at the expense of the rest. An idea, which is based on the power-sharing and federal view of Montesquieu that has been of significance in the development of federal theory in the USA.

The institutional answer according to this model would therefore be to have different levels of governments with checks and balances between the institutions and with several direct channels in the Community between governing and governed so that as many parts of government as possible get their legitimacy *direct* from the consent of the governed. This would ensure that the trust relationship is not disturbed and that not one institution can receive too much power on its own and abuse that power. It also makes it easier for citizens to influence the government if there are possibilities of direct entry to several institutions at several different levels, than if all power were concentrated in a single institution.¹⁴¹

The principle of trust excludes *indirect*¹⁴² legitimacy that is characteristic of the legislative institution, the Council, despite the fact that the Ministers in the Council are legitimate representatives in their Member States. According to this model, individuals can only delegate limited parts of their political power through an *indirect* consent and the political society do not have the competence to create new political power that goes beyond control of its citizens. This *indirect* legitimacy is only sufficient for limited political cooperation and if progress is going to lead to further integration towards “an ever closer union” the basis that exist today is not enough and will not correspond to the principles of trust.¹⁴³

4.1.1.6 The institutions in the citizen-based model

The citizen-based or federalist view holds that to increase the legitimacy of the EU, the European institutions must be equivalent to their national counterparts, or at least as integration is progressing the institutions will continuously increase their role towards this model. This kind of reasoning ends up in a demand to give the European Parliament in the EU the same powers as those in the Member States, which would mean that the EP should be vested with the sole power to enact EU legislation and maybe with the right of legislative initiative¹⁴⁴.

The reason for that would be that the EP is the only direct elected body in direct relation to the citizens that give them the right to influence and give their consent to the EU system. Through the election of the Parliament the citizens freely express their will and determine in an unfiltered way

¹⁴¹ O. Zetterquist, *A Europe of the Member States or of the Citizens*, p 297.

¹⁴² Not meaning the out-put form of indirect legitimacy.

¹⁴³ O. Zetterquist, *A Europe of the Member States or of the Citizens*, p 299-300 ff.

¹⁴⁴ Although not necessarily the EP need to be given this right.

decision-making in the EU¹⁴⁵. The direct elections that were introduced in 1979 are an essential step forwards in order to shape the EP according to its national counterparts but it must be followed by an increase in its power and competencies and EP's role in EU policies has to be enhanced. For as we have seen the European Parliament still have some limited powers, for example the EP only enjoys veto as regards Commission and Council proposals for new legislation and the power to control only extends to the Commission and does not apply the Council.

4.1.1.7 The Court of Justice - a gradual democratisation of the Union

Not surprisingly, a European constitution would suit the citizen-based model and federal view and serve as a political charter and focus of identification. European values and interests will again force and strengthen the emotional links between the citizens and the EU system.

In this aspect, the European Court of Justice has played an important role as the creator of a constitution or constitutional charter in what has been called a constitution-making process, which means that the Court has shown a tendency to reduce the differences between treaties and constitutions. This process has been achieved through clarifying the legal principles of direct effect, supremacy, fundamental rights and judicial review as included in EC law. The active development of the Court has not only contributed to the development of a Constitution in Europe¹⁴⁶, but also at the same time created a framework for a federal-type structure and boosted the democratisation of the Union. The Court has made clear that the Treaties establish a system of checks and balances based on democratic principles that clearly confers rights to the European citizens¹⁴⁷.

This development was however not the intentions of the originators of the Treaties and shocking though it may seem, the Community was originally never even intended to be a democratic organisation.¹⁴⁸ As the Community began as an international organisation founded on a Treaty between sovereign states, powers were instead concentrated in the hands of the governments of the Member States, which virtually had monopoly on legislative power. The original limited and consultative role of the EP in legislative matters and the strong role of the Council with unanimity required in decision-making were constructed in order to control the transfer

¹⁴⁵ For federalists, the EP should go into a direction of a state-like polity, a parliamentary Europe or even a supranational parliamentary democracy (Duff 1995) and role of the EP would in the long run look like the one in the national parliaments (Laming 1995:117) in W Wessels and U. Diedrichs 'A New Kind of Parliament- The Evolution of the European Parliament', p 3.

¹⁴⁶ F. Mancini, 'The making of a Constitution for Europe', *Common Market Law Review* 26, 1989 p 595-596.

¹⁴⁷ Which also has strengthened the role of the supranational institutions such as the EP and the ECJ itself.

¹⁴⁸ G. F. Mancini and D. T. Keeling, 'Democracy and the European Court of Justice', *Modern Law Review*, March 1994, V 57, No 2, p 177.

of sovereignty within clear limits.¹⁴⁹ However, as the roles that have been given the institutions over the years through the Treaty amendments have changed the character of the EU remarkably, it has been necessary with a process that has gradually allowed for more direct representation and democracy at EU-level.

4.1.1.8 The Court of Justice and the European Parliament

As power and sovereignty gradually were removed from the national parliaments, to the European arena, these powers could not be exclusively placed under the competence of the Council and Commission. Reforms were needed to give the EP, a more active role in the Community's legislative process in order to endow it with democratic legitimacy.¹⁵⁰

The first step to involve the EP in the legislative process was taken through the SEA in 1986 by introducing the *co-operation* procedure. However, already in 1979, the Court declared in its judgment *Roquette Frères v Council*¹⁵¹ that the Council must ask the directly elected EP for its opinion before legislating under certain provision of the Treaty irrespective of the urgency of the matter. The Court expressed it as “the consultation provided for in the Treaty is the means which allows the Parliament to play a [...] part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principles that the people should take part in the exercise of power through the intermediary of a representative assembly”.¹⁵² It is interesting that the Court expresses the “fundamental democratic principle” as one of the arguments that the Court bases its judgement on although there is weak support for this argument in the text of the Treaty. The authority for the principle is to be found as an inherent part of the Community legal order and the principle find its roots in the constitutional traditions of the member states, in natural law and in common heritage of Western civilisation.¹⁵³

Some years later, after the ratification of the SEA and the *co-operation* procedure being in use, the Court expanded these ideas. Its judgement in 1988 concerned the authors of the SEA's reluctance to amend Article 230 TEC, in a way that would give the Parliament the possibility to challenge the acts of other institutions before the Court. In this *Chernobyl*-case, which was preceded by an earlier attempt by the Parliament¹⁵⁴ to be given this possibility, the Court meant that since SEA the EP now had taken the step

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Case 138/79 *Roquette Frères v Council* [1980] ECR 3333.

¹⁵² *Ibid.* at para 33.

¹⁵³ G. F. Mancini, D.T, Keeling, ‘Democracy and the Court of Justice’, *Modern Law Review*, March 1994 No 2 Vol 57, p 179.

¹⁵⁴ In the *Comitology* case, challenged by the EP two years earlier the Court rejected the Parliaments request which it now accepted. See Case 302/87 *Parliament v Council* [1988] ECR 5615.

from its role as a consultative body into the important role it now played in the legislative process. In order to maintain the institutional balance created by the Treaty and amended by the SEA the Parliament should be able to safeguard its newly won prerogatives and therefore it must be given the right to challenge unlawfully adopted measures by the Council or Commission before the ECJ. The reason for it was specially to avoid the Council, choosing as the legal basis for its acts, a provision in the Treaty under which the *co-operation* procedure did not apply, to prevent the Parliament for being involved in the legislative process. If the Parliament was not given the chance to challenge these acts, how could it then ensure its position in the legislative process. The judgement was fiercely debated but despite the critique, it did represent an important step forward, endowing the Community with an improved system of checks and balances based on democratic traditions and hence strengthening its democratic legitimacy. The Maastricht Treaty moreover incorporated the judgement into the new version of Article 230.

The Court itself meant that the fact that the legal order of the Community, where the legislative power is shared between the representative European Parliament and two unelected institutions (Council and Commission) and that the scope of the Parliament's power varies much¹⁵⁵ makes it necessary to have a system with checks and balances. The Community is dependent on the principles of limited powers expressly laid down in Article 4 EC Treaty and the only body that can guarantee that each institution acts within its confined powers is the ECJ. If the Court had denied the Parliament's right to challenge trespasses of other institutions, it would have been its abandoning its duty, to ensure that the law is observed.¹⁵⁶ As the main role of the Court is to guarantee the observance of the Treaties, this procedure can be the most democratic procedure and competence there is within the Community, since the Treaties are the only documents in the EU decided upon a real and solid democratic basis, through the national parliaments or citizens of the Member States.

4.1.1.9 The Court of Justice - safeguarding the rights of the individuals

In a constitutional system, federal-type, democracy is not only about ensuring that the peoples elected play a full role in the law-making process, democracy is also about ensuring and protecting the rights of the individuals. In the Community, the citizens of Europe are involved remarkably in the application of the Treaty by the Community and the Member States. They are the ones that benefit directly from the internal market and the four freedoms from which they profit an unhindered flow of goods, services and capital and can benefit the labour rules on mobility and enjoy social advantages in any country within the Union to which they

¹⁵⁵ From *consultation* procedure to *co-decision* depending on the subject matter of the legislation.

¹⁵⁶ Article 164 TEC, see G. F. Mancini, D.T. Keeling, 'Democracy and the Court of Justice', *Modern Law Review*, March 1994 No 2 Vol 57, 180-181.

move. The Court has though furthermore, in various ways, interpreted the Treaties extensively and included some legal principles and rights to the citizens as comprised in EC law although no written law supports it.

In the case *Costa v. Enel*,¹⁵⁷ the Court first of all explicitly expressed the supremacy of EC law “by creating a Community of unlimited duration, having its own institutions, its own personality [...] and, more particularly, real powers stemming from limitation of sovereignty or a transfer of powers from States to the Community, the Member States have limited their sovereign rights [...] and thus created a body of law which binds both their nationals and themselves”. The Court thus meant that EC law is a constitutional system of law that in a hierarchical order is above the legal systems of the member States.¹⁵⁸

Another important achievement of the Court’s case law, which is an essential feature of all federal systems, is the judicial review of legislation and the possibility for individuals to vindicate their rights before the Court. According to Article 230 TEC, the Court can review the legality of acts of the Council and Commission brought by other institutions, the Member States and or even natural and legal person¹⁵⁹. However, the Treaty does not give the individuals the opportunity to sue a Member States directly in the ECJ for national legislation infringing Community law. All the individuals can do is to invoke the rights conferred on them by Community law before a national Court. This Court may in turn refer the matter the ECJ under Article 234¹⁶⁰, requesting it to give a preliminary ruling on the interpretation of Community law. Although this preliminary ruling procedure seems legally frailer than that of a traditional dual system of federal courts¹⁶¹ and the procedures are dependent of the co-operation and good will of the national courts, the Court has used it successfully and transformed it into a instrument for reviewing compatibility of national legislation with Community law, challenged by individuals.¹⁶² It is today a quite common procedure and the national courts seem to accept the rulings requested in most cases¹⁶³

¹⁵⁷ *Costa v. ENEL* (Case 6/64) [1964] ECR 593, [1964] CMLR 425.

¹⁵⁸ Although disputed, the supremacy clause was accepted by the judiciaries and administrators of both old and new member states, and the reason for it was that the alternative to the clause would have been a rapid erosion of the Community, which not even most custodians of national sovereignty wanted see F. Mancini, ‘The making of a Constitution for Europe’, *Common Market Law Review* 26, 1989 p 600.

¹⁵⁹ For natural and legal person the Court can review only such acts that affect them directly and individually. The Court has moreover not been given the right to review member state law despite the possibility under article 226 EC to monitor national laws for incompatibility with the Treaties and secondary legislation.

¹⁶⁰ If the judgement is not subject to appeal, it must refer it to the ECJ.

¹⁶¹ Since it does not grant direct access to the Court, individuals have no possibility to appeal national judicial decisions to the ECJ.

¹⁶² G. F. Mancini, D.T, Keeling. *Democracy and the Court of Justice*, *Modern Law Review*, March 1994 No 2 Vol 57, p 182.

¹⁶³ Mancini, F. ‘The making of a Constitution for Europe’, *Common Market Law Review*, 26: 595-614, 1989, p 605.

It is moreover necessary that the Community right, the individuals is invoking before the national court, has direct effect in the Member States. Before the famous cases *Van Gend en Loos*¹⁶⁴ and *Van Duyn v. Home Office*¹⁶⁵ only regulations were expressly endowed with the quality of having direct effect, the Treaty itself did not possess it, nor did directives. The Court revolutionised this situation by holding in the case *Van Gend en Loos* that Treaty rules not implemented in time, give individuals the possibility to impose obligations on a Member State if the Treaty provision in question was sufficiently precise, unconditional and could be fulfilled without the need of any further measures. In *Van Duyn v. Home Office* it further attributed *direct effect* to provisions of Directives not yet transposed into the laws of the Member States within the time limit.

The effect of the case *Van Gend en Loos* was that Community law, with its ability to affect the lives of the individuals directly, was taken out of the hands of the politicians and bureaucrats and given it to the people.¹⁶⁶ This has been a great democratising achievement of the Court recognising democracy in the Community as both the right for the people to participate in the law-making function through representative bodies and the ability of individuals to have their rights upheld in judicial proceedings.¹⁶⁷ This possibility of the European citizens is one of the most direct and influential opportunities individuals have to claim their rights, originated from EC law and to effect the development of the integration process.

Another area over which the Court has made great contributions in a federal-like direction concerns the fundamental rights and the achievements of the Court in this area, has certainly enhanced the democratic legitimacy of the Union.¹⁶⁸

The Court's role in strengthening the fundamental and human rights as part of the Treaties was brought up in 1967 when the Constitutional Court in German argued that the Community order, lacking any protection for human rights, had no lawful democratic basis. Therefore, the transfer of power from Germany to the Community could not deprive German citizens the protection they had through their own constitution and hence Community law had to be examined at national level to ensure the compatibility with the German constitutional provisions.¹⁶⁹ Though this would jeopardise the very independence and supremacy of Community law, and through the awareness of a democratic deficit in the Community, that ECJ was obliged

¹⁶⁴ Case 26/62 [1963] E.C.R. 1.

¹⁶⁵ Case 41/74, [1974] E.C.R. 1337.

¹⁶⁶ Case 26/62 [1963] ECR 1, 12.

¹⁶⁷ See G. F. Mancini, D.T. Keeling, Democracy and the Court of Justice, *Modern Law Review*, March 1994 No 2 Vol 57 p 183-184. The Authors also add that although the principle of direct effect was a new concept in Community law and created the unique charter of Community law, it had flourished before as a part of international law.

¹⁶⁸ G. F. Mancini, D.T. Keeling, *Democracy and the Court of Justice*, *Modern Law Review*, March 1994 No 2 Vol 57, p 187.

¹⁶⁹ Mancini F. 'The making of Constitution for Europe', *Common Market Law Review*, 26: 595-614, 1989, at p 610.

to declare that “fundamental rights form an integral part of the general principles of law” which it did in its judgement *Nold*¹⁷⁰ in 1974. The Court argued that the constitutional traditions of the Member States, international treaties and conventions of human rights would serve as inspiration. Ever since the case, the Court has specially used conventions of the Member States as minimum human rights standard in legislative practice of the Community and today EC law thus clearly confers these rights to individuals.¹⁷¹ Today an even greater step is about to be taken with the new Constitution proposals as it contains as special charter for fundamental rights and the rights for European citizens will further be strengthened.

4.1.2 Direct and indirect legitimacy

As we have seen the two different concepts of legitimacy according to the state- and citizen-based model seems to be in accordance with the two models of *direct* and *indirect* legitimacy mentioned in the beginning of this chapter. We will now go back to these normative theories of legitimacy and use them to explain how the democratic legitimacy problem in the EU can be dealt with in the light of the two main lines used to define the European integration project.

4.1.2.1 Direct legitimacy

The idea of direct legitimacy in the EU can be categorized as the federal school of the EU democratic deficit debate and further be the kind of legitimacy necessary according to the citizen-based model.

In the direct legitimacy approach, (“legitimacy by the people”) the starting point of the *common good* would be the *general will of the people*.¹⁷² This legitimacy by the people would justify direct democracy where legislators and executive powers receive their powers through direct elections.¹⁷³ Representative governments would be a necessity and Westminster-type institutions that ensure the visibility and electoral accountability of majoritarian governments would have the strongest claim for legitimacy.¹⁷⁴

The legitimacy of the EU is viewed as directly derived from the degree of appreciation of the EU by the European public and requires a stable and serious “common identity” among the electorate to justify the institutionalised supranational structures of the EU. The common identity is also necessary for the majority rule to be legitimate since people only accept

¹⁷⁰ Case 4/73 [1974] E.C.R. 491, para 13.

¹⁷¹ See Case 60 and 61/84 [1985] E.C.R., 2605, para. 26. Mancini F. ‘The making of Constitution for Europe’, *Common Market Law Review*, 26: 595-614, 1989, at p 612.

¹⁷² Scharpf. F, ‘Problem-Solving Effectiveness and Democratic Accountability in the EU’, MPIfG Working Paper 03/1, February 2003 p 3.

¹⁷³ To make sure that those who govern better fulfil their missions and safeguard the interests and trust of the governed better through direct channels.

¹⁷⁴ Scharpf. F, ‘Problem-Solving Effectiveness and Democratic Accountability’ in the EU, p 4.

the majoritarian principles of democracy within a polity to which they see themselves as belonging.¹⁷⁵

This approach has two institutional models as a solution for legitimacy at the EU level, *the regulatory* and *the parliamentary*. The first, which has been defined as a *regulatory* or *presidential model*, is a functional approach that views the Union as a special purpose organisation, the primary task of which is to address a number of issues over which it can hope to achieve greater efficiency than the Member State acting individually.¹⁷⁶

While that model is less likely to be developed in a multi-national EU consisting of traditionally non-presidential liberal democracies, the parliamentary model seems to be the model, which the EU is gradually evolving towards. The parliamentary model is further dominant in European countries and is the standard reference in reflections on the institutional architecture of the EU.

The parliamentary approach comes from a vision of democratic legitimacy in which institutional arrangements are essential.¹⁷⁷ Parliaments, are because of their representativeness, very important for legitimacy and they must therefore have a decisive say in public policies. Those who want to transform the EU to a continental power, which acquires a range of functions similar to those traditionally enjoyed by the nation states also want a growing importance of the EP and an extension of the rights of the EP in all areas in which the EU is active.¹⁷⁸ The Parliament should also be able to control the operation of the executive in the Union.¹⁷⁹

The last two decades have though been characterised by attempts to inject ever-greater doses of *parliamentarism* into the European institutional system and for this development, the growing involvement of the EP in the legislative process has been an important step together with its role in the appointment of the Commissions as redefined in the Treaty reforms.¹⁸⁰

The problems with this approach have been argued by for example Trevor Hartley, who means that an increased role of the European Parliament and direct democracy at EU-level would not necessarily diminish the democratic deficit and strengthen the legitimacy in the EU, quite the opposite. His arguments refer to the role of the European Parliament in the European

¹⁷⁵ Weiler, 'The Transformation of Europe', *The Constitution of Europe*, p 83.

¹⁷⁶ Dehousse, 'European institutional architecture after Amsterdam: Parliamentary or regulatory structure?' *CML Rev* 35, 1998, p 596.

¹⁷⁷ Compared to the *regulatory model* for which institutional questions are means to achieve certain objectives rather than an end in themselves. Dehousse, 'European institutional architecture after Amsterdam: Parliamentary or regulatory structure?' *CML Rev*, p 598-599.

¹⁷⁸ Which squares well with the federal school and also the citizen-based theory that sees the EU as a supranational political society.

¹⁷⁹ Which would mean that there should be increased accountability of the Commission to the EP. Dehousse, 'European institutional architecture after Amsterdam: Parliamentary or regulatory structure?' *CML Rev* 35, 1998, p 598.

¹⁸⁰ *Ibid* p. 598-599

elections and specially the results of the elections. It is a dilemma that the citizens of Europe, instead of voting on persons and parties they would normally support in the EP, choose to vote on parties and persons that contradict with the views of the politicians on the national arena, either government or national parliaments, to express their dissatisfaction with the ruling national governments. Hartley means that this consequence, that those who shall be held responsible for their measures taken are in fact protected in the European structure and others, that were not involved will be held responsible, is the dilemma with the democratic deficit in the EU.¹⁸¹

This problem or dilemma was particularly shown in the latest election 2004 where the tendency was the same all over Europe. In UK, for example the labour party lost a huge percentage of their voters due to the fact that they disapproved with the Iraq war and the British government in general and the same pattern can be found in other EU countries.

This makes the EP unaffected from public opinion and whatever they do or do not, it will not affect their chances of being re-elected. According to Hartley thus makes that the EP fails to provide a mechanism for popular opinion to influence Community policy.¹⁸²

Hartley further means that this problem will not solely be solved by giving the European Parliament greater powers specially by making the Commission responsible to the EP and these facts must also be considered when speculating what the influence of a more powerful European Parliament will have in the EU decision-making procedures. As long as the people do not see the EP as an important role-player and legislator in the Union and instead uses it to show dissatisfaction with their national governments it might not be suitable to increase its powers and the idea of direct democracy and legitimacy in the Community does not simply work.¹⁸³

4.1.2.2 Indirect legitimacy

Indirect legitimacy or (“legitimacy for the people”)¹⁸⁴ views the legitimacy of the EU as domestically or nationally authorised by the popular authority of member states rather than the European citizens. The view sees the legitimisation of the EU coming out of an agreement between Member States as well as permission from the citizens of these states to participate in the Union.¹⁸⁵ We recognise these arguments from the state-based model that uses the indirect legitimacy approach as claim for legitimacy.

¹⁸¹ Hartley, *Constitutional Problems in the European Union* p 19.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Scharpf, *Governing in Europe: Effective and Democratic*, Oxford University Press, 1999.

¹⁸⁵ A. Muntean, ‘The European Parliament’s Political Legitimacy and the Commission’s “Misleading Management”: Towards a “Parliamentarian” European Union?’, *EioP* Vol.4 (2000) No 5 p 2-3.

Nevertheless, this theory is criticised from a democratic point of view. The problem can be exemplified by the arguments that indirect legitimacy in the Community is first achieved through the fact that the Council's members are responsible to their respective parliaments. A clear evidence of this would be the fact that unanimously for decision-making was required in the Council and that therefore no Member State could be voted out.¹⁸⁶ Over the years and through the Treaty reforms, the right to take decision through majority voting has progressively increased. Of course, this development of increasing the majority voting is necessary if the Union shall be able to unify the now 25 members of the EU in various questions in the Council, but it also makes the control of the Council via national parliaments and governments disappear. The collective will in the indirect form is not active for the final supranational decisions on the EU level. This indirect status of the legitimacy of the Union seen on the context of its direct impact on the European citizens therefore has basis for being unstable and does not give positive grounds for further improvements in EU legitimacy.

Furthermore, the fact that the decisions making in the Council are taken behind close doors and not as the direct legitimacy approach with open parliamentary debates and voting, furthermore worsens the case.¹⁸⁷

Those who argue in defence of indirect legitimacy say that the basis for it is that the elected representatives in the national parliaments can legitimately select their representatives in the Council, because of the consent expressed by the electorate. Nevertheless, this can be questioned as an accurate appointment of these representatives. Since the Ministers in the Council receives their mandate from their governments which in turn receives its mandate from some members of the national parliaments, there is a possibility that the other part of that parliament¹⁸⁸, lack a voice and vote in the Council as they have in the national parliament. Therefore, the state does not represent the whole of its citizens in the Council in the same way that a national parliament does since it does not receives its mandate from the whole of the parliament, but only a part of it.¹⁸⁹

Moreover, this indirect legitimacy leads to a favourable environment for indirect accountability and lack of collective responsibility of the supranational institutions of the EU to the European electorate¹⁹⁰ that can be described with two examples.

¹⁸⁶ The right to veto in the Council was given the Member states because of the Luxembourg crises in 1966 when the French EU sceptical President, Charles de Gaulle, required the right to veto to secure the Member State influence over decision-making.

¹⁸⁷ Although it says in the EC Treaty that the outcome and explanation of a vote must be in the public domain, such an arrangement is far from the procedures in a traditional legislature, article 207(3).

¹⁸⁸ Sometimes the majority of representatives of the Member States citizens in the national parliaments.

¹⁸⁹ O. Zetterquist, *A Europe of the Member States or of the Citizens*, p 319 not 1309.

¹⁹⁰ Dehousse, *European institutional architecture after Amsterdam: Parliamentary or regulatory structure?* CML Rev 35, 1998.

First, there is the problem that the public does not have confidence in the most important legislator in the Union the, Council. There are many reason for this, there is no permanent composition in the Council since its members are constantly changing according to the various policy-areas the decisions are taken within. The appointment of the ministers in the Council is moreover an internal matter for the Member States and there is therefore not a clear relation of responsibility between European citizens and their legislators in the Council.¹⁹¹

Secondly, since there is no direct link between the governed and those who govern as there are in representative democracy, those who govern can not take responsibility for the measures they adopted. It is instead common that others, e.g. member states politicians, judges and officials must take the blame in their Member States for unpopular decisions taken at European level.¹⁹² As those persons were never involved in taking the measures in question, this has the consequence that the originators of the measures are protected from political reactions which certainly reduces the political control mechanism¹⁹³.

4.2 Is a European demos necessary?

The institutional dimension of the democratic deficit must seem to be the most frequent object of criticism and of reform proposals as solutions to the EU's legitimacy problems. Nevertheless, there are other important aspect that need to be mentioned. Currently missing prerequisites for democracy in the EU also includes a European people or a "European demos" according to some writers,¹⁹⁴ who argue that a common European identity among the citizens is a necessary requirement for a legitimate political society in the Community.

However, the question of whether a European democracy should be founded on a European people is not clear and the different views that exist in literature can be divided into two separate theories, which can be called either "thick" demos or "thin" demos.

4.2.1 Thick demos concept

The discussion about a European people as necessary carrier of European democracy have been stressed specially by some German lawyers, who believe that a community must be united by a number of factors before it can acquire a political dimension. For example according to Fritz Scharpf, the democratic deficits remains because, given the historical, linguistic,

¹⁹¹ O. Zetterquist, *A Europe of the Member States or of the Citizens*, Zet 316.

¹⁹² *Ibid.* p 317.

¹⁹³ *Ibid.* p 317 not 1304.

¹⁹⁴ See further e.g. Hix, S. 2002, '*Linking National Politics to Europe*', Erikson, E.O. and Fossum, J, 2000. *Democracy in the European Union. Integration through deliberation?*, 2000, Beetham, D. and Lord, C. 1998, '*Legitimacy and the European Union*'.

cultural, ethnic and institutional diversity of its Member States, there is no question that the Union is very far from having achieved a thick collective identity.¹⁹⁵ This concept sees a united demos with common values as a necessary pre-condition for a legitimate democratic political society and must exist before the people can be united in a state, since it is the existing people that institute the legal order.

Since there is no such thick demos as long as this social, spiritual, political homogeneity and collective identity can not be found¹⁹⁶ in the Union and the citizens in Europe will continue to cling to their used and familiar values and symbols, it will be nearly impossible to develop a European identity. The demos will instead be found in each nation state through separate demos of the nation states¹⁹⁷ and therefore, the democratic legitimacy of the EU shall be found in the national system, based on the national demos.

In addition, the German Constitutional Court's in the Brunner case argued that the democracy problems in the Union do not merely lie in the institutional balance, representation or accountability between the institutions. Democracy is also rule by the demos, the people; *das Volk*, if no demos exists no democracy exist. Since no demos exist in Europe, no more power can be transferred to the EU without being unlawful and ineffectual and claims by European institutions to have competence to settle their own competence, *Kompetenz-Kompetenz*, would be illegal and not valid in German law.¹⁹⁸ As we can understand from the Brunner case, the Court used the lack of demos as an argument of ensuring the powers of the national parliaments.

Hartley is one of the writers who argues in line with the German Court and uses the thick demos concept against the use of direct democracy principles, majoritarian governments and decision-making at European level since this democracy principles presupposes that members of the electorate think of other voters in some sense as being "one of us". The reasons for his arguments however differ though from that of the Court. He means that the voters shall have a sense of group loyalty and belonging and share the same values and attitudes. Only if the voters feel that way, a minority will be willing to give in to the majority on certain points of disagreement. Both sides then start from the same point and can reason with one another and it is possible that the minority of today will become the future's majority¹⁹⁹. This will not apply if the electorate can be split into divisions with

¹⁹⁵ Scharpf 'Governing in Europe- Effective and Democratic?', Oxford University Press, 1999, in Hergenhan, J, Governance in Europe after Nice, "Governance in Europe – will EU catch up with its cities?", EUROCITIES Magazines n 13, spring 2001.

¹⁹⁶ Anne, Peters, A Plea for a European Semi-Parliamentary and Semi-Consociational Democracy, European Integration Online Papers, EiOP, Vol 7 (2003) N 3.

¹⁹⁷ Through their national Parliaments as representatives of the existing national demos. W. Wessels and U Diedrichs, 'A New Kind of Parliament- The Evolution of the European Parliament', European Integration *Online Papers* (EiOP) Vol 1 (1997) No 6, p. 4.

¹⁹⁸ See further BvR 2134/92 at para [1994] 1 CMLR 57

¹⁹⁹ Which means that they are aware of that the majority party can loose and the minority party win next time.

completely different values, which can occur if there is ethnic or religious differences that are regarded so important, by the persons concerned.²⁰⁰ Members of the opposing group will then be considered as “them” and not “us”. Democracy will no longer work, if the system becomes “tribalized” in this way. Ethnic minority parties can never become the government because they can never win a majority of votes and they will always be a permanent opposition and continuously call for a separate state where they can constitute the majority and influence policy-making.²⁰¹ These ideas can be applied in the Union since the EU is made up by a number of separate nations that only have a limited sense of being European. The differences of fundamental values and religious values are obvious in the multicultural Europe and the citizens of other European countries are considered for the citizens in each Member State to be “them” and not “us”.

There are however many weaknesses in the thick demos-theory which not only mentions the difficulties of identifying identities due to the lack of a European consensus on what the decisive characteristics or criteria of such a collective body would have to be. Moreover, there are also divergent philosophies about what makes a people a people throughout Europe, which also makes it even more complicated to define.²⁰²

The risk is further when one requires a kind of homogeneity that it does not stay at a reasonable level and can lead to requirements that would be discriminating and extreme. Also considering the member states widespread and mixed population in this multicultural era is makes the idea almost impossible to imply and demand.

4.2.2 Thin demos concept

The opposite of the strong idea is the “thin” idea, which can be defined as a legal definition of who belongs to which legal order. The legitimacy of a legal order thus requires that it should be based on the community, existing in the demos of society. With a thin position, this legal system institutes the demos²⁰³ and it would be unrealistic to ask for a already existing European people as a pre-condition of European democracy when such a phenomena is often a product of deliberate nation-building.²⁰⁴

As MacCormick suggest we should not overstress the requirements of culture, common ethnicity or language as essentially constitutive of a demos required for a democratic government. Rather he suggests a kind of

²⁰⁰ Hartely *Constitutional Problems in the European Union* p 20.

²⁰¹ *Ibid.*

²⁰² Peters, A Plea for a European Semi-Parliamentary and Semi-Consociational Democracy, European Integration Online Papers, EiOP, Vol 7 (2003) N 3, at <http://eiop.or.at/eiop/texte/2003-003a.htm>

²⁰³ O. Zetterquist, *A Europe of the Member States or of the Citizens* p 312.

²⁰⁴ Peters, A., *A Plea for a European Semi-Parliamentary and Semi-Consociational Democracy*, European Integration Online Papers, EiOP, Vol 7 (2003) N 3.

individual-centred or *civic* demos that would be identified by the relationship of individuals to common institutions of a civic rather than an ethnic-cultural character.²⁰⁵ He further agrees with the ideas of Habermas that this civic identity is constituted by a constitutional patriotism or *Verfassungspatriotismus*. Through the knowledge of the *common good*, people seek for a political society that can regulate the *common good* and their ideas in a legal form.²⁰⁶ This means that there is a common loyalty to a common constitutional order, despite the differences in language, ethnic background etc which the people are willing to give up for the sake of a common participation in the lawfully constituted polity or Union.²⁰⁷ MacCormick also argues that if there is something as a lawfully constituted entity of Europe it is also possible that we can orient ourselves towards this and see it as something of ours or rather, a common possession and achievement of the peoples of the states that participate in that entity. This can furthermore create a basis of recognising each other as fellow members in the same community.²⁰⁸

In that respect, this theory seems to be a better one to reflect the progress of the Union today with a new constitution on the agenda since it emphasizes the civic demos as first to be united through a Constitution.

MacCormick finally means that there does already exist enough conditions today for some thin sense of community or unifying factor in the Community through the awareness among the people in Europe that European integration is the pre-condition for the original imperatives of peace and decent prosperity, principles on which the Community was established upon. At least there exist grounds for seeking identification and something with which to identify, beyond state, state-nationality and state loyalty. This demos in the Union is at least enough to make democracy possible if democracy is what we want.²⁰⁹

²⁰⁵ MacCormick, 'Democracy, Subsidiarity and Citizenship in the European Commonwealth', *Law and Philosophy* 16:331-356 1997, p 341

²⁰⁶ O. Zetterquist, *A Europe of the Member States or of the Citizens* p 312.

²⁰⁷ MacCormick, 'Democracy, Subsidiarity and Citizenship in the European Commonwealth', *Law and Philosophy* 16:331-356 1997 p 341.

²⁰⁸ *Ibid.* p 342.

²⁰⁹ *Ibid.*

4.3 A missing “Market square”?

As mentioned in previous chapter some writers criticize the fact that there does not yet exist a European public space that would shape the will and opinion of the population. Nor does there exist a common sense of belonging to one polity expressed in such tongue as common press and other media, shared political parties and a common political debate in Europe which is a necessary requirement for democracy.²¹⁰ It is moreover empirically shown in the elections to the EP, that in each state the elections are concerned primarily with nation-state politics, and there are no European parties with European manifestos.²¹¹

The reasons for this lack of a public space is that the European system of governance does not invite for an open discussion of European politics and for many people seems to far away from influence and interest of the citizen. Moreover, the decision-making procedures are anything but open and accessible to the public and hard to understand and the lack of transparency in the decision-making procedures in the Community, makes it harder to hold those governing responsible for their acts. This concern, which is also recognised to be one of the elements of the critique of the democratic deficit, will lead to increasing lack of public support and interest for the Union as a whole.

We shall here briefly look into these matters although they do not necessarily presents an answer to the questions put forward in this essay. It is also interesting to analyse whether more parliamentary influence in the Union can improve and create grounds for a so-called “Market square”.

4.3.1 Transparency

It has always been important with openness and objectivity in the political process. A continuing important part of modern democracy is the exchange of opinions in political debates where the citizens can argue for their point of views, openly and on the basis of fact. Open decision-making also has the advantage that it is much more difficult to exercise powers of decision in an unfair way and allow for unchecked abuse of power when they are subject to direct public examination by the governed, by their representatives and other organs like the mass media.²¹² This process is moreover important for the legitimacy of majority decision and the decisions taken in that process are likely to reflect the interests of the citizens better than those would without such a discussion.²¹³

²¹⁰ As expressed by the German Court in the Brunner case. BvR 2134/92 and [1994] 1 CMLR 57

²¹¹ *Ibid.*

²¹² A, Follesdal ‘Democracy and the European Union: Challenges’, in Follesdal, A., and Koslowski, P, eds 1997: *Democracy and the European Union*, Studies in Economics Ethics and Philosophy. Berlin: Springer-Verlag.

²¹³ O. Zetterquist, *A Europe of the Member States or of the Citizens* p 321.

Though it is a necessary pre-condition for a legitimate and accountable government that its structure is transparent to the citizens it is a problem for the Union that the decision-making procedures and present political system are not always open to the public in the same way as it is in the national systems which raises doubts about its legitimacy. The main legislator in the EU, the Council, often takes decisions behind close doors without showing how their different votes were divided between the Ministers. The Ministers actions and decisions cannot be checked or controlled in a satisfactory way until maybe afterwards through the European Court of Justice. In addition, the decision-making procedures in the Commission are complex and difficult to understand for the public.

There has been and still is a pressure to improve the openness of decision-making processes and it is considered that a proper treatment of the problem, is likely to some extent diminish the democratic deficit.²¹⁴ This pressure in favour of greater transparency has also concerned the EP and has appear to a large part due to scepticism to the ability of citizens to acquire influence via representative democracy because of the limited powers of the EP. Since the Parliaments is the only institution that hold open sessions and debates available for the citizenry and the institution traditionally seen as capable of engendering popular belief, it has been a further argument for increasing its powers since it suffered from the outset from being a marginal player in the system.²¹⁵

4.3.1.1 Transparency in Treaty Provisions

Transparency is a value whose status and importance within EU law have increased considerably since the time of the Maastricht Treaty.²¹⁶ Before the Maastricht Treaty, a principle of secrecy prevailed in relation to European institutions with the exception of the European Parliament.²¹⁷

The matter of transparency concerns different features, such as holding the meetings in public, the provision of information, and the right of access to documents. The latter right forms the most developed legal dimension of the principles of transparency in the EU context and is set out in the Treaties. The right is now enshrined in the Chapter of Fundamental rights but the legal entitlement was first included in article 254 EC by the Amsterdam Treaty. A related amendment introduced at Amsterdam was moreover the rhetorical declaration in Article 1 TEU that all EU decisions are to be taken “as open as possible”.

²¹⁴ Dehousse, ‘European institutional architecture after Amsterdam: Parliamentary or regulatory structure?’ *CML Rev* 35, 1998, p 615-616.

²¹⁵ Lodge, J. 1996, ‘The European Parliament’ in Svien S. Andersen and Kjell A . Eliassen (eds), *The European Union: How Democratic is it?* London: Sage Publications, pp 187-214, p 189 f.

²¹⁶ P. Craig and G. de Búrca, *EU law, text, cases and materials*, 3 ed, p 394.

²¹⁷ Dehousse, ‘European institutional architecture after Amsterdam: Parliamentary or regulatory structure?’ *CML Rev* 35, 1998, p 617.

The legislative foundation for the right of access to information of EP, Council and Commission documents is established in Article 255²¹⁸, which has been held to lack direct effect.²¹⁹ Although the “principles and conditions”, under which the documents are made accessible, remain to be defined the provisions are enshrined in the Treaty which gives no possibility for far-reaching exceptions and neither Article 255(3) which provide each institution to “elaborate its own rules of procedures regarding access to documents” opens the door to many restrictions.²²⁰ Furthermore, when the Council acts in legislative capacity, the results of votes, explanations of votes and statements attached are to be made public, a rule granted with Treaty status.²²¹

Now the rule can be said to be public access instead of confidentiality as it was in the post-Maastricht period.

Still there remain important limits to the principle of openness. Although committees that assist the Commission and the Council or the European agencies do not enjoy formal decision-making powers, the decisions adopted by the European institutions are influenced by their deliberations, especially when complex scientific assessments are required. Therefore, it would be important for interested parties to be granted access to the documents that are consulted in this context in order to be able to make representations to the component bodies.²²² Another problem is the fact that documents, rather than information, is the reference for requests which enables the institutions to reject requests in which the relevant documents are not clearly identified.²²³

4.3.2 Public support and engagement

There are empirical evidence that shows non-plausible results of acceptability of the EU and its institutions over the years. The process of ratification of the Maastricht Treaty and other evidence demonstrate serious difficulties in the public’s appreciation of the EU activities.

In Sweden the EU sceptic-parties and politicians have made huge progress over the last years which seems to be a result of the wide-spread EU-scepticism among the people of Sweden. It was particularly shown in the referendum of the EU monetary system last year and this year’s election to the European Parliament.

²¹⁸ P. Craig and G. de Búrca, *EU law, text, cases and materials* p 394.

²¹⁹ See Case t-191/99, *Petrie v. Commission* [2001] ECR I-nyr.

²²⁰ Dehousse, ‘European institutional architecture after Amsterdam: Parliamentary or regulatory structure?’ *CML Rev* 35, 1998, p 615-616.

²²¹ Article 207 TEC.

²²² Dehousse, Joerges, Majone, Snyder and Everson, ‘Europe after 1992: New regulatory strategies’, (*Florence: EUI Working Paper LAW 92/31*, 1992), 29-31.

²²³ Dehousse, ‘European institutional architecture after Amsterdam: Parliamentary or regulatory structure?’ *CML Rev* 35, 1998 p 620.

The problem seem to be the same all over Europe. Citizens interest of European issues is generally low and participation in European elections is often dictated by national issues alone. The catastrophically low electoral turnouts in 1999 and 2004 EP elections indeed showed this apathy among the people of Europe.

The problem with weak public support for the institutions and legal system is not necessarily the same as an illegitimate system. According to some writers, the low turnout in elections for example does not show that the government are illegitimate in the sense that there is no trust relationship or that the governed are not acting according to the laws in a correct manner. It only shows that the individuals are not engaged in the political process and lack interest for it, something that they can never be forced to do. As Pat Cox, former President of the European Parliament commented the electoral turn out over the elections in 1999; *“Turnout across Europe was higher than in the last US presidential election, and I don’t hear people questioning the legitimacy of the presidency of the United States”*²²⁴.

Nevertheless, one can question if a comparison with the US system is a reasonable defence for the lack of public support. The system in the US also consists of a congress and a President which are both elected by the people. That the congress does not receive many votes does not necessarily matter much since the President or government, is elected separately. Congressional and European elections are more alike though. In both cases voters can change the Parliament but not the government – which for most people is the main incentive to cast a vote.²²⁵ It is not clear and it can only be a speculative idea that the interest in European elections would increase if the Commission could be voted out or even if there was a European President to vote for.²²⁶ There might be problems with a system as this as long as the people of Europe have a national outlook and it is not likely that they would vote on a foreigner.

Although it is recognised that public support is not a necessary ground for legitimacy in the Union, the lack of it does create problems for the Union. A system that lacks public support is first of all vulnerable for criticism. There is also a danger that the institutions are able to make illegitimate institutional changes without the public reacting against it since the citizen do not care and are aware of it. In that case, power can be concentrated to organs with less public control and influence which stands outside effective control, for example the European Council²²⁷.

The lack of public support can also have the consequence that the institutions do not need to meet the same demands and citizens requests as

²²⁴ Pat Cox, in BBC, ‘The EU’s democratic challenge’, by Stephan Mulvey, BBC News Online, at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/3224666.stm>

²²⁵ *Ibid.*

²²⁶ *Ibid.* To some this idea might seem to federalist though.

²²⁷ Although the decisions in the EC are merely of political character.

they do within the state. The result is that things might go wrong within the institutions as it did with the Commission under Santer in 1999.

Another problem might be that there will never emerge certain loyalty towards the Union among the citizens. Profound empirical assessments of the legitimacy sources demonstrate that the people of the European do have a multi-tiered sense of belonging beginning in order of importance, -town, region, country and the EU, the 'European tier' remains the weakest.²²⁸ EU citizens see themselves more as nationals of their member state than citizens of the EU and the Member State will always find it easier to mobilise public support also because of the physical closer connection the people have to the State than the Union in Brussels. Also the politics in the Member States are often of greater interest of the citizens than the politics at European level.

4.4 Political legitimacy and the European Parliament

It is generally recognised the Parliaments in traditional liberal democratic theories, are the distinguishing feature for democratic legitimacy and therefore, it is interesting to look at the legitimacy of the European Parliament as such. Since the EP is the only directly elected institution in the EU, an analyse of the legitimacy of the EP also requires an assessment of the relationship between the EP and European electorate and further to analyse the degree of insufficient representation and effectiveness of this institution.

It is through empirical evidence demonstrated that the EP is considered to be the most reliable and legitimate institution of the EU. This result is supported by Eurobarometer surveys, which showed that European citizens were and still are in favour of the EP and 81% in 2004 stated that the EP is very important in the life of European Union and meant that the EP should play a more important role in the EU system.²²⁹ The explanation of the desire to see the EP more powerful is due to the fact the European public consider EP as the most reliable of institutions and 54% in 2004 say they rely on the European Parliament and 37 % were convinced that it defended their interest (in Sweden only 22%). But there also, comparison to national parliaments is important since only 35% of the EU15 and 16% of the NMS²³⁰ countries held trust in their national parliaments. Furthermore, 43 % (including the NMS) described themselves as satisfied with democracy in the EU, against 39 % (EU15²³¹) and 27 % (NMS) dissatisfied. But there, it

²²⁸ Beetham, D. and Lord, C. 1998, *'Legitimacy and the European Union'*. in A. Muntean, The European Parliament's Political Legitimacy and the Commission's "Misleading Management": Towards a "Parliamentarian" European Union?, *EioP* Vol.4 (2000) No 5 p 3.

²²⁹ Eurobarometer 61 spring 2004.

²³⁰ New Member States from May 2004.

²³¹ EU countries pre enlargement in May 2004.

is interesting to see that only 50 % of the people showed satisfaction with the democracy in their home country, (only 24 % regarding the NMS).

Although, these attitudes only demonstrate the attitudes of Europeans towards the EP in terms of reliability, not necessarily legitimacy and effectiveness it is interesting to see that these attitudes are more or less the same to national institutions.

As the EP do not enjoy its legitimacy through public attitudes, its political legitimacy can instead be seen as originated from the institutional authority of a Parliament and the role it plays in the legislative procedures, exercising its powers. The public expresses its loyalty and support for EP activities through the traditional institutional belief that the Parliament is a necessary and classic institution of representative democracy.²³² In other words, the EP's legitimacy is based on established rules (Treaties within the EU system) and these rules' content are justifiable through the beliefs and acceptance of the European public based on *habitual institutional beliefs*²³³ and the belief that the EP is "doing the right things".²³⁴

Legitimacy is further enhanced by the positive view of European citizens towards the EP²³⁵ but despite that, electoral results and voting attitudes is evidence of a failure of the EP to play a fully legitimising role in the EU. EP elections are for voters more about expressing their preferences about national parties. Voters seem to rank domestic and national issues more importantly than European issues which lead to the "second-order" character of the elections.²³⁶ In all EU Member States there are significant lower levels of turnout in EP elections than in national elections with an average turnout from 63% in 1979, 58.8% in 1989 and 45.7% in 2004²³⁷ in European elections. The general decline of EP electoral turnout and ignorance of EP elections over the years is a main evidence for the second-order character.²³⁸ The reason for this is likely that the activities of the EP remain largely unknown and are viewed as less relevant than those at national levels. Moreover, voters see the parties and candidates of the EP as those who speak about national problems and not enough about Europe and

²³² Hix, *The Political System of the European Union*, New York St Martin's Press, 1999.

²³³ I.e. generally unquestioned acceptance of supranational authority by subordinates based on 'parliamentarian habits' originated from national systems of the EU member states. See R. Barker, *Political Legitimacy and the State*. Oxford: Clarendon 1990.

²³⁴ A. Muntean, The European Parliament's Political Legitimacy and the Commission's "Misleading Management": Towards a "Parliamentarian" European Union?, *EioP* Vol.4 (2000) No 5 p 6.

²³⁵ As described above the trust in the EP and sees it as a reliable institution does enhance legitimacy although it is not necessary for it.

²³⁶ Beetham and Lord, *Legitimacy and the European Union*, 1998, London: Macmillan and van der Eijk and Franklin (1996) Choosing Europe: *The European Electorate and National Politics in the Face of the Union*, Ann Arbor, University of Michigan Press.

²³⁷ European elections, at www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/turnout_1...

²³⁸ European Election Results (Strasbourg : European Parliament), European Parliament UK Office –Election facts at: <http://www.europarl.org.uk/guide/Gelectionfacts.htm>

instead they select among national parties based on national issues.²³⁹ This is a serious concern for the EP legitimacy questioning if its power as a supranational institution is sufficient.

Another area of concern is the system of representation in the Parliament. Some scholars argue that the EP badly represents its electorate, and that there are both political and social essences of representation that are not adequately presented in the EP.²⁴⁰ Political representation can be seen through the activities of the MEPs as members of different political parties where there seems to be lacking a linkage between the public preferences and the constitutional decisions in the EP, due to second-order character of the EP elections with few parties that offers clear alternatives for the future development of the EU.²⁴¹ Social representation, which outlines the different social groups represented in a legislative body, is argued to be weak and not adequately representing the large number of European societies within the EU.²⁴²

The weaknesses of both political and social representation, seems to be caused by the absence of a common electoral system at the EU level. If there was a universal electoral system of the EP, the European public would have a clear view on how the MEPs are elected and how they govern. This would lead to an increased knowledge of the EP's structure and effectiveness and would provide a more legitimate basis for a further increase of the legislative powers of the EP.²⁴³

4.4.1 Parliament and Commission - accountability

Accept from the EP's legislative role, its legitimacy also depends on its relation to other institutions in terms of accountability and responsibility. We will now more specifically look into the relationship between the EP and the Commission on this matter.

The redistribution of power between the Council and the EP under the Treaty amendments might be considered as the first step to diminish the democratic deficit in the EU,²⁴⁴ by reducing the gap of responsibility between these institutions. However, another important aspect is clearly the Commission being accountable and responsible to the EP. That the government is responsible before the parliament is essential in any

²³⁹ A. Moravcsik, *In Defense of the "Democratic Deficit" Reassessing Legitimacy in the European Union*, Centre for European Studies Working Paper No. 92 p 2, 2003

²⁴⁰ M. Marsh and B. Wessels, 'Territorial Representation' and R.S. Katz 'Representational Roles', in *European Journal of Political Research* 32 (2) 1997: 227-41 and 211-226.

²⁴¹ M. Marsh and P. Norris, 'Political Representation in the European Parliament' in *EJPR* 32 1997 p 153-64.

²⁴² P. Norris and M. Franklin, 'Social Representation' in *EJPR* 32 1997 p 185-210.

²⁴³ P. Dunleavy, S. Hix and H. Margetts, *Counting on Europe: Proportional Representation and the June 1999 Elections to the European Parliament*. London: LSE Public Policy Group Press 1999.

²⁴⁴ M. Westlake, *A Modern Guide to the European Parliament*, London; New York: Pinter.

parliamentary system and allows the voters to dismiss rulers with whom they are dissatisfied.²⁴⁵

Although the Commission fulfils many traditional “government” functions²⁴⁶ it is not a separate executive authority in the EU system of governance since it shares governmental responsibilities with the Council. Therefore, a common democratic scheme in which government is accountable to the parliament cannot be applied to the EU system. Instead, the Commission is accountable to the EP as a *collegium*.²⁴⁷

Ever since the ECSC Treaty the EP has had the power to censure the Commission, require its resignation and the right to participate in the Commission’s appointment. The Amsterdam Treaty improved the process of the appointments of the Commission President and stated that the Parliament had to be consulted on the nomination of the President of the Commission and its approval obtained, Article 214.²⁴⁸ The President was also given enhanced status in the appointment procedure of the commissioners, Article 214(2)²⁴⁹ and it was set out in Article 219 that the Commission should work under the political guidance of the President. The Nice Treaty modified the selection process of the Commission and Commission President further so that from February 2003 forward the President of the Commission is now selected by the European Council using QMV and then approved by the EP. Afterwards the Council in conjunction with the newly elected Commission President will select the rest of the Commissioners, once again to be approved by the EP. This increases the role of the EP in the selection and approval process of both the Commission President and the other Commission members.²⁵⁰

All these modifications must be seen as a further step towards a *parliamentary* system although some may still argue that the Commission still is “the most unaccountable government in the world”²⁵¹ and that the

²⁴⁵ Dehousse, ‘European institutional architecture after Amsterdam: Parliamentary or regulatory structure?’ *CML Rev* 35, 1998, p 609.

²⁴⁶ Traditionally allocated to the government machinery: policy impulsion, drafting of legislation, monitoring of its implementation. See Dehousse. *Ibid*.

²⁴⁷ See. J.H. Matlary, ‘Democratic Deficit and the Role of the Commission’, in A Follesdal and P. Koslowski, *Democracy and the European Union*, Berlin: New York: Springer, 1998.

²⁴⁸ See S.Hix, ‘Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?’, in K. Neunreither and A. Wiener (eds.), *European Integration After Amsterdam*, p 95.

²⁴⁹ Although he/she is not given disciplinary powers, the threat of non-renewal it can help to impose a certain discipline on unruly colleagues, which was not always possible before. Dehousse, ‘European institutional architecture after Amsterdam: Parliamentary or regulatory structure?’ *CML Rev* 35, 1998, p 611-612.

²⁵⁰ Kreppel, Amie, *Necessary but not sufficient: Understanding the impact of treaty reform on the internal development of the European Parliament*, *Journal of European Public Policy* 10:6 December 2003, p 890.

²⁵¹ J.H.H Weiler, ‘European Democracy and Its Critique’, *West European Politics*, 18(3): 4-39, 1995.

only real argument in favour of the Commission's accountability is the EP's right to demand the Commission's resignation.

The EP has though both through its increased legislative and administrative powers, through the censure motion²⁵² and the resignation of the Commission in 1999 increased the ability to control and push the Commission to act more effectively. The EP's victory in the censure against the Commission was an evidence for a pre 1999 Commission that represented a non-transparent and non-accountable institution in the EU, but more importantly showed the new and increased accountability of the Commission to the EP. The crises also showed that the EP could keep the Commissioners responsible for their actions and further that the EP had obtained the possibility to investigate, scrutinize and force the resignation of the Commission. Finally, the EP could hold an individual Commissioner responsible for misleading activities and fraud that was important for the forthcoming environment of the new Commission.

²⁵² Article 201 TEC.

5 A constitution for Europe

5.1 Introduction

In December 2001, the Laeken European Council laid the institutional foundations for the next Treaty reform and established the Convention. A Convention that began its deliberations in March 2002 and ever since worked on different questions such as competence between the EU and Member States, simplification of the Union Treaties, the status to be given the Charter of Rights, the possibility of a European Constitution, and moves to enhance democracy, efficiency and transparency in the EU.

The outcome of the Convention resulted in the final draft for a Constitutional Treaty for Europe, which was agreed upon during in June this year and recently signed by the Heads of States and Governments in Rome. Although not ratified by the European citizens²⁵³ yet, this document, which is both symbolically and legally important, thus marks a new stage of the European integration.

The Constitution consists of four main parts. Part I includes the initial objectives of the Union, the main provisions of the constitutional nature and describes the powers, decision-making procedures and institutions of the Union. Part II, includes the Charter of Fundamental Rights, part III, presents the updated provisions from the current Treaties on policies and detailed provisions on how the institutions work. Part IV finally sets out the general and final provisions, including the procedures for adopting and reviewing the Constitution.²⁵⁴ The Constitution can be said to merge the three “pillars”²⁵⁵ and explicitly gives the Union legal personality.

The most important amendments that effect the European Parliament, national parliaments and the so-called democratic life of the Union will now be outlined.

5.1.1 The role of the European Parliament

The reforms concerning the EP focus on the creation of a new system of distributing seats between the Member States and on extending the Parliament’s powers in the Union’s decision-making procedures. The Constitution sets out the most important rules concerning the EP in one

²⁵³ Which will be done either through referendums or through a vote in the national parliaments, the latter alternative is the one Sweden most likely will use.

²⁵⁴ See further Constitution CIG 86/04 and Summary of the Constitution adopted by the European Council in Brussels on 17/18 June 2004, (The European Parliament delegation to the Convention PE 337.106).

²⁵⁵ Although special procedures are maintained in the field of foreign policy , security and defence.

single article to enhance visibility, (Article I-19)²⁵⁶. The EP will jointly with the Council of Ministers, enact legislation and exercises budgetary functions, as well as functions of political control and consultation. The use of co-decision procedures that has been rebaptised as “the ordinary legislative procedure”²⁵⁷ and has been extended to a large number of articles. That means that the Parliament will now be the co-legislator with the Council in almost all cases.²⁵⁸

The EP will moreover continue to elect the President of the Commission on proposal from the European Council (adopted by QMV) which will have to take into account the results of the elections and the EP will the also approve the Commission as a whole.²⁵⁹

The Constitution does not set out new rules for the procedures in the European elections and the elections are still based on direct universal suffrage in free and secret ballot and allow the citizens to elect their representatives for a five-year term²⁶⁰. The article also maintains the legal basis that says that the elections must be organised in accordance with uniform procedures in all Member States.

5.1.2 The role of the national parliaments

The proposal for a Constitution in large accepted the proposal put forward by the Working Group regarding the role and responsibilities of the national parliaments.

First of all the national parliaments will be directly involved in monitoring the application of the principle of subsidiarity, i.e. state when the Union should take action on a matter or leave it to the Member State. The Constitution proposes to strengthen the application of the principle and the active role of the Member States through increased information and transparency to the national parliaments²⁶¹ and the “early warning system” allowing the national parliaments to deliver a reasoned opinion if they consider that the subsidiarity principle has not been complied with²⁶². Two protocols are also attached to the Constitution, one protocol regarding the

²⁵⁶ Just as in case with the other institutions, the Constitutions in whole is a simplification or previous system and the provisions are set out as visible and clear as possible.

²⁵⁷ See article I-33 and III-302.

²⁵⁸ “*Outcome of the Convention*”, the European institutions, the European Parliament, p 1-4 at http://europa.eu.int/scadplus/european_convention/parliament_en.htm

²⁵⁹ Article I-19, see Constitution CIG 86/04 and Summary of the Constitution adopted by the European Council in Brussels on 17/18 June 2004, the European Parliament delegation to the Convention PE 337.106.

²⁶⁰ Article 232.

²⁶¹ Forwarding Commission proposal etc, see “*Eu-decision making procedures, The subsidiarity principle and the role of the national parliaments*”, Outcome of the European Convention, at: http://europa.eu.int/scadplus/european_convention/subsidiarity_en.htm

²⁶² The reason behind this role of the national parliaments was to establish political control for the national parliaments to ensure that the Commission did not take initiatives that should not be taken on European level but at the same time ensure that the Commission’s right of initiative was not slowed down or slow down the legislative process.

role of the national parliaments in the decision-making process and one on the application of the principle of subsidiarity. The latter one specifies the procedures of the parliaments right to ensure the application of the principle and describes how the national parliaments should notify the EU institutions and their own government. After reviewing the Commission proposal, they can under certain circumstances force the Commission to change the proposal. The national parliaments can, in the last instance, bring the matter to the Court of Justice on grounds of infringement of the principle by a legislative act. This forces the Commission to send all of its legislative proposals and amended proposals to the national parliaments and the Union's legislator, the Council. Also legislative resolutions of the EP and positions of the Council should be sent to the national parliaments. In certain urgent matters when Commission cannot conduct public consultations it must give reasons for the decisions.²⁶³ This not only has the effect that national parliaments can affect the principle as such but also gives them more insight in the legislative procedures which they more easily can effect and influence through other channels.

In the protocol on the role of the national parliaments in decision-making procedures, the need of greater transparency and more effective document transmission has been recognised. The protocol sets out several measures that obligates the Commission and the Council to pass on information to the national parliaments, regarding their work programme and other legislative planning or political strategy acts, that they submit to the EP. Also proposals to the EP shall be sent to the national parliaments and the agendas of the meetings in the Council.

5.1.3 Other provisions

Some things can be mentioned regarding the other institutions and some especially important new measure.

The European Council now becomes a full institution with a permanent Presidency with limited powers, elected by QMV of its members for a term of two and a half years. Consensus will still be the general rule for adopting decisions. The European Council continues to deal with political priorities and do not exercise legislative functions.²⁶⁴

The Presidency of the Council of Ministers will still be based on the principle of equal rotation but now on a system of "team" presidency defined by a decision of the European Council.

The Commission's power of legislative initiative is clearly restated. It will maintain with one commissioner per Member State at least until 2014 when the number of commissioners will be reduced to two-thirds of the number of

²⁶³ See "Eu-decision making procedures, The subsidiarity principle and the role of the national parliaments", Outcome of the European Convention, p 2

at:http://europa.eu.int/scadplus/european_convention/subsidiarity_en.htm

²⁶⁴ Article I-20

the Member States. The Commissioners will be chosen based on equal rotation among the member states. The role of the President, elected by the EP, will be reinforced. It will include the appointment of Commissioners, the allocation of portfolios and the right to request resignation of a Commissioner.

The European Court of Justice's competence will be wider, especially in areas of freedom, security, and justice and some aspects of foreign policy. There is also provision for a degree of individual access to the Court²⁶⁵. The Constitution will also guarantee better protection of the individuals rights by the inclusion of a charter of fundamental rights.

Several articles also includes provisions to increase the transparency of the decision-making procedures. This included that Council proceedings, when exercising legislative functions shall be open to the public. National parliaments will be informed about all new initiative from the Commission.

5.1.4 Democracy and legitimacy in the constitution for Europe

The "democratic life" of the Union is covered as Title V of the Constitution. The articles specially sets out the principles of democratic equality, representative democracy, participatory democracy, transparency, access to documents, the European Ombudsman etc. This is the first time the democratic foundations of the Union are set out in the Constitution. The principles of democratic equality and representative democracy do not confer new rights on European citizens but just confirms the principles corresponding to the spirit of the Treaties. The citizens are according to this article directly represented through the EP and through the national governments with representatives in the European Council and the Council that are accountable to national parliaments.²⁶⁶

The article therefore sees the principles of democracy fulfilled through both indirect and direct representation as complementary to each other within the EU system.

The important principle of participatory democracy sets out the possibility with at least one million signatures obtained from a number of Member States to be sent to the Commission inviting it to take a legislative initiative, if that initiative is compatible with the Constitution.²⁶⁷ The same article also mentions the requirements for the institutions to maintain an open transparent and regular dialogue with representatives associations and civil society and to carry out broad consultations with parties concerned.²⁶⁸

²⁶⁵ Any natural or legal person will be given the opportunity to institute proceedings against regulatory acts that are of direct concern to him or she and that do not entail implementation measures Article III-270.

²⁶⁶ Article I-45.

²⁶⁷ Article I-46.4

²⁶⁸ Article I-46.2 and 3.

6 Analysis

6.1 Democracy and legitimacy in the EU

The European cooperation within the framework of the EU has continuously expanded over the years, both geographically and materially. It now plays an even more important role on the global, European and national arena. From originally being an international organisation with limited powers and influences, the organisation has transformed into an economic, political and social Union. The institutional structure contains a mixture of supranational and traditional intergovernmental aspects, which makes it difficult to define the EU in political and constitutional terms. The Union has gradually adopted federal characteristics but despite that, it has not developed into a federation or super-state, as state-hood is traditionally understood in international law. The development in a federal direction has been the result of the many Treaty amendments over the years, which has, strengthened and expanded the powers and competencies of the supranational institutions in legislative, executive and judicial areas. The integration process has further deepened due to the active role of the European Court of Justice, which has interpreted many important legal principles, such as the supremacy-clause that makes EC law a constitutional system of law, which, in a hierarchical order, stands above the legal systems of the member States. All together, this proves the fact that the Member States in reality have transferred parts of their sovereignty for the benefit of the supranational institutions in the Union.

The motive behind this transfer of powers has been the political and economic profits of cooperating with other state in the form of the European Union. Nevertheless, those aspects are not the only ones. According to Article 6 TEU; “*the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*”. This provision, that the Union is based upon democratic principles, has also been confirmed by the ECJ in its ruling. Though this principles have put pressure on the Member States of the EU and on new Member States to comply with the principles of respect of human rights and a democratic governance, preferably *parliamentarian* democracy, the EU itself has ironically not being able to live up to the democratic principles it has established. One can even question if the EU would qualify for membership of the Union.

The EU’s democratic deficits are many and concerns many different aspects, due to the many views on what makes an ideal democratic system and what kind of democracy that is necessary for the EU. Although most theories and arguments are based on the assumption that the operation of the EU must be judged by the same criteria, which, are applied to nation states, one can question if that is really a suitable comparison since the Union clearly is not a state and never will be.

What still can justify a comparison with a state or a federation, is the fact that the EU, in less than fifty years, has evolved from an intergovernmental Treaty to and increasingly unified entity with many features of a state; territory, currency, central bank, executive, legislature, Court and soon armed forces.

Nevertheless, as the German Constitutional Court held, the Community falls short of a state-hood and in many ways resembles a Union of States. The German Court argued that the Treaties are international agreements among sovereign states, which never surrendered their powers to resign the Union. Compared to nation states the EU has less control over its territorial area and fewer powers of implementation. The Community also lacks the use of coercion and enforcement, which is defining characteristics of the state in classical international theory. These elements instead justify a comparison with a confederal structure.

These two views of what the EU can be compared against is in accordance with the two main lines discussed in literature concerning the purpose and goals of the integration process. We can here see a clear distinction between those who are positive to a further integration and want to see a future enhanced role of the EU supranational institutions towards a federal Union (citizen-based model) and those who are more negative to further integration and instead want to ensure the sovereignty of the Member States (state-based model).

The right way of viewing the Union might lie somewhere in between, since the EU cannot be said to be completely in accordance with either models. It is a well know fact that the EU has both supranational and inter-governmental aspects and there are different levels of governing within the complex structure of the Union. Much research on the EU's democratic deficit therefore sees the EU as a *sui generis* entity instead. However, if we do not judge the structure of the EU in a systematic comparison but just see it as a unique entity, there is a risk for assertions made in vacuum or rarely tested and there is a risk that the EU might not even compared or criticized since there is nothing to be compared to. Without judging, the Union against any preferences and just say it is a *sui generis* organization is neither desirable nor wanted. Therefore, it is appropriate to use the two perspectives as guidance for defining the democratic legitimacy problems of the EU and to understand the logic behind democratic deficit critique.

6.1.1 Citizen-based model

The view of the citizen-based theory leads us to a certain group of arguments of problems with the democratic deficit. These arguments include the lack of accountability in the EU and the problem that the Community is unresponsive to democratic pressure since the government (the Commission and the Council) cannot be changed either through the EP elections or

through any other possibility for the citizens to directly influence as in the traditional parliamentary democracy.

The citizen-based theory wants democracy at European level and will never be satisfied with an institutional system, which is based on indirect legitimacy. Indirect trust and indirect protection of rights increases the risk that uncontrollable institutions in the EU will abuse their power and no longer exercise for the best of all, but instead will fall victim to special interests. For example, the procedures in the Council are often secret and inaccessible and it is hard to hold the Minister accountable. Also the negotiations in the European Council when new Treaties in the EU are discussed are a problem since the Heads of States discuss and agree the Treaties behind close doors and let national interests confront one another before they present what they have agreed upon, to the parliaments as “take it or leave it proposals”.

Instead, there must be several direct channels in order to satisfy the principle of trust. This means that the EU must satisfy the same demands and the same institutional arrangements for direct legitimacy as the state, which would bring the EU closer to its citizens.

As the EP is the only institution directly authorised by the European electorate with a possibility to legislate, an increase of the EP's effectiveness through democratic activity will help to eliminate the democratic deficit in the EU and strengthen the democratic legitimacy. This means that the EP should be given the same powers as parliaments in the Member States and vested with power of legislative initiative²⁶⁹ and maybe with the sole power to enact EU legislation.

Although it is true that the EP still has less powers over the content of legislation than do national parliaments and its right is merely a veto right, the Treaty amendments over the years have given the EP more legislative powers, increased its influence as a supranational legislator, and have furthermore, changed the role of the Council²⁷⁰. The reduction and simplification of the legislative procedures, has eliminated the co-operation procedure for the benefit of the co-decision procedure with the possibility of a third reading on many new areas which has put the EP on a more equal footing with the Council.

Also by increasing the power of the EP against the Commission, the parliamentary influence has considerably increased in the appointment of Commissioners and Commission President. Article 214(2) requires the nomination of the ‘President designate’ to be approved by the EP and since Nice, the Council thereafter, in conjunction with the newly elected

²⁶⁹ Although one can question this idea since it will make it difficult for the Commission to fulfil its main task as “*guardian of the Treaties*” - this responsibility of the Commission is also in the interest if the citizen-based and federal theory since it brings the integration process further.

²⁷⁰ This is no longer a dominant actor in the EU.

President, will select the rest of the Commissioners, once again to be approved by the EP. This has increased the role of the EP in the selection and approval process of both the Commission President and the other Commission members. The recent discussion about the appointment of the new Commission, which forced the Commission President's to back down on his choice of Commissioners in the face of criticism from the EU's parliament, has been the first demonstration of this new competence that has surely boosted democracy in the EU. Some commentators have described it as "*the European Parliament woke up to find it had lost its milk teeth, and had grown from a much-patronised talking shop into a genuine European institution*"²⁷¹. The amendments in Treaty provisions over the years, has also increased the EP's power towards the Commission with a more intensive investiture procedure, which was specially demonstrated through the resignation of the Commission in 1999. The increase in the Commission's accountability to the EP has stabilised the Commission-Parliament activities and created procedures that are more effective. This role of the EP towards the Commission has also strengthened the political legitimacy of the EP and has demonstrated that the European political system is evolving towards a parliamentary model²⁷² of supranational governance, which also seems appropriate since the EU member states have traditionally experienced the parliamentary structure within their own national political system.

Nevertheless, despite the Treaty amendments, the EP's powers are under some circumstances, still weak. With the co-decision procedure, the EP can practically only accept or reject the proposal. Although, it seems as if the EP has good chances at getting its amendments included in the final regulation or directive, some might say that these changes were minor and the ones the Council was willing to accept. The EP does also not have the right to initiate laws. Furthermore, the Council, with only indirect legitimacy, still holds its strong position in the Community. Since the citizen-based view also is dependent on a solid system of checks and balances it is important to ensure that the Council do not accumulates too much power and it must be more efficiently controlled.

Therefore, some further possible changes to the legitimacy problems on the EU according to this model can be mentioned.

That part of the legislative power that now lies in the indirectly appointed and rotating Council ought to be replaced by a construction that better reflects the principle of trust and directness. The proposal according to the citizen-based model would be to increase to powers of the EP in different ways. One suggestion might be that EP, representing the citizens, could be given full legislative powers shared with the Council as a second chamber representing the member states, where the EP could represent political currents organized through and within European parties. Alternatively, the

²⁷¹ <http://news.bbc.co.uk/1/hi/world/europe/3960595.stm>

²⁷² A model which strives to make the EU more effective and stable through a legitimate and workable Parliament and a accountable and responsible Commission.

EP would be given real legislative powers of its own and instead the Council could be given the right to veto Parliament decisions, as opposite to today's situation. In addition, the Commission and its procedures for appointment could be changed and there could be the election and control of the Commission as a European type of government, where the Commission still would need the approval of the EP. Another suggestion is to give the EP the possibilities to check the Council and maybe a solution would be to have a permanent body in the Council which can be outvoted or and even elected by the EP or, the EP could be given the possibility to dismiss the Council²⁷³, as it can with the Commission. All these suggestions would better accord with the trust principle of the citizen-model than the present structure in the Union and would make sure that those who govern can be hold responsible for their acts and outvoted if they do not act for the best of the all and serve the *common good*.

According to the citizen-based theory democracy is not only about ensuring that the peoples elected play a full role in the law-making process, democracy is also about ensuring and protecting the rights of the individuals. In the EU today, many of the decisions and regulations in the Union concerns right for individuals and through the principle of direct effect confer rights upon the citizens directly. On areas within the first pillar the citizens have continuously been given more rights through the internal market and the four freedoms (freedom for goods, labour, services and capital). In this aspect, the case law of the European Court of Justice has been the most striking contribution conferring rights upon the EU citizens by including many important legal principles as part of EC law. This development has moreover contributed to a constitution-making of the Treaties and strengthened the federal characteristics of the Community.

As the citizens-based model also requires, for democratic governance, a system founded on checks and balances and on the principle of limited government, the institutional balance between the institutions in the Community is of utmost importance. By protecting the position of the EP through ensuring the law is observed, the Court has also by its case law undoubtedly made a significant contribution to enhancing democracy in the Community.

There was of course the risk that this active development of the Court was not wanted, at least it was not the intentions of the originators of the Treaty. Nevertheless as the Community's character has remarkably changed over the years through the Treaty amendments and more power has been transferred to Brussels, it has been a necessary process to guarantee the democratic principles at EU level, above all to ensure the rights of the individuals and the abuse of power of an uncontrollable elite. These aspects can be worthy the Court's abdication from the task entrusted to it by the founding father. As Mancini and Keeling express it: "*The risks are there*

²⁷³ Only if the Council was a permanent assembly.

but they must be faced. If Europe is not to grow as a democratic organism that which will be left for us will no longer be Europe.”²⁷⁴

6.1.2 State-based model

The state-based model is very different from the citizen-based since it argues that the institutional democratic legitimacy is achieved by the fact that the Member States, which are all democratic states, enjoy political legitimacy. As long as the organs in the EU are ultimately controlled by the Member States, institutional legitimacy at the European level is of secondary interest, since the Union’s institutions lack independent political power in relation to the Member States.

The democratic deficit according to this theory is caused by the sometimes limited influence of the national parliaments and Member States at EU level. For example, the increasing use of the QMV-voting creates problem in terms of accountability according to this theory. Instead, the veto power of the Member States is very important to guarantee the control of the Member States at EU level.

This view does not want to enhance the powers of the EP, quite the opposite it wants to make it to a marginal player and diminish the supranational powers of the Union. The most important players in the EU are instead the national parliaments, which also best represent the Member States. However, in the EU today, the main channels of communication between the EU and the Member States are the national governments, which control the direction of Community decision-making. The authority of the national governments and their Ministers in the Council is based on the indirect legitimacy there that these Ministers are accountable to their respective parliaments, which are responsible to their electorate. Therefore, the intergovernmental institutions such as the Council and the European Council shall further remain powerful²⁷⁵.

However, since the Member states’ actually lost or transferred powers through the integration process in some areas, such loss must somehow be compensated, as the parliamentary control of the Member States is no longer guaranteed to the same extent. The German Court brought up this problem of this theory in the Brunner-case and hold that a minimum requirement for the supranational aspects of the integration process, is that the development in the EU is predictable for the national parliaments and

²⁷⁴ G. F. Mancini, D.T, Keeling. *Democracy and the Court of Justice*, Modern Law Review, March 1994 No 2 Vol 57, p 190. The Author Federico Mancini is judge at the ECJ and David T. Keeling is Legal Secretary at the ECJ.

²⁷⁵ It is though hard to find an indirect legitimacy of a traditional kind in the Community and the arguments of representation and legitimacy in the Member States seems more to be an expression of defending their own positions rather than that of the electorate, the individuals.

that the Community only can function within the structures these parliaments have accepted.

The problem with this theory is not only the increasingly use of majority voting in the decision-making procedures which makes the control of the Council via national parliaments and governments disappear. The problem with indirect legitimacy in the Union is also the fact that the decisions in the Council are taken behind close doors and not as the parliamentary with open debates and voting which worsen the case and makes it hard to hold and individual Minister responsible for his/her national parliament.

The way to enhance the legitimacy and diminish these problems of the indirect approach might instead be to enhance the influence of the national parliaments. As we saw in chapter two, the Working Group on national Parliaments contributed with certain recommendations on provisions and amendments to be included in the Constitution proposals that strengthen the role of the national parliaments. Most of the contributions were included in the draft for a European Constitution.

Although these proposals were surely in line with the state-based model, it is ironic that the reason for these new initiatives was to “*strengthen the democratic legitimacy of the Union and bring it closer to its citizens*”²⁷⁶, when a strengthening role of the national parliaments, quite the opposite, brings the Union closer its Member States and not its citizens.

The proposals put forward will however make it easier for the national parliaments to receive knowledge of the procedures and legislative measures that are taken already at a pre-legislative phase, which makes it possible to influence their governments and the Ministers in the Council more effectively. It will also be possible to use their ways of lobbying more easily and the inter-parliamentary co-operation with e.g COSAC will be improved. This would increase the indirect legitimacy and ensure the member states influence. Not at least through the principle of subsidiarity, National Parliaments can control which areas that are going to be subject to EU legislation. As the German Court expressed it, the Union does not have its own Kompetenz-Kompetenz and the Member States remain “Master of the Treaties”.

Though the institutional reforms suggested by the Working group and considered in the Constitution would be very useful for the national parliaments role in EU decision-making and influence, national parliaments themselves have an own responsibility as well. The realisation of their value also depends on their internal organisation and the way they handle European politics. Even without certain institutional modifications, parliaments can increase their influence in the European decision-making and by this not meaning only their possibility of controlling the Ministers in the Council by giving them a strict mandate. There are still other ways to influence. Parliaments can be involved in the realisation of the national

²⁷⁶ CONV 353/02, p 2.

point of view that will be defended in the Council, contacts can be made with the EP, and Members of the national parliament can become part of contacts with the networks where the European legislation is being prepared. Parliaments can also try to keep an eye on the broad outlines of different measures and reflect on policy choices in long term. They can moreover influence the set of the agenda and on the base of national problems urge the EU to take action. It is moreover important that the parliaments are prepared to integrate the European politics in their daily activities and to communicate this to the people. European integration has changed the political reality in the Member States enormously, in this new context the national parliaments thus have a role to play. It is important that parliaments take up this role and really uses all these possibilities to influence European politics. Not only is this necessary because of the impact European politics have in their own domains and policy areas but also to ensure enough parliamentary influence at European level and to increase the democratic legitimacy of the European system.

6.1.3 Demos

The two ideas of a “thick” and a “thin” demos concept in the Union have been widely discussed and the lack of a European demos has been an argument against the possibility to have a democratic political society in the Union. The idea that the Union will not be a political society without demos leads us to a point where either there exist demos in the EU or in the Member-States, which means that legitimacy lays either in the Member States or in the Union.

According to the German Court, there is not enough thick demos for there to be a real popular will to control the Union and hence a opportunity for real democracy. The demos can instead be found in each nation state through separate demos of the nation states and the democratic legitimacy of the Union can therefore be found in the national system, based on the national demos. However, one can surely question the thick demos concept and the Court’s arguments in the multicultural Europe of today since it would be most likely too difficult to ever achieve such demos when it does not even exist in all the nation states due to the diversity of people and cultures. Other problems with this approach is that it would be hard to find a correct definition of what kind of people would be the prerequisite for a European demos as there are different interpretations of what makes people a people.

Looking at the structure of the Union and the establishment of the Union today it is rather the individual-centred, thin demos that exist than the socially and cultural defined demos. The internal market principles of free movement in the Community makes it impossible for the Member States to use the nationality criteria, since the rights on the internal market are individual rights and no discrimination or exception based on nationality will be allowed. The rights and principles established are instead applicable to all citizens in the Union irrespective of which Member State they come from and originally, one of the reason with the Community, was to

eliminate such barriers as nationalism. When we do not have a national, cultural or social criterion for citizens and demos as the in the Union, there will neither be the problem of “them against us”, as argued by Trevor Hartley as a reason for not being able to establish a democratic political society at the European level. Instead, everyone is a citizen of the Union and has the same rights and sense of belonging. The idea of thin demos will also support the diversity among people, which is in line with the strong protection of rights according to the citizen-based model.

As MacCormick argues, it would be more adequate to require a kind of individual-centred or *civic* demos in the Union identified by a common loyalty to a common constitutional order. With a new Constitution about to be ratified, this better reflect the progress of the Union today, since it points out the *civic* demos to be united through a Constitution. As MacCormick moreover means, there is enough conditions today for a thin demos at EU-level if we want to make democracy possible, through the awareness among the European citizens that European integration is the pre-condition for the original imperatives of peace and decent prosperity, principles on which the Community was established upon.²⁷⁷

6.1.4 Transparency and public support

Though it is a necessary pre-condition for a legitimate system of governance that its structure is transparent to the citizens it is a problem for the Union that the decision-making procedures and present political system are not always open to the public in the same way as it is in the nation state. To avoid an unchecked abuse of power in the Community it must be possible with direct public examination by the people and other organs like the mass media, which can only be obtained through more openness in the political process.

Despite that transparency and openness in the decision-making procedures have increased considerably through the Treaty amendments, there are still problems with the lack of transparency of the EU system as a whole. Better access to documents for national parliaments is necessary to make sure that they can influence and participate in the decision-making processes and moreover, to control the Ministers in the Council (by being able to instruct them before the meetings in the Council and by holding them accountable afterwards²⁷⁸). The pressure in favour of greater transparency also demands a stronger role to the EP since it is the only institution that hold open sessions and debates available for the citizenry and the sort of institution traditionally seen as capable of creating popular belief. The EP must also be given better access to documents so it can use its full capacity in the decision-making procedures.

²⁷⁷ MacCormick, *Democracy, Subsidiarity and Citizenship in the European Commonwealth*, Law and Philosophy 16:331-356 1997, p 342

²⁷⁸ National Parliaments must be given information of how their different votes were divided between the Ministers.

The EU's decision-making system is also still too remote from ordinary people, who cannot understand its complexities and its difficult legal texts. Although the EU is trying to overcome this through simpler legislation and better public information and by giving people's organisations a greater say in European policy-making, it is not yet a sufficient improvement to reach out to the European citizens. Therefore, the lack of transparency has also been one of the reasons behind the lack of public support in the EU. The secrecy and vagueness in the decision-making procedures makes the interest for EU policy-making less interesting for the public and many people are losing confidence in a poorly understood system to deliver the policies that they want which creates further apathy for European politics among the citizens. As the lack of public support does not automatically mean lack of EU legitimacy, it is a huge problem for the Union.

If the people of Europe do not believe in the integration project and if we do not start to listen to their voices the Union will never be able to continue the integration process since the people will simply reject, in referendums, such constitutional or Treaty provisions that require the people's approval. Furthermore, if the Member States continue to transfer more policy areas to EU-level without the people's consent it will just create an even angrier electorate. The time might come when Europe is ready for a further integration step and a move towards a federal Union, but to make that development possible, it is necessary to listen to the people's voices.

To win the confidence and engagement of the European public, the Union and its institutions must show better conduct of their work and must spread out among the public what EU actually is, stand for and does. This responsibility to inform to citizens and to convince them of the advantages with the integration lies in the hands of the politicians at both European and national level and they must start to take this widespread ignorance and apathy among the electorate seriously.

In this aspect, the single greatest failure of the EU, is the failure of the European Parliament to acquire any hold over the public opinion. The European Parliament itself is hardly representative of the feelings, hopes and desires of EU citizens. Political scientists have identified European elections as "secondary elections", usually dictated by national issues alone and with lower turnouts than national elections. The catastrophically low electoral turnout in 2004 indeed showed this apathy among the people of Europe. One of the reasons for this problem is the fact that despite the significant increased influence of the EP after the Treaty reforms, the powers of the EP simply do not cover many areas and more important, do not enough cover areas which can interest the citizenry. Another problem is the fact that there are no parties in the government of the EU²⁷⁹, and no party can therefore be responsible for government policy, which is normally the main incentive to cast a vote in parliamentary elections.

²⁷⁹ This would be the Commission, which is not a party government.

The EP indeed has a great responsibility shaping itself into a Parliament with a clear party system, a uniform electorate system and make sure that the people knows what the EP does and stand for. Since the EP is the institutions in the Union that are closest to the people it is moreover likely that the EP has the possibility to create that “Market square” that would be so important for the public and social legitimacy in the Union. Otherwise public apathy, ignorance and indifference in EU affairs, will continue to contribute towards further constraint for EU integration.

6.2 A future Europe of the Member States or of the citizens?

The European Union, since the original Economic Coal and Steel Communities, has transformed into a supranational organisation with strong constitutional and federal elements. The current system and legal order of the Union has developed into a complex system, hard to comprehend. The need for a simplified Treaty and a revision of the complicated European order led to the establishment of a European Constitution, which was recently signed in Rome. Although not yet ratified, which makes discussion about this documents’ future role hypothetical, it is worth mentioning the possible effects of the new provisions. Especially those who concern the role of the European Parliaments and the national parliaments in order to enhance the Union’s democratic legitimacy and what further might tell us what type of European cooperation we are approaching for the future Europe.

Concerning the role of the EP, this document clearly gives the EP many new competences and its role in decision-making procedures has surely been enhanced. The EP now becomes the co-legislator with the Council, as a main rule²⁸⁰, and it will jointly with the Council, enact legislation and exercises budgetary functions. Its supervisory powers are further strengthened and it will continue to elect the President²⁸¹ on proposal from the European Council and will approve the Commissioners. These measures mean more parliamentarism in the EU’s structure of governance and an increase of the supranational features in the Union.

The fact that even more decisions in the Council will be taken with the majority rule is another indicator of the Union’s approach to a more citizen-based union. Another important aspect is that, the citizen for the first time can get involved directly in the process through the participatory democracy principle, which gives the citizens the possibility to initiate the drafting of European legislation, Article I-46.4. Although one can question this principle’s likelihood, since it seems impossible to get 1 million signatures from people in a number of Member States, it does have a big symbolic importance for direct democracy and representation at EU-level.

²⁸⁰ Through “the ordinary legislative procedure”.

²⁸¹ A President that decides the allocation of portfolios and has the right to request resignation of a Commissioner.

The inclusion of a charter on fundamental rights in the Constitution, which before only had the status of a political declaration now becomes legally binding and give individuals a much stronger direct protection of their rights. In addition, the competencies of the Court will be wider, especially in areas of freedom, security, and justice and some aspects of foreign policy and there is provision for a degree of individual access to the Court²⁸². These new measures with further jurisdictional guarantees through a stronger judicial authority, with direct access for individuals and a stronger protection of fundamental rights of the citizens, squares very well with the federal and citizens-based view and furthermore confirm the Courts' earlier rulings and development of EC law.

The Constitution also contains a certain chapter for the "democratic life" of the Union where the principles of democratic equality, representative democracy, participatory democracy and transparency and access to documents are set out as the democratic foundations of the Union²⁸³. Furthermore, the Constitution clarifies the distribution of competencies and creates more simple legal instruments, which aims to bring citizens closer to Community institutions. This possibilities for the individuals through direct participatory channels and democracy at EU-level, makes the Constitution square well with the citizen-based model and we would be approaching us a more federal Europe or a Europe of the Citizens.

However, at the same time, the role of the EP is strengthened and many other aspects imply a future "Europe of the Citizens", the national parliaments are getting more involved in the process. It was already clear in the process leading to the Constitution that the role of the national parliaments had to be enhanced in the decision-making procedures and the reason for it was that the indirect legitimacy, which the decision-making procedures in the Council is based upon, was not sufficient and worked imperfectly. The national parliaments will therefore, be involved in the application of the principle of subsidiarity and through the "early warning system" deliver a reasoned opinion if they consider that the principle has not been complied with. This forces the Commission to send all of its legislative proposals and amended proposals to the national parliament and the Council, which certainly gives the national parliaments more insight in the legislative procedures, which they then can better influence through other channels. Furthermore, by the use of a Convention as a method for further revisions of the Constitution that will be standard institutional practice, national parliaments are given the possibility to be involved and represented in the pre-Treaties phase. To give the national parliaments more influence

²⁸² Any natural or legal person will be given the opportunity to institute proceedings against regulatory acts that are of direct concern to him or she and that do not entail implementation measures Article III-270.

²⁸³ Although they are not new rights on the European citizens, they confirm the European Court's earlier rulings, that the EU is founded on democratic principles as inherent in the Treaties.

according to the Constitution proposal squares well with the state-based model.

What is moreover interesting is that Article, I-45 in the chapter concerning the “democratic life” of the Union, explicitly says that the citizens are directly represented through the European Parliament and through the national governments with representatives in the European Council and the Council which are accountable to national parliaments. This means that this democracy at EU level is based on both indirect and direct representation, which means both indirect and direct legitimacy as complementary to each other within the EU system. This means that the legitimacy problems in the Union should find a solution in a mixture of the ideas of the state-based and citizen-based model according to the Constitution.

Although the new proposal for a Constitution marks a new facet in the European integration process, and to some seem like a further step towards a federal Europe, it is hard to say that EU is clearly transforming into a federal state with its own Constitution or will remain a forum for intergovernmental co-operation based on the Treaties.

In a legal perspective, we have already past the line for keeping the Union at a Treaty level. At least according to the ECJ itself, the Treaties have been constitutionalised through the Court of Justice’s case law in a way that surely puts the Union’s legal system on a scale for its own and independent from the ones on the Member States and even superior in some cases. However, problems remain of redefining the political boundaries of the EU. It is an open question whether the necessary shift in public loyalty to such a redefined boundary has occurred. Most likely it has not and never will for the Member States are not willing to surrender their power and sovereignty in the way that such a system would require, either through the establishment of a Constitution or through any other way. The completion of the integration process is furthermore not necessarily a desirable goal. The progress is completely depending on the will of the Member States and a completion of such a dynamic Union will not be an easy task to carry out. Therefore, the fact remains that the EU is a unique construction of international co-operation between states with clear constitutional features, and with both intergovernmental and supranational powers, and both confederal and federal characteristics. The new Constitution it is not likely to change that character of the Union remarkably and its heading “Treaty establishing a Constitution for Europe” gives a clear message that this document is not a Constitution in a traditional sense but another Treaty, which means an international agreement among sovereign states.

Nevertheless, the Constitution contributes with more democracy and parliamentary influence, specially because of the stronger role of the European Parliament in the Union’s supranational structures, which is likely to enhance the democratic legitimacy and to some extent diminish the democratic deficit. However, at the same time, the national parliaments and the Member State influence have increased. As it is undeniably, the Member

States that have the main power in the Union and the future EU is continuing to derive its powers from the Member States and not from the citizens, the Union will continue to have problems with the democratic legitimacy. In the light of this, it might be time to put the question concerning democracy in the Union differently. As MacCormick suggest the question is not if the EU is democratic or not, for it is not in a traditional sense of democracy theories, and will most likely never be at least as long as the Member States want to have the main power²⁸⁴. The question we shall ask ourselves is instead whether the Union is democratic enough for the special structure we got.

6.2.1 The double legitimacy in the EU

Looking at the structure of the EU today, the EU is neither a traditional international organisation, nor a traditional state-hood but rather a unique structure, with its supranational or *sui generis* entity in itself and the international cooperation of states. This means that the EU must be considered as a unique construction. Since the Community is built on an institutional balance between the Council, the European Parliament and the Commission its legitimacy rest on the both the Member States as represented in the Council and their citizens, as represented in the EP and is therefore *double*.

One solution to this double legitimacy could be to recognise the different levels of governance within the EU and deal with those aspects of governance separately. For example, there are intergovernmental aspects of Community governance where the Member States are the main actors, dealing with high politics issues and where most decisions are taken by the unanimity rule²⁸⁵. In those cases, it would be suitable to use the state-based model's ideals of democracy and legitimacy with the possibility for national parliaments to influence and hold the Minister in the Council accountable. However also national governments could organise themselves in order to co-ordinate and control their Ministers better. Although this would mean less efficiently in the decision-making procedures it increases the indirect democratic legitimacy and make the decision-making more democratic.

Regarding the supranational aspects of the EU, which means the governance and legislation in the EC Treaty that most often requires majority-voting, these issues could base its legitimacy and find its democracy ideals in the citizen-based model. Therefore, the EP should have a strong role and my suggestion would be to use the co-decision procedure automatically when the Council is using QMV-voting. The increased role of the EP in the legislative powers at the expense of the Council would therefore contribute to an increase the direct democratic legitimacy.

²⁸⁴ A completely democratic system will not be desirable since it would limit the Member States powers and make the Union to a federal state, which most Members States governments and people do not want.

²⁸⁵ Like unanimously voting in the Council, European Council meetings ect.

As the Commission has expressed it, this new role of the EP that has been shown in recent years is a natural step in the process of enhancing democratic legitimacy of the Union and establishes the “*twofold legitimacy on which the Community is founded, its States and its people*”.²⁸⁶ This development has though not included the right of legislative initiative, which is not necessarily wanted, since it would imbalance the system and limit the Commission to function as “guardian of the Treaties”.

If we go back to one of the first aspects of the democratic deficit critique that says that the EU is deficient because those who make the decisions cannot be voted out from the office. However, the fact that the decision-making structure in the EU is based on an institutional balance between the Council, the European Parliament and the Commission, hinders this. If we believed that the EU could only be properly democratic if the citizens could vote out the institutions that exercise legislative powers, it would mean a dramatic reconstruction of the EU. Hence, these changes would mean a reform of the whole system and it would be necessary with new election procedures for the governments (Commission and Council). But that might still not be sufficient since there would most likely be members in the Council that could not be voted out, because the Member States would never approve a system were their representative were directly elected functioning under the directly elected Commission. This would mean too much loss of control of the Member States and that would further not be what neither the Member States nor the people of the Member States want.

The suggestions about double legitimacy in the EU seem to better suit the special structure of the EU's system of governance. A system that bases its legitimacy on both the indirect and direct oriented legitimacy because of its construction with institutions representing both the Member States and the citizens. This way of reasoning indeed strengthens the normative democratic legitimacy and the whole system would be seen as operating in a more democratic manner. Since the Community is built on an institutional balance between the institutions there would moreover be better *trust in institutional arrangements* since the division of power as it currently exists within the EU itself can be more easily understood and justified. Through a stronger parliamentary influence from both levels there will also be more pressure for those who govern to serve the *common good* of the people instead of any other interests. The idea of a double legitimacy approach is moreover recognised in the Constitution proposal to improve the EU's democratic legitimacy by enhancing the role of the European Parliament and at the same time ensuring more influence of the national parliaments.

That being said does not mean that the procedures of EU governance cannot be improved. The role of the national parliaments, which still in reality have limited ways on influencing and more important, do not use their way of influencing properly, must be improved, as the Working Group recommended and the new measures in the Constitution suggest. The

²⁸⁶ *Scope of the co-decision procedure*, SEC (96) 1225/4, July, 1996 Pt. IIa, para. 1.

decision-making procedures in the Council must moreover be much more transparent and the Ministers votes, made public.

6.3 Concluding remarks

The problem with the democratic deficit in the Union is clearly that fact the Member States have transferred powers from national democratic systems to the Union's supranational institutions without such democratic structures and by not compensating that accordingly. The reason for that is however simple; the political will in the Member States for such a development has clearly been missing. If the Member States would have wanted democratic structures at EU-level they would most likely have created them. However, a democratisation of the Union would undeniably limited the Member States' influences and as the Heads of States and Governments and national parliaments would never be interested in loosing the Member States' ability to control the integration project, the development is understandable.

The European co-operation project has been a way for the Member States to control the economic development in their countries, which due to globalization and our integrated world cannot be dealt with at Member State level only anymore. The EU can therefore been seen as an attempt by the Member States to adapt to the new circumstances. That such a development creates problems in terms of democracy is explainable. When the economic and political borders disappear and the political entity expands geographically also the distance between those who govern and the governed increases and the citizens are becoming further remote from the political centre.

The problem remains that there is hardly any real possibility for the citizens to influence the political process in the Union whichever democracy model we use. As the European politics affect more areas, play an even more important role in the national arena and the supranational decision-making procedures in the EU expand, the democratic deficits concerns in the Union become more and more aware. The democratic aspects of the Union's legitimacy problems will certainly play an important part in the future discussion on the European integration, although not necessarily that would mean further concrete proposals for more democracy. As many would ask for a stronger European Parliament such development means more supranationalism and an approach towards a federal Union. This was not the intentions of the originators and probably not the intentions of those who did ask for such stronger Parliament. The EP must however make sure it uses it full value and form itself into a better working Parliament where there is enough room and space for political debates and currents to flow which can awake an interest among the public for European issues. The EP must moreover get hold of the public, to avoid that the European elections continues to be dictate by national issues alone.

I believe that the necessary conditions for a *further* democratisation of the Union in a federal direction with a strong EP as a base, now and for the nearest future are missing. Instead, the Member States through their national governments will continue to be the main actors in the integration process. It would moreover not be recommendable to try to force the Member States into wider co-operation and increase the use of majority-decisions since there is a risk it will create even more tensions between the institutions and the Member States. Also the social legitimacy as a broad empirical acceptance of the system is not going to be achieved by increased efficiency and supranationalism in the decision-making procedures, it will rather divide the Union than unify it.

If we do not want to see a future federal Europe we must start to look in the other direction, towards the nation state. The conditions for democratic control is clearly better in the nation states and the distance between the govern and the governed less. The necessary political debate exists in the national parliaments and there is further the possibility of holding those politicians directly accountable. Moreover, since the people of the European Union, wish that questions of national interest shall continue to be resolved at a national rather than a supranational level this seems like a better option. By giving the national parliaments a greater role to play in the Union, the citizens' possibility to influence European politics will be strengthened, which undeniably, will be a democratic improvement of the Union's way of working.

Nevertheless, there is a risk that it might slow down a further development of the integration process and create a weaker Union but that is a risk we have to live with. To restore the trust among the European people we need to accept a less efficient Union and to continue a successful co-operation towards a future with stability and peace in Europe, greater acceptance of the economic, cultural and social differences between the Member States is necessary.

Bibliography

Literature

Andersen, Svien S., and Eliassen, Kjell, A., *The European Union: How Democratic is it?* London: Sage Publications 1996

R. Barker, *Political Legitimacy and the State*. Oxford: Clarendon 1990.

Bainbridge, T., *The Penguin Companion to European Union*, London : Penguin, 2002

Beetham, *The Legitimation of power* 1991 Basingstoke : Macmillan, 1991

Beetham and Lord, *Legitimacy and the European Union*, 1998, London: Macmillian

Craig, P., and de Búrca, G., *EU law, text, cases and materials*, 3 ed, Oxford University Press, 2003

Dinan, *Ever Closer Union, an introduction to European integration*, 2 ed. Boulder, Colo. : Lynne Rienner Publishers, 1999

Dunleavy, P., Hix, S. and Margetts, H, *Counting on Europe: Proportional Representation and the June 1999 Elections to the European Parliament*. London: LSE Public Policy Group Press 1999

Follesdal, A., and Koslowski, P, *Democracy and the European Union*, Studies in Economics Ethics and Philosophy. Berlin: Springer-Verlag 1997

Hartley, Trevor, *Constitutional Problems of the European Union*, Hart Publishing, 1999

Hix, S., *The Political System of the European Union*, Houndmills: Palgrave, 1999

Katz, R., Wessels, B, *The European Parliament, the national parliaments, and European Integration*, Oxford: Oxford University Press, 1999

Keohane, R.O., and Hoffmann, S., *The new European Community*, Boulder, Westview Press, 1991

MacCormick J., *Understanding the European Union: a coincide introduction*, Basingstoke : Macmillan ; New York, N.Y, St. Martin's Press, 1999

Neunreither, K., and Wiener, A., *European Integration After Amsterdam*

Oxford University Press, 2000

Nugent, N., *Governments and Politics in the European Union*, 4th ed., Palgrave 1999

Scharpf, F. W., *Governing in Europe: Effective and Democratic*, Oxford University Press, 1999

Smith, Eivind, (eds) *National parliaments as cornerstones of European Integration*, London : Kluwer Law International, 1996

Van der Eijk, C. and Franklin, M., '*Choosing Europe: The European Electorate and National Politics in the Face of the Union*', Ann Arbor, University of Michigan Press, 1996

Weiler, J. H.H., *The Constitution of Europe: "do the new clothes have an emperor?" and other essays on European Integration*, Cambridge : Cambridge University Press, 1999

Westlake, M., *The Council of European Union*, Catermill, 1995

Westlake, M., *A modern guide to the European Parliament*, London : Pinter, 1994

Zetterquist, O., *A Europe of the Member States or of the Citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, Lund, 2002

Articles

Dehousse, R., 'European institutional architecture after Amsterdam: Parliamentary or regulatory structure?' *Common Market Law Rev* 35, 1998,

Dehousse, Joerges, Majone, Snyder and Everson, 'Europe after 1992: New regulatory strategies', (Florence: EUI Working Paper LAW 92/31, 1992)

Hergenhan, J, 'Governance in Europe after Nice, *Governance in Europe – will EU catch up with its cities?*', EURO CITIES Magazines n 13, spring 2001.

Hix, S., 'Linking National Policies to Europe', *European Democracy A Manifesto*, at:
http://europa.eu.int/futurum/forum_convention/documents/contrib/acad/0038_c2_en.pdf

Hix, S, 'Executive selection in the European union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?', *European Integration online Papers*, (EioP) Vol 1 No 21 (1997)

- Katz, R. S., 'Representational Roles', *European Journal of Political Research* 32, Issue 6, October, 1997: 227-41
- Kreppel, Amie, 'Necessary but not sufficient: Understanding the impact of treaty reform on the internal development of the European Parliament', *Journal of European Public Policy*, 10:6, December 2003
- MacCormick, 'Democracy, Subsidiarity and Citizenship in the European Commonwealth', *Law and Philosophy* Volume 16 , p 331-356, 1997
- Majone, G., 'Europe's democratic deficit, The question of standards', *European Law Journal* No 1 March 1998
- Mancini, G.F. 'The making of a Constitution for Europe', *Common Market Law Review*, 26: 595-614, 1989
- Mancini. G.F., and Keeling, D.T., 'Democracy and the European Court of Justice', *Modern Law Review*, March 1994, V 57, No 2
- Marsh, M. and Norris, P., 'Political Representation in the European Parliament' *European Journal of Political Research* Volume 32, Issue 6, October, 1997: 153-64.
- Marsh and Wessels, B., 'Territorial Representation' *Journal of Political Research* 32 Issue 6, October, 1997: 227-41
- Moravcsik, A., 'In defence of the "democratic deficit", Reassessing Legitimacy in the European Union', Centre for European Studies *Working Paper* No. 92, 2003
- Muntean, A., 'The European Parliament's Political Legitimacy and the Commission's "Misleading Management": Towards a "Parliamentarian" European Union?', *European Integration Online Papers (EioP)* Vol.4 (2000) No 5
- Norris, P. and Franklin, M., 'Social Representation' in *European Journal of Political Research*, 32 Issue 6, October, 1997:185-210
- Peters, A., 'A Plea for a European Semi-Parliamentary and Semi-Consociational Democracy', *European Integration Online Papers, (EioP)*, Vol 7 (2003) N 3
- Scharpf, F, 'Problem-Solving Effectiveness and Democratic Accountability in the EU', MPIfG (Max Planck Insitut für Gesellschaftsforschung) *Working Paper* 03/1, February 2003
- Scharpf, F., 'Introduction: the problem-solving capacity for multilevel governance', *Journal of European Public Policy* 1997 4(4): 520-38

Weiler, J.H.H, Haltern, U and Mayer, F., 'European Democracy and Its Critique': Five Uneasy Pieces, at:

<http://www.jeanmonnetprogram.org/papers/95/9501ind.html>

Wessels, W., and Diedrichs, U., 'A New Kind of Parliament- The Evolution of the European Parliament', *European Integration Online Papers*, (EIoP) Vol. 1 (1997) N° 6

Zweifel, T. D., 'Who is without sin cast first stone: The EU's democratic deficit in comparison', *Journal of European Public Policy* 9:5 October 2002: 815

Miscellaneous

Abraham Lincoln (American 16th US President 1861-1865) at [http://en.thinkexist.com/quotation/Democracy is the government of the people-by_the/6959.html](http://en.thinkexist.com/quotation/Democracy+is+the+government+of+the+people+by+the/6959.html)

Caroll, F., The European Union and the democratic deficit , ProQest Information and Learning 2003, In Focus, Know Europe; www.knoweurope.net

European Election Results (Strasbourg : European Parliament), European Parliament UK Office –Election facts at: <http://www.europarl.org.uk/guide/Gelectionfacts.htm>

Follesdal, A. 'Democracy in the European Union: The Need for Theory', Presented at the Conference on *Institutional Change, Democracy and Internationalisation* April 29 1997, Hindsgavl Slott, Middelfart, Denmark At

Lord Acton at <http://www.acton.org/about/lordacton/>

Major, John., 'Europe: A Future That Works', William and Mary Lecture, Leiden University, September 7th, 1994. <http://www.fco.gov.uk/europe/leiden/fulltext.htm>

Pat Cox, in BBC, 'The EU's democratic challenge', by Stephan Mulvey, BBC News Online, at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/3224666.stm>

Walter Bagehot, English Constitution, The Cabinet, at: <http://www.bibliomania.com/2/1/328/2415/27962/1/frameset.html>

Official Documents *European Union*

CIG 86/04, Draft Treaty Establishing a Constitution for Europe

CONV 353/02, Final Report of Working Group IV on the role of the national parliaments

PE 337.106, Summary of the Constitution adopted by the European Council in Brussels on 17/18 June 2004, The European Parliament delegation to the Convention

Outcome of the European Convention,
http://europa.eu.int/scadplus/european_convention/index_en.htm

European Council Dublin Summit 28 April 1990, Annex I

Eurobarometer 61 spring 2004

LaekenDeclaration,15/12/2001.
http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

European elections, at www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/turnout_1...

SEC (96) 1225/4, July, 1996 Pt. IIa, *Scope of the co-decision procedure*
European Parliament at
http://www.europarl.eu.int/presentation/default_en.htm.

Sweden

SOU 1994:12 s 90 ff kap 2.4 EU:s demokratiska legitimitet

Table of Cases

2 BvR 2134/92 & 2159/92, “Brunner v. European Union Treaty”,(1994) 1 C..M.L.R. Volume 69

Commission v. Council (Case 22/70) AETR (1971) ECR 263

Costa v. ENEL (Case 6/64) [1964] ECR 585, [1964] CMLR 425

European Parliament v. Council (Comitology) (Case 302/87) [1988] ECR 5615)

European Parliament v Council (Chernobyl) (Case 302/87) [1988] ECR 5615

Nold v. Commission (Case 4/73) [1974] ECR 491

Petrie v. Commission (Case t-191/99) [2001] ECR I-nyr

Roquette Frères v Council (Case 138/79) [1980] ECR 3333.

Cinetheque S.A. v. Federation National des Cinemas Francais (Case 60-61/84) [1985] ECR 2605

Van Duyn v. Home Office (Case 41/74) [1974] ECR 1337

Van Gend en Loos v. Nederlandse Administratie der Belastingen, (Case 26/62) [1963] ECR 1, [1963] CMLR 105